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THE LAW
OF
REAL PROPERTY
AND
OTHER INTERESTS IN LAND

BY HERBERT THORNDIKE TIFFANY

Author of "The Law of Landlord and Tenant,"

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I. THE NATURE AND CLASSES OF EASEMENTS.

§ 348. **Nature of an easement.** An easement involves primarily the privilege of doing a certain class of act on or to the detriment of another's land, or a right against another that he refrain from doing a certain class of act on or in connection with his own land, the holder of the easement having, as an integral part thereof, rights against the members of the community generally that they shall not interfere with the exercise or enjoyment of the easement.

An easement, it has been said, never involves any active duty upon the owner of the land subject to the easement, his duty being merely the passive one, either of not interfering with a certain class of acts by the holder of the easement, or of himself refraining from

a certain class of acts.¹ Occasionally, however, an interest analogous to an easement, involving a duty of an active character upon the owner of land, has been recognized, such an interest being sometimes referred to as a "spurious easement."

So there may be an active duty, in the nature of an easement, to maintain a fence,² and it seems that there may be imposed, upon the owner of land subject to an easement, an active duty to make repairs,³⁻⁴ though this is most unusual.⁵ In Massachusetts, there has even been recognized an obligation, not contractual in character, to contribute to the cost of the maintenance of a dam.⁶

Easements are sometimes divided into affirmative and negative. An affirmative easement is one which authorizes the doing of acts which, if no easement existed, would give rise to a right of action, while a negative easement is one the effect of which is not to authorize the doing of an act by the person entitled to the easement, but merely to preclude the owner of the land subject to the easement from the doing of an act which, if no easement existed, he would be entitled to do. In other words, an affirmative easement involves the creation of a privilege, while a negative easement involves the withdrawal of a privilege.⁷ As examples of affirmative easements may be mentioned a right of way, a right to discharge water on another's land, and a right to maintain an erection thereon, while a right to have light pass

1. *Macclesfield Highway Board v. Grant*, 51 L. J. Q. B. 357; *Taylor v. Whitehead*, Dougl. 716; *Chauntler v. Robinson*, 4 Exch. 163.

2. *Post*, § 357.

3-4. *Rider v. Smith*, 3 Term. Rep. 766; 1 Wms. Saund. 322c; *Gale*, Easements (8th Ed.) 487.

5. *Post*, § 370.

6. *Whittenton Manufacturing*

Co. v. Staples, 164 Mass. 319, 29 L. R. A. 500, 41 N. E. 441, three judges dissenting. See the criticism of this case in 9 Harv. Law Rev. at p. 352.

7. See Professor Wesley N. Hohfeld's article, 27 Yale Law Journal, at pp. 71, 72 in which the nature of an easement is well explained.

to one's building over another's land, and a right to have one's building supported by such land, may be mentioned as examples of negative easements. Affirmative easements are of much the more frequent occurrence.⁸

It is quite frequently stated that one cannot have an easement in his own land, and this is no doubt approximately true. That is, if one has, as owner of land, the right of possession, any use which he makes thereof he makes by virtue of his ownership, and not as having an easement therein. But it may happen that he is an owner of land without having the right of possession, as for instance, when he has an estate in reversion or remainder. In such a case he may have an easement in the land, although he is, in a sense, an owner of the land. So one who has an undivided interest in land, a cotenant, although he has rights of ownership in the land, may also have an easement therein as against his cotenant's undivided interest in the land.⁹ And one may, as cotenant of certain land, have an easement in land owned by him in severalty.¹⁰

It not infrequently occurs that two or more persons have, as appurtenant to distinct pieces of land owned by them, exactly similar easements in a single piece of land. For instance, one who owns several adjoining lots or parcels of ground may, in conveying them to different persons, grant to each of such persons a right of way in an alley, or over some land retained by him.¹¹ The various persons thus entitled to similar easements

8. See Gale, Easements (8th Ed.) 22.

9. Reed v. West, 16 Gray (Mass.) 284; Thompson v. Snyder, 14 N. Mex. 403, 94 Pac. 1014.

10. Bradley's Fish Co. v. Dudley, 37 Conn. 136.

11. See *e. g.* Goodwin v. Bragaw, 87 Conn. 31, 86 Atl. 668;

Goralski v. Kostuski, 179 Ill. 177, 70 Am. St. Rep. 98, 53 N. E. 720; Whitelaw v. Rodney, 212 Mass. 540, 111 S. W. 560; City Club of Auburn v. McGeer, 198 N. Y. 160, 91 N. E. 539, 92 N. E. 105; Ailes v. Hallam, 69 W. Va. 305, 71 S. E. 273.

are sometimes referred to as tenants in common of an easement, but such an expression is inaccurate. If the right of user vested in one person is appurtenant to one tract, and the right of user vested in another person is appurtenant to another tract, there are two distinct rights of user, two easements, and not one easement. It is only when the two persons have an easement appurtenant to land of which they are tenants in common that they can, with any degree of accuracy, be said to be tenants in common of the easement.

— **Easements distinguished from other rights.** Natural rights¹² are, as operating in restriction of the use of another's land, occasionally referred to as easements. Such rights are not, however, as are easements, primarily rights as regards another's land, but are merely rights incident to the ownership of one's own land.¹³

An easement is to be distinguished from a *profit à prendre*, which involves a power in the person entitled thereto of acquiring, by severance and removal from another's land, a part of the soil thereof, or something growing or subsisting in the soil.¹⁴

An easement is to be distinguished from a license, and the privilege created by a license. The nature and characteristics of a license in regard to land constitute a subject as to which there have been numerous decisions and much discussion. The following section will be devoted to a consideration of the subject of licenses.

§ 349. Licenses.— (a) General nature. A license in the law of land, is ordinarily a permission merely to do something on or to the detriment of the land of the

12. *Ante*, chapter 11.

13. See, as to the distinction, *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Pine v. City of New York*, 112 Fed. 98; *Gray v. McWilliams*,

98 Cal. 161, 21 L. R. A. 593, 35 Am. St. Rep. 163, 32 Pac. 976; *Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224, 3 N. E. 675.

14. *Post*, c. 13.

giver of the license, the licensor. Occasionally it is a permission to interfere with an easement or *profit à prendre* belonging to the licensor. It creates a privilege in favor of the licensee. A license, it has been said, "passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it, had been unlawful; as, a license * * * to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful."¹⁵

In so far as an easement involves, as it ordinarily does, the privilege of doing or not doing a certain class of act on or in connection with another's land, there is a superficial resemblance between an easement and the privilege created by a license. The distinction between such an easement and a license privilege lies primarily¹⁶ in the fact that the licensee has a privilege and nothing more, while the holder of an easement has not only a privilege but also rights against the members of the community in general, including the owner of the land, that they refrain from interference with the exercise or enjoyment of the privilege.¹⁷ That a licensee, as such, has no right of action against a third person obstructing his exercise of the license privilege is, it is conceived, beyond question,¹⁸ in spite of occasional

15. *Thomas v. Sorrel*, Vaughan, 351; *Wood v. Leadbitter*, 13 Mees. & W. 837. See, to the same effect, *Cook v. Stearns*, 11 Mass. 533, 480; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Foster v. Brownling*, 4 R. I. 47, 67 Am. Dec. 505; *Thoenke v. Fiedler*, 91 Wis. 386.

The statement that a license "passeth no interest," is questioned by Professor Hohfield (See 27 Yale Law Jour. at p. 95) and properly so, it would seem, if

we give to the indefinite term "interest" the meaning of any advantage recognized by the law.

16. See Professor Hohfield's admirable statement in this regard, in 27 Yale Law Journal at p. 66.

17. *Post*, § 371.

18. See *Whaley v. Laing*, 2 Hurl. & N. 476, 3 Hurl. & N. 675; *Hill v. Tupper*, 2 Hurl. & C. 121; per Bramwell, B., *Stockport Water Works Co. v. Potter*, 3 Hurl. & C. 300; *Heap v. Hartley*, 42 Ch. Div. 461; *Clapp v. Boston*,

decisions to the contrary.¹⁹ That he has no right of action against the landowner himself by reason of such an obstruction by the latter, is involved in the doctrine that a license is revocable and may be revoked by an act on the part of the licensor indicating an intention to revoke.²⁰

A license may be to do any of an almost infinite variety of things on another's land. Thus, one may have a license to flood land,^{20a} to erect buildings or other structures thereon,²¹ to pass on the land,²² to maintain a ditch,²³ to cut timber,²⁴ to use land for railroad

133 Mass. 367; *Fletcher v. Livingston*, 153 Mass. 388, 26 N. E. 1001; *Per Loring, J.*, in *Walker Ice Co. v. American Steel & Wire Co.*, 185 Mass. 463, 70 N. E. 937; *Elliott v. Mason*, 76 N. H. 229, 81 Atl. 701.

"If a so called license does operate to confer an exclusive right capable of being protected against a stranger, it must be that there is more than a license, namely the grant of an interest or easement." *Pollock, Torts* (6th Ed.) 367.

19. *Case v. Weber*, 2 Ind. 108, is to the effect that one having a license to flow water through another's land has a right of action against a third person who obstructs such flow. In *Paul v. Hazleton*, 37 N. J. Law, 106, and *Miller v. Greenwich*, 62 N. J. Law 771, 42 Atl. 735, a right of action in favor of a licensee against a third person was sustained, on the theory that the licensee had, in those cases, the exclusive possession of the land, or of a part thereof. But a mere licensee never has, it seems, possession of the land. *London &*

N. W. Ry. Co. v. Buckmaster, L. R. 10 Q. B. 70; *Taylor v. Caldwell*, 3 Best & S. 826; *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402; *Lightwood, Possession of Land*, 19. One who has possession of land is a tenant, not a licensee. 1 *Tiffany, Landlord & Ten*, § 7. If a licensee did have possession, his right of action against a third person would be based, not on his license, but on his possession, and the existence of the license would be immaterial as against others than the licensor.

20. *Post*, § 349(d).

20a. *Woodward v. Seely*, 11 Ill. 157, 50 Am. Dec. 445.

21. *Crosdale v. Lanigan*, 129 N. Y. 604, 26 Am. St. Rep. 551; *Malott v. Price*, 109 Ind. 22; *Eckert v. Peters*, 55 N. J. Eq. 379, 36 Atl. 491.

22. *Forbes v. Balenseifer*, 74 Ill. 183.

23. *Thoemke v. Fiedler*, 91 Wis. 386.

24. *Callen v. Hilty*, 14 Pa. St. 286. See cases *ante*, § 262, note 96.

purposes.²⁵ A very common form of license is a ticket of admission whereby one is permitted to enter on another's land to witness a spectacle, or for some similar purpose.²⁶ A contract of lodging also, giving not an exclusive right to a part of the premises, but merely a right to enter thereon and use them for certain purposes, is in the nature of a license, and not a lease.²⁷ Likewise, the permission, generally tacit, given to an employee or other person having business with the owner of land, to enter on the land for the purpose of transacting such business, creates the relation of licensor and licensee.²⁸

— (b) **No formality necessary.** No formality is necessary to a license. It may be in writing or oral,²⁹ or may be implied from the relations of the parties, or from the conduct of the landowner, as when he indicates an assent to the doing of certain acts on his land.³⁰ So, a person, by opening a place of business, licenses the public to enter therein for the purpose of transact-

25. *Beck v. Louisville, N. O. & T. R. Co.*, 65 Miss. 172; *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 336.

26. *Wood v. Leadbitter*, 13 Mees. & W. 838; *McCrea v. Marsh*, 12 Gray (Mass.) 211. See 14 Harv. Law Rev. 455. *Meisner v. Detroit B. I. & W. Ferry Co.*, 154 Mich. 545, 118 N. W. 14.

27. See *White v. Maynard*, 111 Mass. 250; *Wilson v. Martin*, 1 Denio (N. Y.) 602; 1 Tiffany, *Landlord & Ten.*, § 8.

28. *Merriam v. City of Meriden*, 43 Conn. 173; *Cutler v. Smith* 57 Ill. 252.

29. *Occum Co. v. A. & W. Sprague Mfg. Co.*, 34 Conn. 529; *Owens v. Lewis*, 46 Ind. 489, 15 Am. Rep. 295; *Great Falls Water-*

works Co. v. Great Northern Ry. Co., 21 Mont. 487, 54 Pac. 963; *Wilkins v. Irvine*, 33 Ohio St. 138; *Pursell v. Stover*, 110 Pa. St. 43, 20 Atl. 403; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Bay View Land Co. v. Ferguson*, 53 Wash. 323, 101 Pac. 1093; *Lockhart v. Geir*, 54 Wis. 133, 11 N. W. 245.

30. *Occum Co. v. A. & W. Sprague Mfg. Co.*, 34 Conn. 529; *Cutler v. Smith*, 57 Ill. 252; *Noftsgar v. Barkdoll*, 148 Ind. 531, 47 N. E. 960; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658; *Harmon v. Harmon*, 61 Me. 222; *Fletcher v. Evans*, 140 Mass. 241, 2 N. E. 837; *Metcalf v. Hart*, 3 Wyo. 513, 31 Am. St. Rep. 122, 31 Pac. 407.

ing business.³¹ And a license to do certain acts on land may occasionally be inferred from the owner's failure to object to the doing of such acts thereon.³² One who sells to another things which are upon the land impliedly licenses the purchaser to come upon the land to get the chattels within a reasonable time.³³

— (c) **Scope of license.** A license to do a particular act necessarily involves a license to do any other act essential thereto.³⁴ A license is not, however, ordinarily construed as allowing an act other than that named unless it is so essential, and it has accordingly been decided that a license to place a structure or appliance on one's land does not authorize the licensee to place there another structure or appliance in case the first is destroyed or becomes useless.³⁵ In the case of a license to do some particular act, not continuous in its nature, the act must be done within a reasonable time.³⁶

31. *Gowen v. Philadelphia Exchange Co.*, 5 Watts & S. (Pa.) 141; *Cutler v. Smith*, 57 Ill. 252. See *Phillips v. Cutler*, 89 Vt. 233, 95 Atl. 487.

32. *Occum Co. v. Sprague Mfg. Co.*, 34 Conn. 529; *Noftsgcr v. Barkdoll*, 148 Ind. 531, 47 N. E. 960; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658; *Smyre v. Kiowa County*, 89 Kan. 664, 132 Pac. 181; *Sheehan v. Kasper*, 41 Nev. 27, 165 N. W. 632; *Driscoll v. Newark, etc., Lime Co.*, 37 N. Y. 637, 97 Am. Dec. 761; *Ewing v. Rhea*, 37 Ore. 583, 82 Am. St. Rep. 783, 52 L. R. A. 140, 62 Pac. 790; *Thayer v. Jarvis*, 44 Wis. 388; *Metcalf v. Hart*, 3 Wyo. 513, 31 Am. St. Rep. 122, 31 Pac. 407. See *Phillips v. Cutler*, 89 Vt. 233, 95 Atl. 487.

33. *Rogers v. Cox*, 96 Ind. 157;

Folsom v. Moore, 19 Me. 252; *Barry v. Woodbury*, 205 Me. 592, 91 N. E. 902. And see *post*, § 349(d), note 56.

34. *Clark v. Vermont, etc. R. Co.*, 28 Vt. 103; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80, 22 Am. Dec. 410; *Woodruff v. Beekman*, 43 N. Y. Super. Ct. 282; *Sayles v. Bemis*, 57 Wis. 315, 15 N. W. 432.

35. *Hall v. Boyd*, 14 Ga. 1; *Carleton v. Redington*, 21 N. H. 291; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287. But see *Southwestern R. Co. v. Mitchell*, 69 Ga. 114.

36. *Parsons v. Camp*, 11 Conn. 525; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455.

The license will protect the agents or servants of the licensee if it is a license, not for pleasure, but to take profits from the land,³⁷ or if the act authorized is such as to render the employment of others to do it necessary or proper.³⁸

— (d) **Revocability of license.** A license is, as a general rule, revocable at the pleasure of the licensor,³⁹ and the fact that the license was embodied in an instrument under seal is immaterial in this regard.⁴⁰ The fact, moreover, that a consideration was paid for the license has more usually been regarded as not

37. *Wickham v. Hawker*, 7 Mees. & W. 63.

38. *Sterling v. Warden*, 51 N. H. 217.

In *Fletcher v. Evans*, 140 Mass. 241, 2 N. E. 837, it was held that if the heirs at law gave to the widow authority to erect a monument upon the family burial lot, they in effect gave her authority to make any reasonable contract for a monument, and, by implication, the right to give to the contractor a license to enter the lot to build a monument, and to remove it if it was not satisfactory or if she did not pay for it.

39. *Fentiman v. Smith*, 4 East. 107; *Wood v. Leadbitter*, 13 Mees. & W. 845; *DeHaro v. United States*, 5 Wall. (U. S.) 599, 18 L. Ed. 681; *Profile Cotton Mills v. Calhoun Water Co.*, 189 Ala. 181, 66 So. 50; *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Fluker v. Georgia Railroad & Banking Co.*, 81 Ga. 461, 2 L. R. A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; *Wilmington Water Power Co. v. Evans*, 166 Ill. 548,

46 N. E. 1083; *McBride v. Bair*, 134 Iowa, 661, 112 N. W. 169; *Elswick v. Ramey*, 157 Ky. 639, 163 S. W. 751; *Seidensparger v. Spear*, 17 Me. 123, 35 Am. Dec. 234; *Rangeley v. Snowman*, 115 Me. 412, 99 Atl. 41; *Cook v. Stearns*, 11 Mass. 533; *Morse v. Copeland*, 2 Gray (Mass.) 302; *Hodgkins v. Farrington*, 150 Mass. 19, 5 L. R. A. 209, 15 Am. St. Rep. 168, 22 N. E. 73; *Wood v. Michigan Air Line R. Co.*, 90 Mich. 334, 51 N. W. 263; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 203; *Geiger v. McMahon*, 31 S. Dak. 95, 139 N. W. 958; *Barsdale v. Hairston*, 81 Va. 764.

40. *Wood v. Leadbitter*, 13 Mees. & W. 838; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Jackson v. Babcock*, 4 Johns. (N. Y.) 418; *Smyth v. Brooklyn Union Ele-*

affecting its revocability,⁴¹ but there are to be found not infrequent statements or suggestions to the contrary, that the payment of a consideration may, by itself, or in connection with the making of improvements, operate to prevent a revocation.⁴² How the

vated R. Co., 121 App. Div. 282, 105 N. Y. Supp. 601; Williamston etc. R. Co. v. Battle, 66 N. C. 540.

That the license is evidenced by an unsealed writing is *a fortiori* immaterial as regards the power of revocation. Lehigh & N. E. R. Co. v. Bangor & P. R. Co., 228 Pa. 350, 77 Atl. 552.

41. Wood v. Leadbitter, 13 Mees. & W. 838; Workman v. Stephenson, — Colo. App. —, 144 Pac. 1126; St. Louis National Stock Yards v. Wiggins Ferry Co., 112 Ill. 384, 54 Am. Rep. 543; Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 51 Minn. 304, 53 N. W. 639; Shippey v. Kansas City, 254 Mo. 1, 162 S. W. 137; Dodge v. McClintock, 47 N. H. 383; Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Eckerson v. Crippen, 110 N. Y. 585, 1 L. R. A. 487, 18 N. E. 443; Herndon v. Durham & S. Ry. Co., 161 N. C. 650, 77 S. E. 683; Baldwin v. Taylor, 166 Pa. 507, 31 Atl. 250; Caledonian County Grammar School v. Kent, 86 Vt. 151, 84 Atl. 26; Thoemke v. Fiedler, 91 Wis. 386, 64 N. W. 1030. And see cases cited *supra*, this section, note 39.

That this is so has been frequently decided in cases involving the rights of the holder of a ticket to a theater or other place of entertainment. *And v.*

Leadbitter, 13 Mees. & W. 845; Marrone v. Washington Jockey Club, 227 U. S. 633, 57 L. Ed. 679, 43 L. R. A. (N. S.) 691; McCrea v. Marsh, 12 Gray (Mass.) 21, 71 Am. Dec. 745; Burton v. Scherpf, 1 Allen (Mass.) 133, 79 Am. Dec. 717; Meissner v. Detroit B. I. & W. Ferry Co., 154 Mich. 545, 19 L. R. A. (N. S.) 872, 129 Am. St. Rep. 493, 118 N. W. 14; Shubert v. Nixon Co., 83 N. J. L. 101, 83 Atl. 369; People v. Fynn, 189 N. Y. 180, 82 N. E. 169; Purcell v. Daly, 19 Abb. N. Cas. 301; Taylor v. Cohn, 47 Ore. 538, 84 Pac. 388; Horney v. Nixon, 213 Pa. St. 20, 1 L. R. A. (N. S.) 1184, 61 Atl. 1088, 110 Am. St. Rep. 520; Buenzle v. Newport Amusement Ass'n, 29 R. I. 23, 14 L. R. A. (N. S.) 1242, 68 Atl. 721; Boswell v. Barnum & Bailey, 135 Tenn. 35, 185 S. W. 692; W. W. V. Co. v. Black, 113 Va. 728, Ann. Cas. 1913E, 558, 75 S. E. 82.

42. Sullivan Timber Co. v. Mobile, 124 Fed. 648; Hicks v. Swift Creek Mill Co., 133 Ala. 411, 57 L. R. A. 720, 91 Am. St. Rep. 38, 31 So. 947; Alderman v. New Haven, 81 Conn. 137, 18 L. R. A. (N. S.) 74, 70 Atl. 626; Hiers v. Mill Haven Co., 113 Ga. 1002, 39 S. E. 444; McTeynolds v. Harrigfield, 26 Idaho, 26, 140 Pac. 1096; Morse v. Lorenz, 262 Ill. 115, 104 N. E. 237; Nowlin

nature of the privilege created by a license can be altered in this or any other respect by reason of the fact that a consideration was paid for the license is not readily perceptible. But though the payment of a consideration should not render a license irrevocable, the fact that a consideration is paid for a grant of permission, either oral or in writing, to make a particular use of one's land, is a circumstance tending to show that the grant of an easement and not a license merely was intended, in which case, as hereafter explained, the making of improvements on the faith of such invalid grant will justify the interposition of a court of equity to protect the grantee.⁴³

— **Improvements by license.** The question whether, after the licensee has expended money in the making of improvements "on the faith of the license,"

v. Whipple, 120 Ind. 596, 6 L. R. A. 159, 22 N. E. 669; Ruthven v. Farmers' Co-operative Creamery Co., 140 Iowa, 570, 118 N. W. 915; Kastner v. Benz, 67 Kan. 486, 73 Pac. 67; Martin v. O'Brien, 34 Miss. 21; Wright v. Brown, 163 Mo. App. 117, 145 S. W. 518; Ewing v. Rhea, 37 Ore. 583, 52 L. R. A. 140, 82 Am. St. Rep. 733, 62 Pac. 790; Falls City Lumber Co. v. Watkins, 53 Ore. 212, 99 Pac. 884; Salinger v. North American Woolen Mills, 70 W. Va. 151, 73 S. E. 312.

In *Hurst v. Picture Theatres, Ltd.* (1915) K. B. 1, it was decided, by two judges against one, that the license involved in the sale of a ticket for a performance could not be revoked. The majority opinions appear to be based upon the theory that there was a contract, capable of enforcement by injunction, that the

ticket holder should be allowed to sit through the performance, which gave him an equitable interest in the land itself, which could not be withdrawn at will. Such an interest, if its existence be conceded, must be in the nature of an easement, and an easement to endure only for the period of a moving picture performance is, to say the least, a novelty. That the ticket holder has no interest in such a case, entitled to protection, see editorial notes in 13 Mich. Law Rev. at p. 401, 27 Harv. Law Rev. 495 and article by J. C. Miles, Esq., 31 Law Quart. Rev. 217. The decision is approved in editorial notes in 14 Columbia Law Rev. at p. 608; 26 Yale Law Journal, 395.

43. *Post*, this section, notes 43-49.

that is, for the purpose of availing himself of the license, the license continues revocable as it was before such expenditure, has been the subject of a great number of dicta and decisions. These may be broadly divided into two groups. Those in the one group are in terms that, after the licensee has made expenditures upon the strength of the license, a revocation of the license would involve a fraud upon him, which a court of equity, and occasionally a court of law, will not permit.⁴⁴ Those in the other group are to the opposite

44. *Davis v. Tway*, 16 Ariz. 566, L. R. A. 1915E, 604, 147 Pac. 750; *Stoner v. Zucker*, 148 Cal. 516, 7 Ann. Cas 704, 113 Am. St. Rep. 301, 83 Pac. 808; *Gyra v. Windler*, 40 Colo. 366, 13 Ann. Cas. 841, 91 Pac. 36; *Alderman v. New Haven*, 81 Conn. 137, 18 L. R. A. (N. S.) 74, 70 Atl. 626; *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582; *Cherokee Mills v. Standard Cotton Mills*, 138 Ga. 856, 76 S. E. 373 (statute); *McReynolds v. Harrigfield*, 26 Idaho, 26, 140 Pac. 1096; *Girard v. Lehigh Stone Co.*, 280 Ill. 479, 117 N. E. 698; *Ferguson v. Spencer*, 127 Ind. 66, 25 N. E. 1035; *Joseph v. Wild*, 146 Ind. 249, 45 N. E. 467; *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, 490; *Hansen v. Farmers' Co-operative Creamery*, 106 Iowa, 167, 76 N. W. 652; *Patterson v. City of Burlington*, 141 Iowa, 291, 119 N. W. 593; *Kastner v. Benz*, 67 Kan. 486, 73 Pac. 67; *Smyre v. Kiowa County*, 89 Kan. 664, 132 Pac. 209; *Cape Girardeau & T. B. T. R. Co. v. St. Louis & G. Rwy. Co.*, 222 Mo. 461, 121 S. W. 300; *Great Falls Water works Co. v. Great North.*

Ry. Co., 21 Mont. 487, 54 Pac. 963; *Arterburn v. Beard*, 86 Neb. 733, 126 N. W. 379. *Raritar Water Power Co. v. Veghte*, 21 N. J. Eq. 142; *Van Horn v. Clark*, 56 N. J. Eq. 476, 40 Atl. 203; *Polakoff v. Halphen*, 83 N. J. Eq. 126, 89 Atl. 996 (But see, as to New Jersey, *Lawrence v. Springer*, 49 N. J. Eq. 289, 31 Am. St. Rep. 702, 24 Atl. 993); *Lee v. McLeod*, 12 Nev. 280; *Bowman v. Bowman*, 35 Or. 279, 27 Pac. 546; *Kelsey v. Bertram*, 63 Ore. 563, 127 Pac. 777; *Rerick v. Kern*, 14 Serg. & R. (Pa.) 267; *Pierce v. Cleland*, 133 Pa. 189, 7 L. R. A. 752, 19 Atl. 352; *Butz v. Richland Twp.*, 28 S. Dak. 442, 134 N. W. 895 (*dictum*); *Risien v. Brown*, 73 Tex. 135, 10 S. W. 661 (*dictum*); *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Barre v. Perry & Scribner*, 82 Vt. 301, 73 Atl. 574; *Phillips v. Cutler*, 89 Vt. 233, 95 Atl. 487; *Kent v. Dobqns*, 112 Va. 586, 72 S. E. 139 (*semble*); *Gustin v. Harting*, 20 Wyo. 1, 33 A. & E. Ann. Cas. 1914C, 911, 121 Pac. 522.

On this theory it has been decided that if two adjoining

effect, that the making of improvements by a licensee is not ground for denying to the licensor the right of revocation which is otherwise incident to a license.⁴⁵

owners of land erect buildings together with an oral agreement as to the mutual use of stair-cases or hallways, each has in effect a license, which cannot be withdrawn after the buildings have been constructed on the faith of the agreement. *Clark v. Henckel* (Md.), 26 Atl. 1039; *Binder v. Weinberg*, 94 Miss. 817, 48 So. 1013; *Cleland's Appeal*, 133 Pa. 189, 7 L. R. A. 752, 19 Atl. 352.

45. *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411, 91 Am. St. Rep. 38, 57 L. R. A. 720, 31 So. 947; *Howes v. Barmon*, 11 Idaho, 64, 69 L. R. A. 568, 114 Am. St. Rep. 255, 81 Pac. 48 (*dictum*); *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243; *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509; *Morse v. Lorenz*, 262 Ill. 115, 104 N. E. 237 (But see, as to Illinois, *Ashelford v. Willis*, 194 Ill. 492, 62 N. E. 817); *Moulton v. Faught*, 41 Me. 298; *Hodgkins v. Farrington*, 150 Mass. 19, 15 Am. St. Rep. 168, 5 L. R. A. 209, 22 N. E. 73; *Nowlin Lumber Co., v. Wilson*, 119 Mich. 406, 78 N. W. 338; *Minneapolis Mill Co. v. Minneapolis & St. L. Rwy. Co.*, 51 Minn. 304, 53 N. W. 639 (But see as to Minnesota, *dictum* in *St. John v. Sinclair*, 108 Minn. 274, 122 N. W. 164); *Belzoni Oil*

Co. v. Yazoo & M. V. R. Co., 94 Miss. 58, 47 So. 468 (But see, as to Mississippi, *Binder v. Weinberg*, 94 Miss. 817, 48 So. 1013); *Great Falls Waterworks v. Great Northern Rwy. Co.*, 21 Mont. 487, 54 Pac. 963; *Archer v. Chicago M. & St. P. Rwy. Co.*, 41 Mont. 56, 137 Am. St. Rep. 692, 108 Pac. 571; *Houston v. Laffee*, 46 N. H. 505; *Batchelder v. Hibbard*, 58 N. H. 269; *Crosdale v. Lanigan*, 129 N. Y. 604, 26 Am. St. Rep. 551, 29 N. E. 824; *Richmond & D. R. Co. v. Durham & N. Ry. Co.*, 104 N. Car. 658, 10 S. E. 659; *Rodefer v. Pittsburgh, etc., R. Co.*, 72 Ohio St. 272, 70 L. R. A. 844, 74 N. E. 183; *Yeager v. Tuning*, 79 Ohio St. 121, 86 N. E. 657; *Fowler v. Delaplaine*, 79 Ohio St. 279, 87 N. E. 260; *Foster v. Browning*, 4 R. I. 47; *Nunnally v. Southern Iron Co.*, 94 Tenn. 397, 29 S. W. 361; *Yeager v. Woodruff*, 17 Utah, 361, 53 Pac. 1045 (*semble*); *Hathaway v. Yakima Water, etc., Co.*, 14 Wash. 469, 53 Am. St. Rep. 874, 44 Pac. 896; *Rhoades v. Barnes*, 54 Wash. 145, 102 Pac. 884; *Pifer v. Brown*, 43 W. Va. 412, 49 L. R. A. 497, 27 S. E. 399; *Thoemke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030; *Huber v. Stark*, 124 Wis. 359, 109 Am. St. Rep. 937, 102 N. W. 12; (But see, as to Wisconsin, *McDougald v. New Richmond Roller Mills Co.*, 125 Wis. 121, 103 N. W. 244; *Water-*

These latter cases are ordinarily based on the theory, firstly, that one who takes a license is presumed to know that, as a matter of law, a license is revocable, and consequently cannot assert that he was misled by the license into making improvements as if he had a more or less permanent interest in the land, and, secondly, that, in so far as the license is oral, as is usually the case, the contrary view involves a violation of the Statute of Frauds, in allowing what is in effect a permanent or *quasi* permanent interest in land to be created orally. A consideration of the question on principle would seem to lead to the conclusion that the two groups of decisions are not so discordant as at first sight appears, and that the difference of view really centers about a question of the construction of the license, so called, as to whether it was intended merely as a license, or as the grant of an easement, the privilege being in the former case subject to withdrawal in spite of the improvements, but not in the latter. In other words, it being generally recognized⁴⁶⁻⁴⁷ that, in the case of an oral gift of land, if the donee makes improvements on the faith of the gift, equity will enforce the gift, on the theory of part performance or equitable estoppel, it necessarily follows that an oral gift of an easement or right of profit in the land will likewise be enforced in equity in case the donee makes improvements on the faith thereof.⁴⁸ An attempted oral grant or "agreement for" an easement, in return for a valuable consideration, will *à fortiori* be enforced in equity, if followed by improvements on the faith thereof, whether it be regarded for this purpose

man v. Norwalk, 145 Wis. 663, 130 N. W. 479.)

46-47. *Post*, § 547.

48. But in Huber v. Stark, 121 Wis. 359, 109 Am. St. Rep. 937, 102 N. W. 12, it was held that

the fact that it was intended by the owner of the land that the user of his land should be permanent was immaterial, unless there was a consideration for the grant of permission.

as an executory contract to convey an easement or as an attempt to grant an easement, invalid because oral.⁴⁹

Applying the above considerations, if an oral permission to make a particular use of land is construed as an attempt to create an easement, that is, an interest in the land of a more or less permanent character, which is therefore invalid as not being in writing, the effect of the making of improvements on the faith thereof will be to create an equitable right in accordance with the intended gift or grant; while if such permission is merely a license, and not an attempt to create an easement, then it is properly revocable after as before the making of improvements. Accordingly, the decisions that a license cannot be revoked after the making of improvements on the faith thereof appear properly to involve merely the assertion of a rule of construction, that an oral permission to make a particular use of land, which use is such that it will be necessary or desirable to make expenditures in order to avail oneself of the permission, is to be construed as an attempt orally to grant an easement in the land, which is absolutely invalid as a grant, but operates by way of equitable estoppel in favor of the intended grantee if he subsequently makes expenditures on the assumption that he acquired an easement thereby, although, as a matter of fact, he originally acquired, by reason of the invalidity of the grant, merely a license. On the other hand, the decisions that a license can be re-

49. See *Flickinger v. Shaw*, 87 Cal. 126, 22 Am. St. Rep. 234, 11 L. R. A. 134, 25 Pac. 268; *Legg v. Horn*, 45 Conn. 415; *St. Louis Nat. Stock Yards Co. v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243; *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Binder*

v. Weinberg, 94 Miss. 817, 48 So. 1013; *Lewis v. Patton*, 42 Mont. 528, 113 Pac. 745; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *East India Company v. Vincent*, 2 Atk. 83; *Devonshire v. Eglin*, 14 Beav. 530; *Plimmer v. Wellington*, L. R. 9 App. Cas. 699; *McManus v. Cooke*, 35 Ch. Div. 681.

voked even after the making of improvements on the faith thereof appear properly to involve the assertion of a rule that permission to make a particular use of land is not to be construed as an intended grant of an easement, even though its enjoyment does involve the making of improvements by the person to whom it is given. In accordance with this view, that the question is properly one of the construction of the language used in granting the permission, in connection with the character of the acts authorized and the necessity of expenditures to make the permission practically available, are occasional decisions that if the license is expressed to be revocable, or subject to the pleasure of the licensor, it may be revoked in spite of expenditures for improvements,⁵⁰ as well as occasional suggestions that if the permission is granted for a named period it cannot be revoked until the end of that period.⁵¹ If permission to use another's property is expressed to be revocable, it must necessarily be either a license merely, or the grant of an easement, subject to a power of revocation, while if it is granted for a named period, it cannot be intended as a license merely, but must be construed as a grant, or attempted grant, of an easement.

It has in one state been decided that when a license to make a particular use of one's land is merely inferred from acquiescence in such use,⁵² the making of

50. *Thompson v. Normanden*, 134 Iowa, 720, 112 N. W. 188; *Laughery Turnpike Co. v. McCreary*, 147 Ind. 526, 46 N. E. 906; *Kentucky Distilleries Warehouse Co. v. Warwick Co.*, 166 Ky. 651, 179 S. W. 611; *Wood v. Edes*, 2 Allen (Mass.) 578; *Risien v. Brown*, 73 Tex. 135, 10 S. W. 661; *Hall v. Chaffee*, 13 Vt. 150. So if it is for one year only, it is revocable thereafter
2. R. 2.—2

in spite of expenditures. *Brower v. Wakeman*, 88 Conn. 8, 89 Atl. 913.

51. *St. Louis Nat. Stock Yards Co. v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243; *Baynard v. Every Evening Printing Co.*, 9 Del. Ch. 127, 77 Atl. 885; *Adams v. Weir & Flagg* (Tex. Civ. App.), 99 S. W. 726.

52. *Ante*, this section, note 27.

improvements by the licensee did not render the license irrevocable.⁵³ Such a view appears reasonable. There is evidently no attempted grant of an easement, and nothing on which the licensee can properly base an assumption that he has a permanent interest in the land, so as to justify his expenditure for improvements.

There are occasional decisions or dicta that after a license has become irrevocable by reason of the making of improvements thereunder or, as we would prefer to express it, after an attempted oral grant of an easement has been validated by such making of improvements, the license privilege remains irrevocable, or the easement endures, only so long as the improvements originally made continue available for the purpose of its exercise.^{53a} This view appears to involve a failure to recognize the connection between the case referred to and the doctrine of part performance or equitable estoppel. There is no more reason that the privilege should in such case be restricted to the life of the improvements than that a decree specifically enforcing a contract for the sale of land, based on the part performance involved in the making of improvements, should call for a conveyance of an estate to endure only as long as the improvements endure.

Occasionally the courts have suggested or asserted that, in case the licensee has made improvements on the faith of the license, it can be revoked, but only if the licensee is placed in *statu quo* by reimbursement of the cost of such improvements.⁵⁴ The propriety of this

53. Shaw v. Profitt, 57 Ore. 192, Ann. Cas. 1913A, 63, 109 Pac. 584, 110 Pac. 1092; Ewing v. Rhea, 37 Ore. 583, 82 Am. St. Rep. 783, 52 L. R. A. 140, 62 Pac. 790. Compare Boynton v. Hunt, 88 Vt. 187; 92 Atl. 153.

53a. Ameriscoggin Bridge v. Bragg, 11 N. H. 102; Phillips v. Cutler, 89 Vt. 233, 95 Atl. 487;

Clark v. Glidden, 60 Vt. 702, 15 Atl. 358.

54. Wynn v. Garland, 19 Ark. 23, 68 Am. Dec. 190; Flick v. Bell, 110 Cal. xvii 42 Pac. 813; Southwestern R. Co. v. Mitchell, 69 Ga. 114; Dillion v. Crook, 11 Bush (Ky.) 321; Ferguson v. Spencer 127 Ind. 66, 25 N. E. 1035; Shipley v. Fink, 102 Md.

form of relief in favor of the person making the improvements, like that of the absolute negation of the right to revoke, appears properly to be a question of the construction of the language used in according permission to make use of the land, as to whether it is a license or the attempted grant of an easement. If the latter, it is for the court, in its discretion, it would seem, to determine whether the landowner should be given an opportunity, by reimbursing the expenditures made on the faith of the invalid grant, to relieve his land of the easement to which it would otherwise be subject on the theory of equitable estoppel.

—**License coupled with an interest.** A license which is coupled with a grant or interest cannot, it is agreed, be revoked.⁵⁵ What this means is that if one has an interest, acquired by grant or otherwise, in some thing or things upon the land, for the purpose of removing which a license to enter on the land is expressly given or necessarily implied, such removal cannot be prevented on the theory that a license is revocable. The doctrine that a license coupled with an interest is irrevocable has been applied in the case of chattels

219, 62 Atl. 316; *Dawson v. Western Md. R. Co.*, 107 Md. 70, 14 L. R. A. N. S. 809, 126 Am. St. Rep. 337, 15 A & E. Ann. Cas. 678, 68 Atl. 301; *Johnson v. Barton*, 23 N. D. 629, 44 L. R. A. (N. S.) 557, 137 N. W. 1092. See compilation of cases in 44 L. R. A. N. S. 557.

Applying such a theory, it has been held that if the licensee is allowed to recover from the licensor the value of his improvements, he cannot thereafter assert that the license is irrevocable. *Oster v. Broe*, 161 Ind. 131, 64 N. E. 918.

55. *Thomas v. Sorrell*, Vaughan

330, 351; *Wood v. Leadbitter*, 13 Mees. & W. 838; *Miller v. State*, 39 Ind. 267; *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Williamston etc. R. Co. v. Battle*, 66 N. C. 540; *Metcalf v. Hart*, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 900, 31 Pac. 407.

Occasionally the courts have mistakenly referred to what is properly a valid grant of a right of profit, as a license coupled with an interest, *Funk v. Halde-man*, 53 Pa. 229; *McLeod v. Dial*, 63 Ark. 10, 37 S. W. 306.

sold while lying upon the vendor's premises,⁵⁶ and also in the case of chattels placed upon another's land by the latter's permission.⁵⁷ So, as has been judicially stated,⁵⁸ while a license by A to hunt in his park, whether given by deed or parol, is revocable, as merely rendering lawful the act of hunting, which would otherwise be unlawful, on the other hand, if the license be, not only to hunt, but also to take away the deer killed to his own use, this is a grant of the deer, with a license annexed to come on the land, and supposing the grant of the deer to be good, the license is irrevocable. The doctrine might also be applied in connection with a valid conveyance or sale of growing trees, or of minerals or fixtures in or on the land, which while legally a part of the land, are capable of becoming personalty by severance,⁵⁹ but in such a case the inability of the landowner to deprive the transferee of the privilege of entering on the land for the purpose of removing the things granted may perhaps be more satisfactorily based on the theory that the grantee of those things, trees, minerals or fixtures, as the case may be, acquires not a license merely, but an easement, a right of way by necessity,⁶⁰ which will endure so long as the necessity exists.

A license is obviously not coupled with a grant or interest in the sense referred to, so as to be irrevocable,

56. *Wood v. Manley*, 11 Ad. & El. 34; *Walker Furniture Co. v. Dyson*, 32 Dist. Col. App. 90, 19 L. R. A. N. S. 606; *Parker v. Barlow*, 93 Ga. 700, 21 S. E. 213; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Heath v. Randall*, 4 Cush. (Mass.) 195; *Lambert v. Robinson*, 162 Mass. 34, 44 Am. St. Rep. 326, 37 N. E. 753.

57. *Patrick v. Colerick*, 3 Mees.

& W. 483; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *White v. Elwell*, 48 Me. 360, 77 Am. Dec. 231.

58. *Wood v. Leadbitter*, 13 Mees. & W. 828.

59. See *Newberry v. Chicago Lumbering Co.*, 154 Mich. 84, 117 N. W. 592; and *infra*, this section section, note 63.

60. *Post*, § 363(c).

if the licensee has failed to secure any interest by reason of the invalidity of the attempted grant of the interest.⁶¹ So it has been frequently decided that, an oral sale of growing trees being insufficient to pass them as such,⁶² the vendee has merely a revocable license to cut the trees, while, after they are cut, the sale is regarded as taking effect on them, as intended, in their chattel character, and then the vendee, having an interest in the trees, has an irrevocable license to enter on the land to remove them.⁶³ And a like doctrine has been applied in connection with a sale of minerals in or fixtures upon the land which, as being oral merely, is not effective as a transfer thereof.⁶⁴

If what was originally a license has become, by the application of the doctrine of part performance or equitable estoppel, in effect an easement, it no doubt remains a burden upon the land in the hands of a subsequent purchaser of the land, except when he is a purchaser for value and without notice.⁶⁵ And a subse-

61. *Crosby v. Wadsworth*, 6 East, 602; *Wood v. Leadbitter*, 13 Mees & W. 838; *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653.

62. *Ante*, § 261, note 82.

63. *Colby Hinkley Co. v. Jordan*, 146 Ala. 634, 41 So. 962; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Cool v. Peters Box & Lumber Co.*, 87 Ind. 531; *Garner v. Mahoney*, 115 Iowa, 356, 88 N. W. 828; *Martin v. Johnson*, 105 Me. 156, 73 Atl. 963; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *United Soc. v. Brooks*, 145 Mass. 410, 14 N. E. 622; *White v. King*, 87 Mich. 107, 49 N. W. 518; *Walton v. Lowrey*, 74 Miss. 484, 21 So. 243; *Pierrepont v. Barnard*, 6 N. Y. 279; *Fish v. Capwell*, 18 R. I. 667, 49 Am. St. Rep. 807, 25 L. R. A.

159, 29 Atl. 840; *Polk v. Carney*, 17 S. D. 436, 97 N. W. 360; *Welever v. Advance Smudge Co.*, 34 Wash. 331, 75 Pac. 863; *Bruley v. Garvin*, 105 Wis. 625, 48 L. R. A. 839, 81 N. W. 1038.

In *Cool v. Peters Box Co.*, 87 Ind. 531, it was considered that even if the trees were cut by a stranger, the contract of sale operated to vest title thereto in the original vendee, who was consequently entitled to sue the stranger for their conversion.

64. *McCullagh v. Rains*, 75 Kan. 458, 89 Pac. 1041; *Wetospky v. New Haven Gas Light Co.*, 88 Conn. 1, 90 Atl. 30; *Whitaker v. Cawthorne*, 14 N. Car. 389.

65. That an innocent purchaser for value is protected, see *Prince v. Case*, 10 Conn. 375, 27 Am. Dec.

quent purchaser with notice has no more right than has his vendor to revoke the license, so called.⁶⁶ The licensee has an equity against the licensor, the right to enforce which as against a purchaser from the licensor is determined by the ordinary rule for determining priorities in equity.⁶⁷

— (e) **Mode of revocation.** A license may be revoked either by express words to that effect, or by an act on the part of the licensor indicating an intention to revoke it,⁶⁸ as when he makes its exercise impossible.⁶⁹ It is likewise revoked by a conveyance of the land to a third person,⁷⁰ or by the death of the

675; *Clark v. Close*, 43 Iowa, 92; *Wilkins v. Irvine*, 33 Ohio St. 138; *Wheaton v. Cutler*, 84 Vt. 476, 79 Atl. 1091.

66. *Russell v. Hubbard*, 59 Ill. 335; *Arterburn v. Beard*, 86 Neb. 733, 126 N. W. 379; *Joseph v. Wild*, 146 Ind. 249, 45 N. E. 467; *Portman v. Topliff*, 138 Iowa, 19, 115 N. W. 508; *Carrolton Telephone Exchange Co. v. Spicer*, 177 Ky. 340, 197 S. W. 827; *Shaw v. Proffitt*, 57 Ore. 192, Ann. Cas. 1913A, 63, 109 Pac. 584, 110 Pac. 1092.

67. See *Ewart*, *Estoppel*, 199 and *post*, § 566.

68. *Wood v. Leadbitter*, 13 Mees. & W. 838; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Fluker v. Georgia Railroad & Banking Co.*, 81 Ga. 461, 12 Am. St. Rep. 328, 2 L. R. A. 843, 8 S. E. 529; *Forbes v. Balenseifer*, 74 Ill. 183; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658; *Hodgkins v. Farrington*, 150 Mass. 19, 5 L. R. A. 209, 15 Am. St. Rep. 168, 22 N. E. 73; *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St.

Rep. 536; *Carleton v. Redington*, 21 N. H. 291, 311.

But it has been held that the institution of an action of ejectment by the licensor against the licensee does not effect a revocation for the purpose of that action. *Somers v. Somers*, 83 Conn. 156, 76 Atl. 45.

69. *Hyde v. Graham*, 1 Hurlst. & C. 593; *Forbes v. Balenseifer*, 74 Ill. 183; *Fowler v. Hyland*, 48 Mich. 179, 12 N. W. 26; *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104; *Quimby v. Straw*, 71 N. H. 160, 51 Atl. 656; *West v. Shaw*, 61 Wash. 227, 112 Pac. 243; *Hazelton v. Putnam*, 3 Pin. (Wis.) 107, 54 Am. Dec. 158.

70. *Wallis v. Harrison*, 4 Mees. & W. 538; *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411, 91 Am. St. Rep. 38, 57 L. R. A. 720, 31 So. 947; *Wetospsky v. New Haven Gas Light Co.*, 88 Conn. 1, Ann. Cas. 1916D, 968, 90 Atl. 30; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *High v. Jasper Mfg. Co.*, 57 Fla. 437, 49 So. 156; *Kamp-*

licensor,⁷¹ since a license cannot justify a trespass on land as against the licensor's grantee, heir or devisee.⁷²

— (f) **Termination otherwise than by revocation.**

A license may, as above indicated, cease to be operative by reason of its revocation, that is, by reason of the landowner's indication of an intention to that effect,⁷³ or by reason of the land having passed into the hands of a person other than the licensor.⁷⁴ It may also cease to be operative by force of the terms of the license itself, as when it permits only one act by the licensee, and that act has been done, or the license is limited as to time,⁷⁵ or it is subject to a

house v. Gaffner, 73 Ill. 453; McIntyre v. Harty, 236 Ill. 629, 86 N. E. 581; Seidensparger v. Spear, 17 Me. 123, 35 Am. Dec. 234; Drake v. Wells, 11 Allen (Mass.) 141; Minneapolis, etc. R. Co. v. Marble, 112 Mich. 4, 70 N. W. 319; Minneapolis Western Ry. Co. v. Minneapolis & St. L. Ry. Co., 58 Minn. 128, 59 N. W. 983; Houx v. Seat, 26 Mo. 178, 72 Am. Dec. 202 (but see Bracht v. Johnson, 187 Mo. App. 220, 173 S. W. 692); Eckerson v. Crippen, 110 N. Y. 585, 1 L. R. A. 487, 18 N. E. 443; Vollmer's Appeal, 61 Pa. St. 118; Price etc. Co. v. Madison, 17 S. D. 247, 95 N. W. 933; U. S. Coal & Oil Co. v. Harrison, 71 W. Va. 217, 47 L. R. A. N. S.) 870, 76 S. E. 346; Coleman v. Foster, 1 Hurlst. & N. 27 (lease).

So it is revoked by the conveyance of a right of user in the land the exercise of which is inconsistent with the enjoyment of the license. Salinger v. North American Woolen Mills Co., 70 W. Va. 151, 73 S. E. 312; Archer v. Chicago M. & St. P. R. Co.,

41 Mont. 56, 137 Am. St. Rep. 692, 108 Pac. 571.

71. DeHaro v. United States, 5 Wall. (U. S.) 599, 18 L. Ed. 681; Jensen v. Hunter, 108 Cal. xvii, 41 Pac. 14; Lambe v. Manning, 171 Ill. 612, 49 N. E. 509; Spacy v. Evans, 152 Ind. 431, 52 N. E. 605; Hodgkins v. Farrington, 150 Mass. 19, 5 L. R. A. 209, 15 Am. St. Rep. 168, 22 N. E. 73; Estelle v. Peacock, 48 Mich. 469, 12 N. W. 659; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Eggleston v. New York & H. R. Co. 35 Barb. (N. Y.) 162; Chavez v. Tortolina, 15 N. Mex. 53, 99 Pac. 690; Bridges v. Purcell, 18 N. C. 492; Caledonian etc. School v. Kent, 86 Vt. 151, 84 Atl. 26; Hazelton v. Putnam, 3 Chand. (Wis.) 117, 3 Pin. 107, 54 Am. Dec. 158.

72. See note in 14 Harv. Law Rev. at p. 73.

73. *Ante*, this section, notes 68, 69.

74. *Ante*, this section, notes 70, 71.

75. Reed v. Merrefield, 10 Mete. 155; Gilmore v. Wilson, 53 Pa.

condition which has been violated.⁷⁶ It may also come to an end by reason of the expiration of a reasonable time for acting thereunder,⁷⁷ or by reason of its abandonment by the licensee.⁷⁸ And a license being personal to the licensee, it becomes inoperative upon his death.^{78a}

A license not being assignable, an attempted assignment by the licensee of his rights thereunder has been regarded as bringing the license to an end,⁷⁹ the courts following in this regard the analogy of a tenancy at will. It has also been regarded as terminated by a sale of the land, even prior to a conveyance in pursuance thereof, the purchaser being let into possession,⁸⁰ and also by the setting off of the land under execution against the owner.⁸¹

— (g) **Effect of termination.** The termination of a license, by revocation or otherwise, while it precludes any subsequent acts on the authority of the license, does not affect the validity of acts previously done thereunder.⁸² If the licensee, in the course of the

194; *Oesting v. New Bedford*, 210 Mass. 396, 96 N. E. 1095; *Glynn v. George*, 20 N. H. 114.

76 *Pratt v. Ogden*, 34 N. Y. 20.

77. *Ante*, § 349(c), note 36.

78. *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Lake Erie R. Co. v. Michener*, 117 Ind. 465, 20 N. E. 254.

78a. *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Page v. Gaskill*, 84 N. J. L. 615, 87 Atl. 460; *Hazelton v. Putnam*, 3 Chand. (Wis.) 117, 3 Pin. 107, 54 Am. Dec. 158.

As to the effect, in case of a license given to two or more persons jointly, of the death of one, see *Rust v. Conrad*, 47 Mich. 449,

41 Am. Rep. 720, 11 N. W. 265; *Chandler v. Spear*, 22 Vt. 388.

79. *Bates v. Duncan*, 64 Ark. 339, 62 Am. St. Rep. 190 42 S. W. 410; *Fischer v. Johnson*, 106 Iowa. 181, 76 N. W. 658; *Blaisdell v. Portsmouth etc. R. Co.*, 51 N. H. 483; *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732; *Polk v. Carney*, 17 S. Dak. 436, 97 N. W. 360.

80. *Bruley v. Garvin*, 105 Wis. 625, 48 L. R. A. 839, 81 N. W. 1038.

81. *Taylor v. Gerrish*, 59 N. H. 509.

82. *Foot v. New Haven etc. Co.*, 23 Conn. 214; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Stevens v. Stevens*, 11 Metc. (Mass.) 251, 45 Am. Dec. 203; *Blaisdell v.*

exercise of his rights under the license, has placed anything on the land, he is entitled, upon revocation of the license, to a reasonable time within which to remove it.⁸³

There is no obligation upon the licensee, on revocation of the license, to restore the land to the condition in which it was before he made changes therein or placed structures thereon, under authority of the license.⁸⁴

The question of the right to revoke a license is entirely distinct from the question whether, in revoking it, the licensor violates a contract on his part, express or implied, not to revoke it. Though the revocation is perfectly valid and effective, the licensor may be liable in damages for having revoked it.⁸⁵

— (h) **Assignment of license.** A license creates a privilege personal to the licensee, which cannot ordinarily be transferred by him to another.⁸⁶ If the

Portsmouth etc. R. Co., 51 N. H. 483; Freeman v. Hadley, 32 N. J. L. 225; Great Falls Waterworks Co. v. Great Northern Rwy. Co., 21 Mont. 487, 54 Pac. 963; Pratt v. Ogden, 34 N. Y. 20; Pursell v. Stover, 110 Pa. 43, 20 Atl. 403; Merriweather v. Dixon, 28 Tex. 15; Lockhart v. Geir, 54 Wis. 133, 11 N. W. 245; Winter v. Brockwell, 8 East 308.

83. Brower v. Wakeman, 88 Conn. 8, 89 Atl. 913; Shipley v. Fink, 102 Md. 219, 62 Atl. 316; Ingalls v. St. Paul, M. & M. R. Co., 39 Minn. 479, 12 Am. St. Rep. 476, 40 N. W. 524, Great Falls Waterworks Co. v. Great Northern R. Co., 21 Mont. 487, 54 Pac. 963; Putnam v. State, 132 N. Y. 344, 30 N. E. 743; Wright v. Brown, 163 Mo. App. 117, 145 S. W. 518; Mellor v. Watkins, L. R. 9 Q. B.

409; Cornish v. Stubbs, L. R. 5 C. P. 334. See Wilson v. Tavener (1901) 1 Ch. 578; Hodgkins v. Farrington, 150 Mass. 19, 15 Am. St. Rep. 168, 5 L. R. A. 209, 22 N. E. 73.

84. Liggins v. Inge, 7 Bing. 682; Hodgkins v. Farrington, 150 Mass. 19, 15 Am. St. Rep. 168, 58 L. R. A. 209, 22 N. E. 73.

85. Kerrison v. Smith, (1897) 2 Q. B. 445; McCrea v. Marsh, 12 Gray (Mass.) 211; Goldman v. Beach Front Realty Co., 83 N. J. L. 97, 83 Atl. 777; Pollock, Torts. (6th Ed.) 363.

86. Wickham v. Hawker, 7 Mees. & W. 63; Ackroyd v. Smith, 10 C. B. 138; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19; Dawson v. Western Md. R. Co., 107 Md. 70, 14 L. R.

license is coupled with an interest,^{86a} however, it ensures to the benefit of one to whom the interest is assigned,⁸⁷ that is, as the original grantee of things upon or in the land may enter to remove them, so any person acquiring title to them from him may do so. And a license, so called, which is irrevocable by reason of expenditures by the licensee on the strength thereof,⁸⁸ is presumably assignable, in the sense that the privilege of making the particular use of another's land passes as incident to the transfer of land of the licensee for the benefit of which the license was given,⁸⁹ that is, as an appurtenant easement.

In one case it was held that the benefit of a license, contained in an instrument of lease, enabling the lessor to enter for a certain purpose, passed to his transferee and was enforceable against an assignee of the lessee, the instrument expressly providing that the stipulations should extend to and be binding on the assignees of the respective parties,^{89a} and in another case it was held to pass to the lessor's transferee without any mention of assigns.^{89b} Such a stipulation, in terms giving the lessor a right to enter on the land, if regarded as a contract to the effect that the lessor or his transferee should be allowed to enter, may well pass on

A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678, 68 Atl. 301; Ward v. Rapp, 79 Mich. 469, 44 N. W. 934; Fuhr v. Dean. 26 Mo. 116, 69 Am. Dec. 484; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; Blaisdell v. Portsmouth. G. F. & C. R. R., 51 N. H. 483; Mendenhall v. Klinck, 51 N. Y. 246. But St. John v. Sinclair, 108 Minn. 274, 122 N. W. 164 appears to be *contra*.

86a. *Ante*, § 349(h), notes 55-60.

87. Bassett v. Maynard, Cro. Eliz. 819; Wickham v. Hawker, 7

Mees. & W. 63; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Ely v. Cavanaugh, 82 Conn. 681. 74 Atl. 1122; Sawyer v. Wilson, 61 Me. 529; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398.

88. *Ante*, § 349(d), notes 44-51.

89. See Russell v. Hubbard, 59 Ill. 335.

89a. Marks v. Gartside, 16 Ill. App. 177.

89b. Brewster v. Gracey. 65 Kan. 137, 69 Pac. 199. And see Stebbins v. Demorest, 138 Mich. 297, 101 N. W. 528.

a transfer of the reversion, and be enforceable against an assignee of the leasehold, as a covenant running with the land, so as to justify a recovery of damages for a breach thereof, and presumably a court of equity would in such case regard what is in terms merely a permission to enter as a contract for an easement of entry to endure for the life of the lease, and as such capable of specific enforcement by means of an injunction to prevent any interference with the exercise of the right of entry by the lessee or his assignee.

§ 350. **Easements in gross and appurtenant.** An easement ordinarily exists for the benefit of the owner of some particular land, it belonging to him as an incident of his ownership of the land. In other words, there is not only a "servient" tenement, subject to the easement, but also a "dominant" tenement, in favor of which the easement exists. And the easement, to be thus "appurtenant" to a dominant tenement, must be such that it conduces to the beneficial use of such tenement.⁹⁰ For instance, one cannot have a right of way over another's land, appurtenant to one's own land, except as it is available for going to or from the latter land.

In England it has been judicially asserted that an easement is always appurtenant, that is, that one cannot have an easement which belongs to him personally, apart from his ownership of particular land.⁹¹

90. *Ackroyd v. Smith*, 10 C. B. 164; *Hill v. Tupper*, 2 Hurl. & C. 121; *Linthicum v. Ray*, 9 Wall. (U. S.) 241; *Moore v. Crose*, 43 Ind. 30; *Whaley v. Stevens*, 21 S. C. 221, 27 S. C. 549, 4 S. E. 145. But in *Perry v. Pennsylvania R. Co.*, 55 N. J. Law 178, 26 Atl. 829, it is held that an easement may be made appurtenant merely by language to that effect in a

conveyance by the owner of the easement.

It is immaterial that the easement incidentally benefits land other than the tenement to which it is appurtenant. *Simpson v. Godmanchester, L. R.* (1897) App. Cas. 696. See 10 *Columbia Law Rev.* at p. 74.

91. *Rangeley v. Midland Ry. Co.*, 3 Ch. App. 306; *Ackroyd v.*

It appears, however, that even there one may have a right analogous to an easement, a personal right as to the user of particular land, not revocable at the pleasure of the land owner,⁹² and whether this is called an easement in gross, a right analogous to an easement, or a right of user, appears to be entirely immaterial. In this country the possibility of the existence of a personal privilege in the nature of an easement or, as it is usually termed, of an "easement in gross," has been freely recognized⁹³.

— **The dominant tenement.** There is no necessity that the dominant tenement, to which the easement is appurtenant, should adjoin the servient tenement,

Smith, 10 C. B. 164; Hawkins v. Rutter, 61 L. J. Q. B. 146.

92. Mounsey v. Ismay, 3 Hurlst. & C. 498; Shuttleworth v. Le Fleming, 19 C. B. N. S. 695; Great Western Rwy. Co. v. Swindon etc. Rwy. Co., 22 Ch. Div. at pp. 706, 707.

Ways in gross are referred to in the earliest English law dictionary, *Termes de la Ley* (1629) under *chimin*: Doddridge, J., in W. Jones 127; by Chief Baron Gilbert in his work on Uses at p. 281. These references are from an article by Charles Sweet, Esq., in 24 Law Quart. Rev. at p. 260. A way in gross was assumed to have a legal existence in *Senhouse v. Christian*, 1 Term. Rep. 560.

93. *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Willoughby v. Lawrence*, 116 Ill. 1, 56 Am. Rep. 758, 4 N. E. 356; *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352; *Goodrich v. Burbank*, 12 Allen (Mass.) 459; *Atmidon v. Harris*, 113 Mass. 59; *Wilder v. Wheeler*, 60 N. H. 351;

Shreve v. Mathis, 63 N. J. Eq. 170, 52 Atl. 234; *Goldman v. Beach Front Realty Co.*, 83 N. J. 97, 83 Atl. 777; *Mayor, etc., of the City of New York v. Law*, 125 N. Y. 380, 26 N. E. 471; *Poull v. Mockley*, 33 Wis. 482.

That an easement of diverting water from or across another's land may be in gross, see *Ring v. Walker*, 87 Me. 550, 33 Atl. 174; *Goodrich v. Burbank*, 12 Allen (Mass.) 459; *Hail v. Ionia*, 38 Mich. 423; *Wentworth v. Philpot*, 60 N. H. 193; *Talbot v. Joseph*, 79 Or. 309, 155 Pac. 184; *Columbia Water Power Co. v. Columbia Elec. St. Rwy.*, 43 S. C. 154, 20 S. E. 1002.

In *Myers v. Berven*, 166 Cal. 484, 137 Pac. 260, a right of way, not apparently created for the benefit of any particular land, was regarded as assignable because, being "distinctly of an easement over the soil upon a defined route," it was an easement, not in gross, but appurtenant. The opinion does not explain how an

which is subject to the easement,⁹⁴ though obviously the two tenements ordinarily do adjoin. There are, however, statements to be found,⁹⁵ and at least one decision,⁹⁶ that a right of way cannot be appurtenant to land unless it has one of its termini upon the land to which it is claimed to be appurtenant, a view which is apparently not in harmony with the statement that the dominant and servient tenements need not adjoin. Why one terminus of a way must be upon the dominant tenement, is not explained.

It has been asserted that a way, in order to be appurtenant to land, must be "essentially necessary" to the enjoyment of the land.⁹⁸ If this statement means anything more than that the way must conduce to the advantage of such land, it is, it is conceived, erroneous.

It is a question whether an easement can be appurtenant to an incorporeal hereditament, whether for instance, a right of way over the land of A can exist as appurtenant to, and for the purpose of exercising,

easement can be appurtenant in the absence of a dominant tenement.

94. *Guthrie v. Canadian Pac. R. Co.*, 27 Ont. App. 64; *Graham v. Walker*, 78 Conn. 130, 2 L. R. A. N. S. 983, 112 Am. St. Rep. 93, 61 Atl. 98; *Goodwillie Co. v. Commonwealth Electric Co.*, 241 Ill. 42, 89 N. E. 272; *Jobling v. Tuttle*, 75 Kan. 351, 9 L. R. A. N. S. 960, 89 Pac. 699; *Witt v. Jefferson*, 13 Ky. Law Rep. 746, 18 S. W. 229; *Cady v. Springfield Waterworks Co.*, 134 N. Y. 118, 31 N. E. 245; *Rieffler v. Wayne Storage Water Power Co.*, 232 Pa. 282, 81 Atl. 300; *Perrin v. Garfield*, 37 Vt. 304.

95. *Washburn, Easements* (4th Ed.) 257 (*semble*); *Garrison v. Rudd*, 19 Ill. 558; *Sanxay v. Hun-*

ger, 42 Ind. 44. See *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791; *Kershaw v. Burns*, 91 S. Car. 129, 74 S. E. 378.

96. *Whaley v. Stevens*, 21 S. Car. 223.

97. That it need not, see *Graham v. Walker*, 78 Conn. 130, 112 Am. St. Rep. 93, 2 L. R. A. N. S. 983, 61 Atl. 98; *Goodwillie Co. v. Electric Co.*, 241 Ill. 42, 89 N. E. 272; *Witt v. Jefferson*, 13 Ky. L. Rep. 746, 18 S. W. 229; *Case of Private Road*, 1 Ashm. (Pa.) 417.

98. *Washburn, Easements*, (4th Ed.) 257; *Moore v. Crose*, 43 Ind. 30; *Whaley v. Stevens*, 27 S. Car. 549, 4 S. E. 145; *Fisher v. Fair*, 34 S. Car. 203, 14 L. R. A. 333, 13 S. E. 470.

a privilege in gross of fishing or taking minerals on the land of B. There is in England a dictum in favor of the view that an easement may thus appertain to an incorporeal hereditament,^{98a} and also a dictum to the contrary.^{98b}

— **Transferability of easement.** An easement in gross has occasionally been regarded as susceptible of voluntary transfer,⁹⁹ and as passing by descent,¹ provided as least the language used in its creation shows an intention to that effect.² But more frequently such an easement has been regarded as so purely personal to the original grantee as to be incapable of voluntary or involuntary transfer.³ Considerations in favor of

98a. *Hanbury v. Jenkins*, L. R. 2 Ch. 401. There is an assumption to this effect by Sharswood, J., in *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 100 Am. Dec. 597.

98b. *Atty. Gen. v. Copeland*, L. R. (1901) 2 K. B. 101. See Gale, *Easements* (8th Ed.) 12; Goddard, *Easements* (6th Ed.) 12.

99. *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 90 Am. Dec. 161; *French v. Morris*, 101 Mass. 68; *Amidon v. Harris*, 113 Mass. 59; *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. 550; *Poull v. Mockley*, 33 Wis. 482; *Percival v. Williams*, 82 Vt. 531, 74 Atl. 321. See *Standard Oil Co. v. Buchi*, 72 N. J. Eq. 492, 66 Atl. 427.

In *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352, such a right was regarded as transferable, apparently on the theory that, because it involved a possibility, in the particular case, of monopolizing a large part of the servient tenement and was peculiarly profitable, it was equivalent to a profit *à prendre*. This view is adopted from Washburn,

Easements (4th Ed.) 13. The same view is asserted, apparently, by Walworth Ch., in *Post v. Pear-sall*, 22 Wend. 425; Sharswood J., in *Tinicum Fishing Co. v. Carter*, 61 Pa. St. at p. 40.

1. *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 90 Am. Dec. 161; *Ring v. Walker*, 87 Me. 550, 33 Atl. 174; *Percival v. Williams*, 82 Vt. 531, 74 Atl. 321.

2. In *Field v. Morris*, 88 Ark. 148, 114 S. W. 206; *Wilder v. Wheeler*, 60 N. H. 351, it was held that it was not transferrable because the language used in its creation did not show an intention to that effect. And in *Lynch v. White*, 85 Conn. 545, 84 Atl. 326, it was held that, there being no words of limitation extending it to heirs, and no facts showing such an intention, it endured only for the life of the person in favor of whom it was created.

3. *Freed v. Morris*, 88 Ark. 148, 114 S. W. 206; *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Hall v. Armstrong*, 53 Conn. 554, 4 Atl.

the latter view have been suggested as follows: "If such right be an inheritable estate, how will the heirs take? In severalty, in joint tenancy, coparcenary, or as tenants in common? If not in severalty, how can their interests be severed? If it be assignable, what limit can be placed on the power of alienation? To whom and to how many may it be transferred?"⁴ Nevertheless it is somewhat difficult to see why, if, as appears to be the case,⁵ a profit in gross is capable of passing by voluntary transfer and by descent, an easement in gross should not be so capable. The courts could effectually protect the owner of the servient tenement against an assignment to such a number of persons as unduly to increase the burden thereon, and the heirs might well be regarded as holding in that form of cotenancy which exists in case of the descent of land itself.

An appurtenant easement is regarded as so closely annexed to the dominant tenement that it passes *prima facie* upon a conveyance of such tenement without express mention,⁶ and regardless of whether the

113 (*dictum*); Louisville etc. R. Co. v. Koelle, 104 Ill. 455; Hoosier Stone Co. v. Malott, 130 Ind. 121, 29 N. E. 412, (*dictum*); Winston v. Johnson, 42 Minn. 398, 45 N. W. 958 (*dictum*); Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597; Comm. v. Zimmerman, 56 Pa. Super Ct. 311; Cadwalader v. Bailey, 17 R. I. 495, 14 L. R. A. 300, 23 Atl. 20; Fisher v. Fair, 34 S. Car. 203, 13 S. E. 470; Kershaw v. Burns, 91 S. Car. 129, 74 S. E. 378; Salem Capital Flour Mills v. Stayton Water Ditch & Canal Co. (C. C.) 33 Fed. 146.

4. Boatman v. Lasley, 23 Ohio St. 614, *per* McIlvaine, J.

5. *Post*, § 382, note 19.

6. Lide v. Hadley, 36 Ala. 627, 76 Am. Dec. 338; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Goodwin v. Bragaw, 87 Conn. 31, 86 Atl. 668; Taylor v. Dyches, 69 Ga. 455; Tinker v. Forbes, 136 Ill. 221, 26 N. E. 503; Moore v. Crose, 43 Ind. 30; Cassens v. Meyer, 154 Iowa. 187, 134 N. W. 543 (warranty deed); Wendell v. Heim, 87 Kan. 136, 123 Pac. 869; Hammond v. Eads, 146 Ky. 162, 142 S. W. 379; Dority v. Dunning, 78 Me. 381, 6 Atl. 6; Douglass v. Riffin, 123 Md. 18, 90 Atl. 1000; Barnes v. Lloyd, 112 Mass. 224; Willets v. Langhaar, 212 Mass. 573, 99 N. E. 466; Dulce Realty Co. v. Stead Realty Co., 245 Mo. 417, 151 S.

conveyance refers to "appurtenances."⁷ Likewise a recovery in ejectment of the dominant tenement involves a recovery of an easement appurtenant thereto.⁸

Since an easement appurtenant is intended to be exercised only for the benefit of and in connection with the dominant tenement, it cannot be separated therefrom by its transfer to a person other than the owner of such tenement.⁹ Such a separation would involve its conversion into an easement in gross.

— **Duration of easement.** An appurtenant easement usually exists in favor of one having an estate in fee simple in the dominant tenement, but in so far as the easement is intended to endure so long only as the purpose of its creation can be regarded as still existent,¹⁰ the possible duration of the easement corresponds to that of an estate in fee determinable rather than to that of an estate in fee simple. And occasionally the language of the grant creating an easement expressly provides that it is to endure only

W. 415; *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339; *Spaulding v. Abbott*, 55 N. H. 423; *Voorhees v. Burchard*, 55 N. Y. 58; *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. 717; *Jackson v. Trullinger*, 9 Ore. 393; *Ruhnke v. Aubert*, 58 Ore. 6, 113 Pac. 38; *Rhea v. Forsyth*, 37 Pa. St. 503, 78 Am. Dec. 441; *Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co.*, 240 Pa. St. 519, 87 Atl. 968; *Re Barhousen*, 142 Wis. 292, 124 N. W. 649.

7. *Shelby v. Chicago & E. I. R. Co.*, 143 Ill. 385, 32 N. E. 438; *Agnew v. Pawnee City*, 79 Neb. 603, 113 N. W. 236; *Smith v. Garbe*, 86 Neb. 94, 124 N. W. 921.

8. *Callaway v. Forest Park Highlands Co.*, 113 Md. 1, 77 Atl. 141; *Crocker v. Fothergill*, 2 Barn.

& Ald. 661.

9. *Ackroyd v. Smith*, 10 C. B. 164; *Moore v. Crose*, 43 Ind. 30; *Baker v. Kenney*, 145 Iowa, 638. 139 Am. St. Rep. 456, 12 N. W. 901; *Ring v. Walker*, 87 Me. 550, 33 Atl. 175; *Wilson v. Ford*, 209 N. Y. 186, 102 N. E. 614; *Wood v. Woodley*, 160 N. C. 17, 41 L. R. A. (N. S.) 1197, 75 C. E. 719; *Boatman v. Lasley*, 23 Ohio St. 614; *Cadwalader v. Bailey*, 17 R. I. 495, 14 L. R. A. 300, 23 Atl. 20; *Reise v. Enos*, 76 Wis. 634, 8 L. R. A. 617, 45 N. W. 414.

That the attempted transfer of the easement apart from the dominant tenement does not extinguish the easement, see a suggestive note in 20 Harv. Law Rev. 136.

10. *Post*, § 372.

until a certain event occurs.¹¹ An appurtenant easement may also, as well as an easement in gross, be for life, as having been intended to endure only so long as the grantee's life estate in the dominant tenement endures,¹² or as having been created by one having only a life estate in the land in which it is created. The easement may be for years only.¹³

— **Determination of class.** Whether, in any particular case, an easement created by grant is an easement appurtenant or an easement in gross, is to be determined by the language of the grant as construed in the light of the surrounding circumstances.^{13a} That the easement is of value to particular land owned by the grantee of the easement,¹⁴ or that it is valueless except as exercised for the benefit of such land,¹⁵ tends to

11. See *e. g.* *Arbaugh v. Alexander*, 164 Iowa, 635, 146 N. W. 747; *Wooding v. Michael*, 89 Conn. 704, 96 Atl. 170.

12. See *Hoffman v. Savage*, 15 Mass. 130; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; *Pym v. Harrison*, 33 Law Times. 796.

13. *Davis v. Morgan*, 8 B. & C. 8. See *Booth v. Alcock*, L. R. 8 Ch. 663; *Newhoff v. Mayo*, 48 N. J. Eq. 619, 27 Am. St. Rep. 455, 23 Atl. 265.

13a. *Hopper v. Barnes*, 113 Cal. 636, 45 Pac. 874; *Durkee v. Jones*, 27 Colo. 159, 60 Pac. 618; *Blanchard v. Maxson*, 84 Conn. 429, 80 206; *Cassens v. Meyer*, 154 Iowa, 187, 134 N. W. 543; *Hammond v. Eads*, 146 Ky. 162, 142 S. W. 379; *Dennis v. Wilson*, 107 Mass. 591; *Kent Furniture Mfg. Co. v. Long*, 111 Mich. 383, 69 N. W. 657; *Liederding v. Zignego*, 77 Minn. 421, 77 Am. St. Rep. 677, 80 N. W. 360; *Smith v. Garbe*, 86 Neb. 94, 124 N. W. 921; *Ruhnke v. Aubert*, 2 R. P.—3

53 Ore. 6, 113 Pac. 38; *Cadwalader v. Bailey*, 17 R. I. 495, 23 Atl. 20.

14. *Webb v. Jones*, 163 Ala. 637, 50 S. 887; *Durkee v. Jones*, 27 Colo. 159, 60 Pac. 618; *Blanchard v. Maxson*, 84 Conn. 429, 80 Atl. 206; *Cherokee Mills v. Standard Cotton Mills*, 138 Ga. 856, 76 S. E. 373; *Goodwillie Co. v. Commonwealth Electric Co.*, 241 Ill. 42, 89 N. E. 272; *Cassens v. Meyer*, 154 Iowa, 181, 134 N. W. 543; *Smith v. Ladd*, 41 Me. 314; *Greenwood Lake & P. J. R. Co., v. New York & G. L. R. Co.*, 134 N. Y. 435, 31 N. E. 874; *Smith v. Garbe*, 86 Neb. 91, 136 Am. St. Rep. 674, 20 A. & E. Ann. Cas. 1209, 124 N. W. 921; *Ruffin v. Seaboard Air Line Rwy.*, 151 N. Car. 330, 66 S. E. 317; *Reise v. Enos*, 76 Wis. 634, 8 L. R. A. 617, 45 N. W. 414; *Jones v. Island Creek Coal Co.*, 79 W. Va. 532, 91 S. E. 391.

15. *Hopper v. Barnes*, 113 Cal. 636, 45 Pac. 874; *Schmidt v.*

show that it is appurtenant to such land. The fact that, after the creation of the easement, it was exercised exclusively in connection with particular property belonging to the grantee of the easement would seem also to tend to indicate that it is appurtenant thereto.¹⁶ That the grant of an easement is in terms in favor of one, his heirs and assigns, does not tend to show that it is personal rather than appurtenant,¹⁷ nor, on the other hand, does the omission of such words ordinarily have such an effect.¹⁸ That it is granted to one for life or during his occupation of particular land has been regarded as showing an intention to create a mere personal right.^{18a}

The courts tend to regard an easement as appurtenant rather than as in gross,¹⁹ and accordingly, in

Brown, 226 Ill. 590, 80 N. E. 1071; Cassens v. Meyer, 154 Iowa, 187. 134 N. W. 543; Dennis v. Wilson, 107 Mass. 591; Lathrop v. Elsnor, 93 Mich. 593, 53 N. W. 791; Lidgerding v. Zignego, 77 Minn. 421, 77 Am. St. Rep. 677, 80 N. W. 360; Cadwalder v. Bailey, 17 R. I. 495, 14 L. R. A. 300, 23 Atl. 20.

16. Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. 38; Wesley v. M. N. Cartier & Sons Co., 30 R. I. 403, 75 At. 626; Lidgerding v. Zignego, 77 Minn. 421, 77 Am. St. Rep. 677, 80 N. W. 360. And see Winston v. Johnson, 42 Minn. 398, 45 N. W. 958. But see Wentworth v. Philpot, 60 N. H. 193.

17. Callaway v. Forest Park Highlands Co., 113 Md. 1, 77 Atl. 141; Parsons v. New York N. H. & H. R. Co., 216 Mass. 269, 103 N. E. 693; Mitchell v. D'Olier, 68 N. J. L. 375, 59 L. R. A. 949, 53 Atl. 467. Rather does such language indicate an intention that the

easement shall be appurtenant. Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874; Moll v. McCauley, 83 Iowa, 677, 50 N. W. 216; French v. Williams, 82 Va. 462, 4 S. E. 591.

18. Dennis v. Wilson, 107 Mass. 591; Teachout v. Capital Lodge etc., 128 Iowa, 384, 104 N. W. 440; Cleveland C. C. & St. L. Rwy. Co. v. Griswold, 51 Ind. App. 497, 97 N. E. 1030; United States Pipe Line Co. v. Delaware L. & W. R. Co., 62 N. J. L. 254, 42 L. R. A. 572, 41 Atl. 759; *Contra* Comm. v. Zimmerman, 56 Pa. Super. 311; Wilder v. Wheeler, 60 N. H. 351. Compare Lidgerding v. Zignego, 77 Minn. 421, 77 Am. St. Rep. 677, 80 N. W. 360.

18a. Estabrooks v. Estabrooks, 91 Vt. 515, 101 Atl. 584.

19. McMahan v. Williams, 79 Ala. 288; Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900; Blanchard v. Maxson, 84 Conn. 489, 80 Atl. 206; Chero-

the ordinary case, a reservation of an easement on a conveyance of part of one's land will be regarded as of an easement appurtenant to the land retained,^{19a} while an easement in the land retained, created by the instrument by which land is conveyed, will ordinarily be appurtenant to the land conveyed.^{19b} But a different view has been indicated in one case, to the effect that if the grant of an easement is by a clause entirely separate from that by which the land is conveyed, though by the same instrument, it is to be regarded as in gross.^{19c} In one case the fact that the grant of the easement was on the same day on which land had been granted was regarded as showing that it was appurtenant to such land.^{19d}

The fact that one to whom there was granted the privilege of taking water from another's land had a life estate only in neighboring land has been regarded as tending to show that the privilege was not ap-

kee Mills v. Standard Cotton Mills, 138 Ga. 856, 76 S. E. 373; Whitaker v. Harding, 256 Ill. 148, 99 N. E. 945; Lucas v. Rhodes, 48 Ind. App. 211, 94 N. E. 914; Presbyterian Church of Osceola v. Harken, 177 Iowa, 195, 158 N. W. 692; Hammond v. Eads, 146 Ky. 162, 142 S. W. 379; Willets v. Langhaar, 212 Mass. 573, 99 N. E. 466; Lidgerding v. Zignago, 77 Minn. 421, 77 Am. St. Rep. 677, 80 N. W. 360; Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. 38; Smith v. Garbe, 86 Neb. 94, 124 N. W. 921; Wilson v. Ford, 209 N. Y. 186, 102 N. E. 614; Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. 38; Calwalader v. Bailey, 17 R. I. 495, 14 L. R. A. 300, 23 Atl. 20; French v. Williams, 82 Va. 462, 4 S. E. 591; Spensley v. Valentine, 34 Wis. 154. But see Wilder v. Wheeler, 60 N.

H. 351; Comm v. Zimmerman, 56 Pa. Super. 311.

19a. Winthrop v. Fairbanks, 41 Me. 307; Smith v. Ladd, 41 Me. 316; Bowen v. Conner, 6 Cush. (Mass.) 132; Dennis v. Wilson, 107 Mass. 591; Lathrop v. Elsner, 93 Mich. 599; Winston v. Johnson, 42 Minn. 398, 45 N. W. 958; Presbyterian Church of Osceola v. Harken, 177 Iowa, 195, 158 N. W. 692.

19b. Kuecken v. Voltz, 110 Ill. 264; Stearns v. Mullen, 4 Gray (Mass.) 151; Blood v. Millard, 172 Mass. 65, 51 N. E. 527; Gunson v. Healy, 100 Pa. 42; Reise v. Enos, 76 Wis. 634, 8 L. R. A. 617, 45 N. W. 414.

19c. Shreve v. Mathis, 63 N. J. Eq. 170, 52 Atl. 234.

19d. Moll v. McCauley, 83 Iowa, 677, 50 N. W. 216.

purtenant to such land.^{19e} In the same state it has been said that the fact that the gift of a right of way to one who owned land in fee was expressed to be for life only might indicate that the way was in gross and not appurtenant to his land.^{19f} If the language of the grant or reservation of an easement is such as itself to show that the easement was created solely for exercise in connection with particular land, as in the case of a right of way specified to be to and from such land, it is appurtenant.^{19g}

The fact that the instrument by which a right of way is created fails to refer in any way to neighboring land owned by the beneficiary of the grant has occasionally been regarded as showing that the right is not intended to be appurtenant to such land, but is in gross.^{19h} But there are a greater number of decisions which assert, expressly or by implication; a contrary view, to the effect that the dominant tenement need not be expressly referred to.²⁰

In the case of an easement by prescription, whether the easement is appurtenant or in gross is to be determined by the consideration whether the user of the servient tenement throughout the prescriptive period was for the benefit of, and in connection with,

19e. *Amidon v. Harris*, 113 Mass. 59.

19f. *Dennis v. Wilson*, 107 Mass. 591. See *Lidgerding v. Zignego*, 77 Minn. 421, 77 Am. St. Rep. 677, 80 N. W. 360; *McDaniel v. Walker*, 46 S. C. 43, 24 S. E. 378.

19g. *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *Mendell v. Delano*, 7 Metc. (Mass.) 176; *George v. Cox*, 114 Mass. 382; *Valentine v. Schreiber*, 3 N. Y. App. Div. 235, 38 N. Y. Supp. 417; *Gunson v. Healy*, 100 Pa. St. 42; *French v. Williams*, 82 Va. 462,

4 S. E. 591; *Thorpe v. Brumfitt*, L. R. 8 Ch. 650.

19h. *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Metzger v. Holwick*, 17 Ohio Circ. Ct. 605.

20. *Hopper v. Barnes*, 113 Cal. 636, 45 Pac. 874; *Durkee v. Jones*, 27 Col. 159, 60 Pac. 618; *Goldstein v. Raskin*, 271, Ill. 249, 111 N. E. 91 (distinguishing *Garrison v. Rudd*, 19 Ill. 558, as having been at law); *Dennis v. Wilson*, 107 Mass. 591; *Salem Capital Flour Mills v. Stayton Water Ditch & Canal Co.*, 33 Fed. 146.

one particular piece of land, and also of the consideration of its utility in connection with such land or its lack of utility apart therefrom.²¹

A right of user, given to one of the parties to a partition of land, over the portion allotted to another of such parties, has been regarded as appurtenant to the portion allotted to the former.²²

There are occasional decisions to the effect that one may acquire, by grant or reservation, an easement to be exercised in connection with and for the benefit of particular land which he does not own, in which case, it seems, the easement is in gross until he acquires such land, and if and when he acquires it, the easement becomes appurtenant to the land.^{22a}

§ 351. Light and air. As before stated, the owner of land has no "natural right" to light or air, and cannot complain that either has been cut off by the erection of buildings on adjoining land.²³ An owner of land may, however, acquire, by grant or its equivalent, a right to have light and air enter a particular window or other aperture, free from interruption by the owner of adjacent land, and such a right constitutes an easement in his favor.²⁴

21. *Schmidt v. Brown*, 226 Ill. 590, 80 N. E. 1071.

22. *Karmuller v. Krotz*, 18 Iowa, 352; *Davenport v. Lamson*, 21 Pick. (Mass.) 72; *Bowen v. Conner*, 6 Cush. (Mass.) 132. See *Hopper v. Barnes*, 113 Cal. 636, 45 Pac. 874.

22a. *North British Railway Co. v. Park Yard Co.* (1898) App. Cas. 643; *Amidon v. Harris*, 113 Mass. 59; *Percival v. Williams*, 82 Vt. 531, 74 Atl. 321; *Kalmowski v. Jacobowski*, 52 Wash. 359, 100 Pac. 852.

23. *Ante*, § 336, note 4d, § 338,

note 29.

24. *Turner v. Thompson*, 58 Ga. 268, 24 Am. Rep. 497; *Keating v. Springer*, 146 Ill. 481, 22 L. R. A. 544, 37 Am. St. Rep. 175, 34 N. E. 805; *White v. Bradley*, 66 Me. 254; *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Story v. Odin*, 12 Mass. 157, 7 Am. Dec. 46; *Brooks v. Reynolds*, 106 Mass. 31; *Greer v. Van Meter*, 54 N. J. Eq. 270, 33 Atl. 794; *Lattimer v. Livermore*, 72 N. Y. 174; *Weigmann v. Jones*, 163 Pa. St. 330, 30 Atl. 198. As to air, see *Chassey v. Ackland* (1895) 2 Ch. 389,

While the owner of land is entitled to have the air diffused over his land free from pollution by any use made of neighboring land, this being a natural right, an infringement of which constitutes a nuisance,²⁵ the owner of the neighboring land may acquire, by grant or prescription, an easement consisting of the right to make such injurious use of his land, or, as it is sometimes said, he may acquire a right to maintain a nuisance involving the pollution of air.²⁶

§ 352. **Waters and watercourses.** The mutual rights of adjoining or neighboring owners in regard to water have been previously considered.^{26a} These rights may, however, be suspended or modified in favor of the owner of one piece of land as against another by the creation of an easement. So, the owner of land upon a natural stream may acquire from the owner of land lower down on the same stream, by grant or prescription, the privilege of polluting the stream, or of appropriating what would otherwise be an unreasonable amount of water,²⁷ or he may acquire the privilege of obstructing the flow of the stream so as to flood the land of an

(1897) App. Cas. 155; Pollock, Torts (6th Ed.) 399, note.

25. See *ante*, § 338.

26. Goddard, Easements, 265; 2 Wood, Nuisances, § 704 *et seq.* Sturges v. Bridgman, 11 Ch. Div. 852; Dana v. Valentine, 5 Metc. (Mass.) 8; Matthews v. Stillwater Gas etc. Co., 63 Minn. 493, 65 N. W. 947.

26a. *Ante*, § 339.

27. Stockport Waterworks Co. v. Potter, 3 Hurl. & C. 300; Wood v. Waud, 3 Exch. 748; Tyler v. Wilkinson, 4 Maso., 397, Fed. Cas. No. 14312; Village of Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; Crosby

v. Bessey, 49 Me. 539, 77 Am. Dec. 271; Warner v. Cushman, 82 Me. 168, 19 Atl. 159; Washburn & Moen Mfg. Co. v. Salisbury, 152 Mass. 346, 25 N. E. 724; Smith v. City of Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907; Loverin v. Walker, 44 N. H. 489; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335, 346; Provost v. Calder, 2 Wend. (N. Y.) 517; Winchester v. Osborne, 61 N. Y. 555; Geer v. Durham Water Co., 127 N. C. 349, 37 S. E. 474; Talbot v. Joseph, 78 Ore. 308, 155 Pac. 184; McCallum v. Germantown Water Co., 54 Pa. St. 40; Messinger's Appeal, 109 Pa. St.

upper proprietor.²⁸ So, land may be subject to an easement precluding the owner thereof from cutting off percolating water, to the detriment of a neighboring owner, though otherwise he has the privilege of doing so;²⁹ or an easement may exist modifying the rights of adjoining owners as to the discharge or flow of surface waters.³⁰

— **Right to take water from spring.** Not infrequently the owner of land on which there is a spring or well grants to a neighboring land owner the privilege of

285, 4 Atl. 162; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Rood v. Johnson*, 26 Vt. 64.

A privilege in a riparian owner to divert or pollute the water of the stream is not strictly an easement in the land of the owner who suffers by such diversion or pollution, it has been said, since it involves no use of the latter's land, or restriction of its use. *Cockburn, C. J.*, in *Mason v. Shrewsbury & H. Ry Co.*, L. R. 6 Q. B. 578; *Geer v. Durham Water Co.*, 127 N. C. 349; 37 S. E. 474. It does, however, involve the privilege of doing an act to the detriment of such land, that is, of depleting the water flowing thereby, and the statement referred to would seem unduly to narrow the definition of an easement. See article by Professor Wesley N. Hohfield, 27 Yale Law Journ. 66.

28. *Wright v. Howard*, 1 Sim. & S. 190; *Central Georgia Power Co. v. Cornwell*, 141 Ga. 843, 82 S. E. 243; *Ballard v. Struckman*, 123 Ill. 636, 14 N. E. 682; *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134; *Williams v. Nelson*, 23 Pick. (Mass.) 141, 34 Am. Dec. 45; *Tourtellot v. Phelps*, 4 Gray

(Mass.) 370; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890; *Cornwell Mfg Co. v. Swift*, 89 Mich. 503, 50 N. W. 1001; *Swan v. Munch*, 65 Minn. 500, 35 L. R. A. 743, 60 Am. St. Rep. 491, 67 N. W. 1022; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Tabor v. Bradley*, 18 N. Y. 113, 72 Am. Dec. 498; *State v. Suttle*, 115 N. C. 784, 20 S. E. 725; *Bobo v. Wolf*, 18 Ohio St. 463; *Campbell v. McCoy*, 31 Pa. St. 263; *Weed v. Keenan*, 60 Vt. 74, 6 Am. St. Rep. 93, 13 Atl. 804.

29. *Chasemore v. Richards*, 7 H. L. Cas. 349, 2 Gray's Cas. 12; *Whitehead v. Parks*, 2 Hurl. & N. 870; *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16, 25 Am. Rep. 125; *Davis v. Spaulding*, 157 Mass. 431, 19 L. R. A. 102, 32 N. E. 650.

30. *Wright v. Williams*, 1 Mees. & W. 77; *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797, 31 N. W. 90; *Phinizy v. City Council of Augusta*, 47 Ga. 260; *Ross v. Mackeney*, 46 N. J. Eq. 140, 18 Atl. 685; *Louisville & N. Ry. Co. v. Mossman*, 90 Tenn. 157, 25 Am. St. Rep. 670, 16 S. W. 64.

taking water therefrom, usually by means of a pipe or conduit.^{30a} In such a case, if the water can be regarded as belonging to the owner of the land, the grantor, there is, it appears, the grant of a *profit à prendre*,^{30b} while if the water is *publici juris*, that is, belongs to no one, the grant is merely of the privilege of taking it across the grantor's land, of an easement merely.

§ 353. Artificial water courses and drains. One may, for the purpose of procuring water from a stream or other source of supply, have the privilege of having water flow to his land over intervening land belonging to another, in an aqueduct or other artificial channel, and such a privilege constitutes an easement in the intervening land.³¹ Likewise one may have an easement consisting (primarily) of the privilege of discharging surface or waste water, or sewage, through or on another's land.³²

In case the privilege of having water thus pass to or from one's own land over or through another's land

30a. See *e. g.* Bissell v. Grant, 35 Conn. 288; Rollins v. Blackden, 112 Me. 459, 92 Atl. 521; Goodrich v. Burbank, 12 Allen (Mass.) 459; Johnson v. Knapp, 146 Mass. 70, 15 N. E. 134; Howard v. Britton, 67 N. H. 484, 41 Atl. 269; Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. 182; Paine v. Chandler, 134 N. Y. 385, 19 L. R. A. 99, 32 N. E. 18; Woodring v. Hollenbach, 202 Pa. St. 65, 51 Atl. 318; Chase v. Cram, 39 R. I. 83, 97 Atl. 481; Vermont Central R. Co., v. Hills, 23 Vt. 681; Corevo v. Holman, 82 Vt. 34, 71 Atl. 718; Wheelock v. Jacobs, 70 Vt. 162, 67 Am. St. Rep. 659, 43 L. R. A. 105, 40 Atl. 41; Diffendal v. Virginia M. Ry. Co., 86 Va. 459, 10 S. E. 536; Warren v. Syme, 7 W.

Va. 474.

30b. *Post*, § 381.

31. Taylor v. Corporation of St. Helens, 6 Ch. Div. 264; Prescott v. White, 21 Pick. (Mass.) 341; Legg v. Horn, 45 Conn. 409; Cole v. Bradbury, 86 Me. 380, 29 Atl. 1097; Watkins v. Peck, 13 N. H. 360, 40 Am. Dec. 156; Cannon v. Atlantic Coast Line R. Co., 97 S. C. 233, 81 S. E. 476.

32. Wood v. Saunders, 10 Ch. App. 582; Humphries v. Cousins, 2 C. P. Div. 239; Brown v. Honeyfield, 139 Iowa, 414, 116 N. W. 731; White v. Chapin, 12 Allen (Mass.) 516; Larsen v. Peterson, 53 N. J. Eq. 88, 30 Atl. 1094; Treadwell v. Inslee, 120 N. Y. 458, 24 N. E. 651; Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165.

exists in connection with a supply of water of a temporary character merely, the watercourse thus formed must necessarily be regarded as artificial rather than natural. When however the source of supply is permanent in character the question as to whether the watercourse is to be regarded as natural or artificial is by no means a simple one. As before remarked,³³ if water flows from a permanent source of supply it might well be regarded as a natural watercourse through the entire extent of its flow, although it flows in part through an artificial channel, provided such channel is of a permanent character. For instance, when the water of a natural watercourse is permanently diverted in part by the construction of a mill race or "cut off," the flow of water in this new channel might well be regarded as part of a natural watercourse. The cases however tend to regard such flow as constituting, originally at least, an artificial, rather than a natural watercourse.³⁴

Any rights or privileges as to the use of the water of an artificial watercourse in favor of the owners of land thereon or thereunder, even though bearing a superficial resemblance to the "natural rights" of riparian land owners, are in the nature of easements,³⁵ and there have been a number of decisions in connection with the question of the existence of such easements. As before stated, in some cases owners of land abutting on an artificial watercourse have been regarded as acquiring, by reason of the passage of time, on the theory, it seems, of acquiescence or estoppel, rights as to the water of the watercourse similar to the natural rights of riparian owners on a natural watercourse.³⁶ In other cases the existence of such easements similar to natural rights has been based on a presumption of grants to that effect, as stated in the next following paragraph.

33. *Ante*, § 339, note 33a.

34. *Ante*, § 329, note 33c.

35. *Wood v. Waud*, 3 Exch. 748;
Rameshur Pershad Narain Singh

v. Koonj Behari Pattuk, 4 App.
Cas. 121; *Baily & Co. v. Clark*,
Son & Morland (1902) 1 Ch. 649.

36. *Ante*, § 339, note 33c.

When a watercourse is constructed over the lands of several persons, for utilization by all of them, it may properly be presumed, it has been held, in the absence of evidence to the contrary, that the intention was that they should enjoy the same rights among themselves as if they were riparian owners on a natural stream,³⁷ that, in other words, there were mutual grants by them of easements to that extent. And there are English cases in which such a presumption has been applied in connection with a watercourse flowing in an ancient channel, of unknown date, but evidently of artificial creation, and apparently intended for the benefit of the various owners of the land through which it passes.³⁸

In the case of an artificial watercourse or drain over the land of one person, which had its inception exclusively in the needs of another person, as when one person acquires by grant a privilege to have water flow in a stream either to or away from his land over the land of another, or causes such flow over another's land without any privilege of so doing, the person whose land is thus burdened would have, in the first place, no right to insist on a continuance of the burden; that is, he would have no easement to have the flow of water so continued for his benefit, nor would he, not having the right to have it continued, have any right as to the water itself.³⁹ In other words, he would not have the rights, as to the water, of a riparian proprietor on a natural stream. Whether, after the flow has continued for the prescriptive period, he could claim an easement by prescription as to the flow of water, would seem largely to

37. *Burrows v. Lang* (1901) 2 Ch. 502; *Whitmores (Edenbridge), Ltd. v. Stanford* (1909) 1 Ch. 427; *Townsend v. McDonald*, 12 N. Y. 381; *Cottel v. Berry*, 42 Ore. 593, 72 Pac. 584; *Harrington v. De-Maris*, 46 Ore. 111, 1 L. R. A. N. S. 756, 77 Pac. 603, 82 Pac. 14; *Cloyes v. Middlebury Elec. Co.*, 80

Vt. 109, 11 L. R. A. N. S. 693, 66 Atl. 1039.

38. *Roberts v. Richards*, 50 L. J. Ch. 297, *Baily & Co. v. Clark, Son & Morland* (1902) 1 Ch. 649.

39. *Burrows v. Lang* (1901) 2 Ch. 502; *Whitmores (Edenbridge), Ltd. v. Stanford* (1909) 1 Ch. 427.

depend on the acceptance of the doctrine of reciprocal easements by prescription elsewhere referred to.⁴⁰ A somewhat analogous question has arisen, in connection with natural watercourses, whether after the channel has been changed and has so remained for a number of years, the stream can be restored to its former channel as against persons who have improved and utilized their land upon the assumption that the change would be permanent.⁴¹

In England it is stated that if a watercourse is created for a merely temporary purpose, there is no room for the presumption of a grant, in favor of a person whose land abuts thereon, of a right as to the use of the water,⁴² but "temporary purpose" appears to include every purpose for which an individual would be likely to create or divert a watercourse,⁴³ and the result of the English cases seems to be, at least approximately, that if a watercourse is created by one for his own purposes, a grant by him of a right as to the water will not be presumed, while if created by several persons for their mutual benefit, across their own lands, mutual grants of rights as to the use of the water will be presumed.⁴⁴

— **Grants of water power.** Though a riparian owner on a natural water course has, by the weight of authority, no power to confer upon another the privilege of appropriating water from the stream, to be consumed elsewhere than upon riparian land,⁴⁵ he may confer upon one who is not a riparian owner the privilege of using the water merely for temporary purposes, the water so used being returned to the stream in such a condition, and with such a degree of promptitude, as not to affect

40. Post, § 532.

41. *Ante*, § 339(h).

42. *Arkwright v. Gell*, 5 Mees.

& W. 203; *Wood v. Waud*, 3 Exch. 748; *Burrows v. Lang* (1901) 2 Ch.

502; *Whitmores* (Edenbridge),

Ltd. v. Stanford (1909) 1 Ch. 427.

43. See cases in next preceding note.

44. *Ante*, this section, note 37.

45. *Ante*, § 339(b), note 54.

the lower proprietors.⁴⁶ This is frequently done for the purpose of furnishing power to a mill or other industrial enterprise away from the stream, the riparian owner causing or allowing sufficient water to supply the power to pass to the desired locality through a flume or other conduit. Such an arrangement is usually referred to as involving the grant of a water right or privilege, or of water power. What is, legally speaking, the specific subject of the grant in such a case is a matter as to which the courts give us no information, and that being the case, the writer ventures to express the opinion that when the riparian owner thus gives to a non riparian owner the privilege of using the water of the stream for the furnishing of power, he grants no right in the water itself, but merely grants a right to conduct, or to have the water flow, over or through his riparian land, in order that it may reach the land where it is sought to be utilized for the creation of power. So far as concerns the utilization of the water in such a way, which does not involve any substantial diminution of the amount of water passing to the lower proprietors, or cause it to pass to them in a deteriorated condition, such lower proprietors cannot object, whether the utilization is by an upper riparian proprietor himself, or by another person. Since then such other person has, as against the lower proprietors, the privilege of so utilizing the water, it is necessary, in order that he actually do so, only that he get access to the water, and this he acquires from the upper riparian proprietor by means of a grant from the latter of the easement of conducting the water, or of having it flow to a named amount, over such upper proprietor's land. Frequently the water is conducted across the riparian land by the riparian proprietor himself, who consequently in effect furnishes the water to the other person at the boundary of the latter's land, but even in such a case, it is conceived, the latter has

46. *Ante*, § 339(c).

merely the privilege of an unobstructed flow of the water over or through the riparian land, an easement in the land and not a right in the water. Indeed the riparian owner has himself no proprietary right in the water, but merely a right to have it flow past his land as it has been accustomed to flow,⁴⁷ and having no proprietary right in the water, he cannot create such a right in another. It may, and no doubt frequently does, occur that the riparian owner merely contracts to furnish water power to a certain extent, or to furnish a certain amount of water for the creation of power, and in such a case there appears to be no transfer whatsoever of a proprietary right, no "grant" in any sense of the term, but merely a personal obligation upon such owner to see that the water is available for use by his neighbor, at the proper height, and to the agreed extent, for the creation of power.

The employment of the expression "water power" in this connection is in itself calculated to produce some confusion of ideas.⁴⁸ The expression properly means the energy to be produced, or capable of production, by the fall of water, and such potential energy would hardly appear to be a proper subject of grant. A riparian owner does not, strictly speaking, own water power, but he owns the privilege of controlling the water at that particular point, so that he can allow it to fall in

47. *Ante*, § 339(a), note 24.

48. The expression appears to have occasioned some perplexity in connection with questions of taxation. The more satisfactory view in this regard is that the water power is not a distinct subject for assessment, but that the possibility of utilizing the water for the development of power is to be considered in determining the taxable value of the riparian land, as is the possibility of obtaining the whole or a part of the power

so developed to be considered in determining the taxable value of non riparian land. See *Blackstone Mfg. Co. v. Inhabitants of Blackstone*, 200 Mass. 82, 18 L. R. A. (N. S.) 755, 85 N. E. 880; *Union Water Co. v. Auburn*, 90 Me. 60, 37 L. R. A. 651, 60 Am. St. Rep. 40, 37 Atl. 331; *Saco Water Power Co. v. Buxton*, 98 Me. 295, 56 Atl. 914; *Penobscot Chemical Fibre Co. v. Bradley*, 99 Me. 263, 59 Atl. 83; *Cocheco Co. v. Strafford*, 51 N. H. 455; *Amoskeag Mfg. Co. v. Con-*

such a manner, and in connection with such appliances, that it will produce power capable of industrial application, and, as above indicated, in making it possible for another person to control the water for the same purposes, by means of a grant of the privilege of having the water flow over his land or otherwise, he effects what is ordinarily referred to as a grant of water power.

In case, as frequently occurs, the riparian owner who grants the use of the water to a non riparian owner, owns a dam upon the stream which serves to keep the water at the desired level, the grant of the use of the water would involve the grant not only of an easement to have the water pass over the riparian land, but also, presumably, of an easement to utilize the dam for the purpose of making the water available for his use.⁴⁹

§ 354. **Support of land.** As before explained, the owner of land has a natural right to support for his land from neighboring land, as has the owner of the surface of land from subjacent soil or minerals.⁵⁰ Such a natural right may be extended or diminished by the creation of an easement in favor of one landowner by the other. The owner of land may accordingly grant to the owner of adjacent land the privilege of withdrawing support from the former's land,⁵¹ and the owner of the surface of land may grant to the owner of subjacent soil or minerals the privilege of withdrawing support from the surface.⁵² But the intention to grant

cord, 66 N. H. 562, 32 L. R. A. 621, 34 Atl. 241; Bellows Falls Canal Co. v. Rockingham, 37 Vt. 622. The propriety of referring to water power, that is, the privilege of controlling the fall of water by reason of the location of one's land, as having a distinct *situs* for the purpose of taxation (as in Quinnebaug Reservoir Co. v. Union

73 Conn. 294, 47 Atl. 328; Moline Water Power Co. v. Cox, 252 Ill. 348, 96 N. E. 1044) is not readily apparent.

49. See *Trudeau v. Field*, 69 Vt. 446, 38 Atl. 162.

50. *Ante*, §§ 345, 346.

51. *Ryckman v. Gillis*, 57 N. Y. 68.

52. *Rowbotham v. Wilson*, 8 H.

(or reserve) an easement of this character must clearly appear, and it cannot be inferred from general language, contained in the conveyance by which the ownership of the minerals is severed from that of the surface, although by that language a right to extract all the minerals is apparently recognized.⁵³

§ 355. Support of buildings. The owner of land may acquire from the owner of adjoining land an easement consisting of a right to support for buildings on his land from such adjoining land,⁵⁴ or from adjoining buildings,⁵⁵ neither of which exists as a natural right.

L. Cas. 362; *Aspden v. Seddon*, 10 Ch. App. 394; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242; *Scranton v. Phillips*, 94 Pa. St. 15; *Miles v. Pennsylvania Coal Co.*, 217 Pa. St. 449, 10 Ann. Cas. 871, 66 Atl. 764; *Kirwin v. Delaware L. & W. R. Co.*, 249 Pa. 98, 94 Atl. 468. That such a privilege of removing surface support is properly regarded as an easement, see Professor Hohfield's luminous article, 27 *Yale Law Journ.* 66.

53. *Dixon v. White*, 8 App. Cas. 883; *Eloss Sheffield Steel & Iron Co. v. Sampson*, 158 Ala. 590, 48 So. 493; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Dec. 242; *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 71 N. E. 335; *Paull v. Island Coal Co.*, 44 Ind. App. 218, 88 N. E. 959; *Collins v. Gleason Coal Co.*, 140 Iowa, 114, 18 L. R. A. N. S. 736, 115 N. W. 479; *Walsh v. Kansas Fuel Co.*, 91 Kan. 310, 50 L. R. A. N. S. 686, 137 Pac. 941; *Piedmont etc. Coal Co. v. Kearney*, 114 Md. 496, 79 At. 1013; *Erickson v. Michigan Land & Iron Co.*, 50 Mich. 604, 16 N. W. 161; *Burgner v. Humphreys*, 41 Ohio St. 340; *Robertson*

v. Youghiogheny River Coal Co., 172 Pa. St. 566, 33 Atl. 706; *Weaver v. Berwind-White Coal Co.*, 216 Pa. 195, 65 Ala. 545; *Berkey v. Berwind-White Coal Co.*, 220 Pa. 651, 16 L. R. A. N. S. 851, 69 Atl. 329; *Stongap Colliery Co. v. Hamilton*, 119 Va. 271, 89 S. E. 305; *Catron v. Smith Buller Min. Co.*, 181 Fed. 941, 104 C. C. A. But see *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 2 L. R. A. N. S. 1115, 53 S. E. 24; *Kuhn v. Fairmont Coal Co.*, 179 Fed. 191, 102 C. C. A. 457.

54. *Rigby v. Bennett*, 21 Ch. Div. 559; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Lasala v. Holbrook*, 4 Paige (N. Y.) 173.

55. *Angus v. Dalton*, 4 Q. B. Div. 162; *Dalton v. Angus*, 6 App. Cas. 740; *Murchie v. Black*, 19 C. B. (N. S.) 190; *Richards v. Rose*, 9 Exch. 218; *Lemaitre v. Davis*, 19 Ch. Div. 281; *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Pierce v. Dyer*, 109 Mass. 374, 12 Am. Rep. 716; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632.

In cases in which separate floors of a building belong to different persons, there is a right of support for the upper floor or floors from the lower part of the building, and this right the owner of the latter can in no way impair, there being an implied grant to this effect in the conveyance of such upper floor or floors.⁵⁶

§ 356. **Party walls.** A "party wall" is a division wall between two buildings belonging to different persons, in which each of such persons has certain rights of use or ownership, or both. The term, as stated in a modern English case,⁵⁷ has been used in connection with division walls in four different senses. It may refer to (1) a division wall of which, with the land beneath it, the owners of the two adjoining buildings are tenants in common;⁵⁸ (2) a wall divided longitudinally into two strips, each of the adjoining owners owning the strip on his side, and having a right to use that strip only;⁵⁹ (3) a wall located entirely upon the land of one of the adjoining owners, and belonging entirely to him, but subject to an easement in the other to have it maintained as a division wall between the two properties and to use it for purposes of support;⁶⁰ or (4) a wall divided

56. *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265; *Rhodes v. McCormack*, 4 Iowa, 375; *Graves v. Berdan*, 26 N. Y. 501; *Harris v. Ryding*, 5 Mees. & W. 60.

But the owner of the upper floor has, it seems, no right to demand that the owner of the lower keep it in repair for the purpose of supporting the former. See *post*, § 370, note 55.

57. *Watson v. Gray*, 14 Ch. Div. 192, *per* Fry, J.

58. It is used in this sense in the following cases; *Cubitt v. Porter*, 8 Barn. & C. 257; *Mayfair Property Co. v. Johnston* (1894)

1 Ch. 508; *Wiltshire v. Sidford*, 1 Man. & R. 404; *Montgomery v. Trustees of Masonic Hall*, 70 Ga. 38. See *Sherrard v. Cisco*, 4 Sandf. (N. Y.) 480.

59. *Matts v. Hawkins*, 5 Taunt. 20; *Murly v. McDermott*, 8 Adol. & E. 138.

60. *Tate v. Fratt*, 112 Cal. 613, 44 Pac. 1061; *Price v. McConnell*, 27 Ill. 255; *Molony v. Dixon*, 65 Iowa, 136, 54 Am. Rep. 1, 21 N. W. 488; *Henry v. Kock*, 80 Ky. 391, 44 Am. Rep. 484; *Dorsey v. Habersack*, 84 Md. 117, 35 Atl. 96; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Nash v. Kemp*, 49 How.

longitudinally in to two strips, each of the adjoining owners owning the strip on his side only, but having an easement in the other strip for the purposes of the support of his building.⁶¹

In England, a division wall is presumed to belong to the first of the above classes.⁶² In this country, no such presumption has ever been recognized, and a party wall almost invariably belongs to the fourth class mentioned above, except in the few cases in which it belongs to the third class as having been built entirely on the land of one proprietor. For this reason, it seems proper to consider the subject of party walls as a part of the law of easements, though a party wall of the first or second class involves no application of that law.

A wall may be a party wall for part of its height, and, as to the balance, a wall belonging entirely to one of the two adjoining owners, without any easement of support in favor of the other.⁶³

If one of two adjoining owners, in building a wall, places it in part upon the land of the adjoining owner, whether with or without the assent of the latter, the

Pr. (N. Y.) 522; *Western Bank's Appeal*, 102 Pa. St. 171; *Bright v. Allan*, 203 Pa. St. 394, 93 Am. St. Rep. 769, 53 Atl. 251; *Duncomb v. Randolph*, 107 Tenn. 89, 89 Am. St. Rep. 915, 64 S. W. 21.

61. *Graves v. Smith*, 87 Ala. 450, 13 Am. St. Rep. 60, 5 L. R. A. 298, 6 So. 308; *Ingals v. Plamondon*, 75 Ill. 118; *Block v. Isham*, 28 Ind. 37, 92 Am. Dec. 287; *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Shiverich v. R. J. Gunning Co.*, 58 Neb. 29, 78 N. W. 460; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Hendricks v. Stark*, 37 N. Y. 106, 93 Am. Dec. 549; *Brocks v.*
2 R. P.—4

Curtis, 50 N. Y. 639, 10 Am. Rep. 545; *Odd Fellows' Hall Ass'n of Portland v. Hegele*, 24 Ore. 16, 32 Pac. 679; *Sanders v. Martin*, 2 Lea (Tenn.) 213, 31 Am. Rep. 598; *Davenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627; *Andrae v. Haseltine*, 58 Wis. 395, 46 Am. Rep. 635, 17 N. W. 18.

62. *Cubitt v. Porter*, 8 Barn. & C. 257; *Watson v. Gray*, 14 Ch. Div. 192.

63. *Weston v. Arnold*, L. R. 8 Ch. 1084; *Price v. McConnell*, 27 Ill. 255; *Ringgold Lodge v. De Kalb Lodge*, 157 Ky. 203, 162 S. W. 1111; *Barry v. Edlavitch*, 84 Md. 95, 33 L. R. A. 294, 35 Atl. 170.

courts will not ordinarily recognize any liability on the part of the latter, by reason of his subsequent user of the wall, to the builder.⁶⁴ A promise by him to pay for such use as he may make of the wall may, however, it has been decided, be inferred from the fact of his acquiescence in its construction by the other in part on his land, with knowledge that the latter expects payment for its use,⁶⁵ and there are occasional decisions and suggestions to be found that, without reference to the circumstances under which the wall was erected, the non builder is bound to contribute to the cost of its erection upon making use thereof.⁶⁶ There is frequently an ex-

64. *Antimarchi v. Russell*, 63 Ala. 356, 35 Am. Rep. 40; *Preiss v. Parker*, 67 Ala. 500; *Orman v. Day*, 5 Fla. 385; *Huck v. Flentye*, 80 Ill. 258; *Long v. Smyre*, 87 Kan. 182, 123 Pac. 765; *Wilkins v. Jewett*, 139 Mass. 29, 29 N. E. 214; *Allen v. Evans*, 161 Mass. 485, 37 N. E. 571; *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Griffin v. Sansom*, 31 Tex. Civ. App. 560, 72 S. W. 864; *List v. Hornbrook*, 2 W. Va. 340. See 21 Harv. Law Rev. at p. 222.

65. *Huck v. Flentye*, 80 Ill. 258; *Wickersham v. Orr*, 9 Iowa. 253, 74 Am. Dec. 348; *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347; *Griffin v. Sansum*, 31 Tex. Civ. App. 560, 72 S. W. 864. See *Bank of Escondido v. Thomas*, — Cal. —, 41 Pac. 462; *Zeininger v. Schnitzler*, 48 Kan. 63, 28 Pac. 1007.

It has been decided that the fact that the wall, though built on A's land, projected over B's land, precluded A from obtaining an injunction against the use of the wall by B. *Guttenberger*

v. Woods, 51 Cal. 523. On the other hand it was held that the fact that the foundation of the wall extended under ground into B's land, all the wall above the ground being on A's land, gave B no right to use the wall without making compensation. *Trulock v. Parse*, 83 Ark. 149, 11 L. R. A. N. S. 924, 103 S. W. 166.

66. *Zugenbuhler v. Gilliam*, 3 Iowa, 371; *Spaulding v. Grundy*, 31 Ky. Law Rep. 951, 104 S. W. 293; *Howze v. Whitehead*, 93 Miss. 578, 46 So. 401; *Reid v. King*, 158 N. C. 85, 73 S. E. 168; *Sanders v. Martin*, 2 Lea (Tenn.) 213.

The mere fact that one, in constructing a building extending to the edge of his land, constructs no wall along such edge, utilizing the wall of his neighbor for protection on that side, without however in any way cutting or breaking into it, does not give the neighbor a right of action. *Nolan v. Mendere*, 77 Tex. 565, 19 Am. St. Rep. 801, 14 S. W. 167. See *Bisquay v. Jennelot*, 10 Ala.

press agreement to this effect,⁶⁷ and occasionally a statute imposes a pecuniary liability upon one making use of a wall placed partly on his land.^{67a}

§ 357. Partition fences. There is generally, at common law, no obligation upon a landowner to maintain a partition fence between his land and the land adjoining.⁶⁸ But there may be an easement, created by grant or prescription, in favor of one piece of land, by which the owner of land adjacent thereto is compellable to maintain a partition fence between them.⁶⁹ Such an easement is sometimes referred to as a "spurious" easement, since a true easement, it is considered, cannot involve a duty of active performance on the part of the owner of the land subject to the easement, the servient tenement. An easement involving a right to the maintenance of a partition fence is to be distinguished from a right to have it maintained by reason of a contract to that effect.⁷⁰

In many states there are statutes providing for the construction of a partition fence between adjoining pieces of land at the joint expense of the owners or occupants thereof.⁷¹ By these statutes, each adjoining owner or occupant is required not only to join in the

245, 44 Am. Dec. 483. But he cannot cut or break into the wall, it not being a party wall. *Simonds v. Shields*, 72 Conn. 141 44 Atl. 29.

67. *Post*, § 361, notes 37-52, § 393.

67a. *Post*, § 365, notes 11-21.

68. *Star v. Rookesby*, 1 Salk. 323; *Moore v. Levert*, 24 Ala. 310; *Rust v. Low*, 6 Mass. 90. And see *ante*, § 298.

69. *Star v. Rookesby*, 1 Salk. 335; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Bronson v. Coffin*, 108 Mass. 175, 118 Mass. 156;

Castner v. Riegel, 54 N. J. Law, 498, 24 Atl. 484; *Adams v. Van Alstyne*, 25 N. Y. 232.

70. *D'Arcy v. Miller*, 86 Ill. 102, 29 Am. Rep. 11; *Bruner v. Palmer*, 108 Ind. 397; *Lawton v. Fitchburg R. Co.*, 8 Cush. (Mass.) 230, 45 Am. Dec. 753; *O'Riley v. Diss*, 41 Mo. App. 184; *Harriman v. Park*, 55 N. H. 471; *Scott v. Grover*, 56 Vt. 499, 48 Am. Rep. 814.

71. 1 *Stimson's Am. St. Law*, § 2182; 12 *Am. & Eng. Enc. Law*, 1050 *et seq.*, *Ante*, § 298.

construction of the fence, but also in its maintenance and repair;⁷² and neither can, without the consent of the other, remove any part of the fence, except, in some states, at certain periods of the year, or after a prescribed notice to the other proprietor.⁷³

When one owner of land desires to compel contribution by an adjacent owner of part of the cost of a partition fence under the statute, and the latter refuses to make contribution, the former is usually expressly authorized to apply to local officers, called "fence viewers," for a determination of the proportions to be built and maintained by each, or, in case the fence is already erected, for an allowance of the amount to be contributed by the party in default.⁷⁴ These statutes usually authorize one thus to compel his neighbor to join in the erection and maintenance of the fence only in case the latter's land is improved,⁷⁵ or occupied,⁷⁶ or inclosed,⁷⁷ and sometimes only when the land is used or occupied "otherwise than in common," this meaning land, it is said, which is segregated from other land by inclosure, or by use of an exclusive nature.⁷⁸

An owner of land who is bound, by grant or prescription, or by reason of proceedings under the

72. 1 Stimson's Am. St. Law, § 2185; Guyer v. Stratton, 29 Conn. 421; Rhodes v. Mummery, 48 Ind. 216; Barrett v. Dolan, 71 Iowa. 94, 32 N. W. 189; Stephens v. Shriver, 25 Pa. St. 78; Carpenter v. Cook, 67 Vt. 102, 30 Atl. 998.

73. 1 Stimson's Am. St. Law, § 2184.

74. 1 Stimson's Am. St. Law, § 2182; Gonzales v. Wasson, 51 Cal. 295; Thompson v. Bulson, 78 Ill. 277; Farmer v. Young, 86 Iowa. 382, 53 N. W. 279; Briggs v. Haynes, 68 Me. 535; Burr v. Hammer, 12 Neb. 483, 11 N. W. 741; Bronk v. Becker, 17 Wend. (N.

Y.) 320; Shriver v. Stephens, 20 Pa. St. 138; Farr v. Spain, 67 Wis. 631, 31 N. W. 21.

75. Wiggin v. Baptist Soc., 43 N. H. 260.

76. Maudlin v. Hanscombe, 12 Colo. 204, 20 Pac. 619; Rust v. Low 6 Mass. 90.

77. Kent v. Lix, 47 Mo. App. 567; Boyd v. Lammert, 18 Ill. App. 632; Boenig v. Hornberg, 24 Minn. 307.

78. Hewit v. Jewell, 59 Iowa. 27, 12 N. W. 738; Jones v. Perry, 50 N. H. 134. See Perkins v. Perkins, 44 Barb. (N. Y.) 134.

statute, to maintain a partition fence, or a part thereof, is liable to the adjoining proprietor for any damage that may occur owing to his failure properly to maintain it, there being usually an express provision to this effect in statutes providing for partition fences.⁷⁹ He has no right to recover against the adjoining proprietor for a trespass by the latter's cattle which results from his own failure to comply with his obligation to fence;⁸⁰ but his obligation is to his adjoining owner only, and to those lawfully using the latter's land, and he may recover against others whose cattle trespass on the adjacent land, and pass therefrom onto his land, although they do so owing to his own failure to fence.⁸¹

§ 358. Rights of way. A right of way is primarily a privilege to pass over another's land. Such a right never exists as a natural right, but must always be created by a grant or its equivalent. A right of way may be either public or private,—that is, it may be a right of passage of which every individual may avail himself, or it may exist for the benefit of one individual or class of individuals. Public rights of way are not, properly speaking, easements, though they are frequently referred to as such, and they will be more particularly discussed in another connection.⁸² Private rights of way, which constitute one of the most important classes of easements, will be hereafter discussed in connection

79. *Powell v. Salisbury*, 2 Younge & J. 391; *Cate v. Cate*, 50 N. H. 144, 9 Am. Rep. 179; *Saxton v. Bacon*, 31 Vt. 540; 1 *Stimson's Am. St. Law*, § 2189 (B).

80. *D'Arcy v. Miller*, 86 Ill. 102, 29 Am. Rep. 11; *Baynes v. Chastain*, 68 Ind. 376; *Barrett v. Dolan*, 71 Iowa, 94, 32 N. W. 189. *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255, 49 Am. Dec.

239; *Rangler v. McCreight*, 27 Pa. St. 95 *Roach v. Lawrence*, 56 Wis. 478, 14 N. W. 595.

81. *Lord v. Wormwood*, 29 Me. 282, 50 Am. Dec. 586; *Rust v. Low*, 6 Mass. 90; *Lyons v. Merrick*, 105 Mass. 71; *Lawrence v. Combs*, 37 N. H. 331, 72 Am. Dec. 332; *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 75 Am. Dec. 207.

82. *Post*, § 417.

with the acquisition, user, and extinguishment of easements.⁸³

A railroad right of way, so called, is frequently more than a mere right of way, it being a strip of land actually owned by the railroad company, on which the tracks are located. In so far as the railroad company has merely an easement of a right of way, that is, the privilege of having its trains pass over another's land, it is necessarily an easement in gross and not an easement appurtenant.^{83a}

Frequently a right of way exists, not directly over the soil of another's land, but over a hallway, passage way or stairway in a building on another's land.^{83b} Such a right of way frequently exists by reason of the leasing of individual rooms or suites in a building, the owner of the building retaining control of the hallways and stairways, subject, however, to a right of way over such hallways and stairways, in favor of each lessee of a room or suite.^{83c}

§ 359. Pews and burial rights. The character of the rights enjoyed by the holder of a church pew has been the subject of numerous decisions in this country, which are, however, not entirely harmonious in character, and are frequently unsatisfactory in their discussion of the principles involved.^{83d} In England, there may be an easement, consisting of the privilege of occupying a particular pew in the parish church, annexed to a particular house or messuage, this apparently not differing in nature from any other easement, the house or messuage constituting the dominant tenement,

83. Post, §§ 361-380.

83a. See 2 Lewis, Em. Domain, §§ 451, 468; Elliott, Railroads, § 938.

83b. See *e. g.* Bale v. Todd, 123 Ga. 99, 50 S. E. 990; Teachout v. Capital Lodge, 128 Iowa, 380, 104 N. W. 440; Gates v. Sebald, 180

Mich. 578, 147 N. W. 481.

83c. Ante, § 51 (d), note 97.

83d. See Article by Carl Zollman, Esq., "Pew Rights in American Law," 25 Yale Law Journ. 467, incorporated in "American Civil Church Government, ch. 15, by that author.

and the church the servient tenement.⁸⁴ In this country it is generally recognized that a "pew holder" is not, as such, a part owner of the church edifice, or of the land on which it stands, these belonging usually to the ecclesiastical authorities, the church corporation, or trustees.⁸⁵ He is sometimes said to have an easement or "incorporeal hereditament,"⁸⁶ but if he has an easement, it is an easement in gross, since in this country a pew is never appurtenant to a particular house or messuage. Pews have also been said to be "real estate,"⁸⁷ but this can be so only when one's interest is, as regards its possible duration, equivalent to an estate of freehold. If one's interest in a pew is

84. *Hinde v. Chorlton*, L. R. 2 C. P. 104; *Brumfitt v. Roberts*, L. R. 5 C. P. 224; *Phillips v. Halliday* [1891] App. Cas. 228.

85. *First Baptist Soc. in Leeds v. Grant*, 95 Me. 245; *Re New South Meeting House in Boston*, 13 Allen (Mass.) 497; *Sohier v. Trinity Church*, 109 Mass. 1; *Jones v. Towne*, 58 N. H. 462, 42 Am. Rep. 602; *Presbyterian Church in Newark v. Andruss* 21 N. J. Law, 325; *Freligh v. Platt*, 5 Cow. (N. Y.) 494; *Trustees of Ithaca First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Wheaton v. Gates*, 18 N. Y. 404; *First Baptist Church in Hartford v. Witherell*, 3 Paige (N. Y.) 226, 24 Am. Dec. 223; *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377; *Howe v. Stevens*, 47 Vt. 262.

86. *First Baptist Soc. in Leeds v. Grant*, 95 Me. 245; *Presbyterian Church in Newark v. Andruss*, 21 N. J. Law, 325; *Gamble's Succession*, 23 La. Ann. 9. See *Washburn, Easements*, 682.

It has been occasionally stated,

rather ambiguously, that the "owners of pews have an exclusive right to their possession and occupation for the purposes of public worship, not as an easement, but by virtue of their individual right of property therein, derived, perhaps, in theory at least, from the corporation represented by the trustees who are seised and possessed of the temporalities of the church." *Shaw v. Beveridge*, 3 Hill (N. Y.) 26, 38 Am. Dec. 616; *O'Hear v. De Goesbriand*, 33 Vt. 606, 80 Am. Dec. 652.

87. *Price v. Lyon*, 14 Conn. 280; *Attorney General v. Proprietors of Federal St. Meeting House*, 3 Gray (Mass.) 1; *Kimball v. Second Congregational Parish in Rowley*, 24 Pick. (Mass.) 347; *Trustees of Ithaca First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Viele v. Osgood*, 8 Barb. (N. Y.) 130; *Howe v. Stevens*, 47 Vt. 262; *Barnard v. Whipple*, 23 Vt. 401, 70 Am. Dec. 422.

limited to a term of years, or is "from year to year," it would seem to be at most personal property merely.⁸⁸ Frequently, if not ordinarily, at the present day, especially in church edifices of recent construction, a pew holder, so called, would appear to be in the position merely of a licensee, he paying so much periodically for the privilege of occupying the pew.

As to the rights of the person entitled to use a pew, upon the destruction of the church edifice or the sale thereof, the cases are not in entire accord. The view more generally adopted is that the church corporation or trustees are liable to him for the value of his right if the building is destroyed or sold without an absolute necessity for such action, while there is no such liability in case such necessity exists.⁸⁹ There are occasional suggestions that the pew owner would have a right to be allotted a pew in a new edifice substituted for the old.⁹⁰

— **Burial rights.** The privilege of interring bodies in a burial ground belonging to a corporation or association,^{90a} has been referred to as an

88. See *McNabb v. Pond*, 4 Bradf. (N. Y.) 7; *Johnson v. Corbett*, 11 Paige (N. Y.) 265, 276; *Inhabitants of First Parish v. Spear*, 15 Pick. (Mass.) 144; *Trustees of the Third Presbyterian Congregation v. Andruss*, 21 N. J. Law, 325. In Pennsylvania, the right to a pew is considered to be personal property. *Church v. Wells' Ex'rs*, 24 Pa. St. 249. And so by statute in Massachusetts. Rev. Laws 1902, c. 36, § 38; and New Hampshire Pub. Stat. 1901 ch. 220, § 14.

89. *Gorton v. Hadsell*, 9 Cush. (Mass.) 508; *Sohier v. Trinity Church*, 109 Mass. 1; *Wheaton v*

Gates, 18 N. Y. 395; *Cooper v. Trustees of First Presbyterian Church*, 32 Barb. (N. Y.) 222; *Mayor v. Temple Beth El*, 52 N. Y. St. Rep. 638, 23 N. Y. Supp. 1013; *Kincaid's Appeal*, 66 Pa. St. 411, 422; *Kellogg v. Dickinson*, 18 Vt. 266.

90. *Daniel v. Wood*, 1 Pick. (Mass.) 102; *Mayor v. Temple Beth El*, 52 N. Y. St. Rep. 638, 23 N. Y. Supp. 1013.

90a. As to the nature of a right of interment in land belonging to an individual, see *Woolridge v. Smith*, 243 Mo. 190, 40 L. R. A. (N. S.) 752, 147 S. W. 1019; *Hines v. State*, 126 Tenn.

easement,⁹¹ as a usufructuary right,⁹² and as a license.⁹³ The question of the nature of the interest of a lot holder, as he is frequently termed, is dependent primarily upon the intention manifested by the instrument by which it is created or evidenced, and the nature of such instrument. It may occur that a lot is conveyed outright to one for burial purposes, he acquiring an estate therein to endure so long as it is used, or capable of use, for burial purposes.⁹⁴ This, however, is unusual.

A privilege of interring bodies in a cemetery lot has been regarded as passing by descent.⁹⁵ Whether it could ordinarily be devised or transferred *inter vivos* to persons outside the family would appear to depend on the provisions of the instrument under which it is held and the regulations of the cemetery corporation or association.⁹⁶

1, 42 L. R. A. (N. S.) 1138, 149 S. W. 1058. See also as to private burying grounds within the confines of another's land. *Brown v. Anderson*, 88 Ky. 577, 11 S. W. 607; *Mitchell v. Thorne*, 134 N. Y. 536, 30 Am. St. Rep. 699, 32 N. E. 10.

91. *Hook v. Joyce*, 94 Ky. 450, 21 L. R. A. 96, 22 S. W. 651; *Jacobs v. Congregation Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853; *Richards v. Northwest Protestant Dutch Church*, 32 Barb. (N. Y.) 42, 20 How. Pr. 317.

92. *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 503; *Windt v. German Reformed Church*, 4 Sandf. Ch. (N. Y.) 471; *Price v. Methodist Church*, 4 Ohio 415.

93. *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903; *Partridge v. First Independent Church*, 39

Md. 631; *Rayner v. Nugent*, 60 Md. 515; *Gowen v. Bessey*, 94 Me. 114, 46 Atl. 792; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *McGuire v. Trustees of St. Patrick's Cathedral*, 54 Hun (N. Y.) 207; *Kincaid's Appeal*, 66 Pa. St. 420, 5 Am. Rep. 377.

94. *Lakin v. Ames*, 10 Cush. (Mass.) 198; *Silverwood v. Latrobe*, 68 Md. 620, 13 Atl. 161; *New York Bay Cemetery Co. v. Buckmaster*, 49 N. J. Law 449, 9 Atl. 591; *Matter of Brick Presbyterian Church*, 3 Edw. Ch. (N. Y.) 155.

95. *Jacobus v. Congregation Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853; *Matter of Brick Presb. Church*, 3 Edw. (N. Y.) 155; *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 807, 40 Atl. 871.

96. See *Pearson v. Hartman*,

The corporation or society controlling the cemetery may make regulations as to the mode and limits of the use of lots therein for burial,⁹⁷ but such regulations must not be unreasonable or arbitrary.⁹⁸ All rights in the persons entitled to use the burial ground are terminated by the necessary abandonment of the use of the land for burial purposes.⁹⁹

In so far as the person to whom the privilege of burial is granted, has no more than an easement or usufructuary right, he does not have the possession of the burial lot.¹ Somewhat strangely, however, it has been decided or assumed, in several cases, that he may maintain trespass *quare clausum fregit* against one interfering with his right.²

§ 360. Miscellaneous easements. In addition to easements of the classes above referred to, numerous

100 Pa. 84; *Dickens v. Cave Hill Cemetery Co.*, 93 Ky. 385, 20 S. W. 282. That interments have been actually made has been regarded as precluding a sale of the lot. *Thompson v. Hickey*, 8 Abb. N. Cas. 159, 59 How. Pr. (N. Y.) 434; *Schroeder v. Wanzor*, 36 Hun. (N. Y.) 423.

97. *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903; *Farely v. Metairie Cemetery Ass'n*, 44 La. Ann. 28, 10 So. 386.

98. *Rosehill Cemetery Co. v. Hopkinson*, 114 Ill. 209, 29 N. E. 685; *Mount Moriah Cemetery Ass'n v. Com.*, 81 Pa. St. 235, 22 Am. Rep. 743; *Silverwood v. Latrobe*, 68 Md. 620, 13 Atl. 161.

99. *Partridge v. First Independent Church*, 39 Md. 631; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *Richards v. North West Dutch Church*, 32 Barb. (N. Y.)

42; *Went v. Methodist Protestant Church*, 80 Hun. 266, 150 N. Y. 577, 44 N. E. 1129; *Price v. Methodist Episcopal Church*, 4 Ohio 515; *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377; *Craig v. First Presbyterian Church*, 88 Pa. St. 42, 32 Am. Rep. 417.

1. That he cannot maintain ejectment, see *Hancock v. McAvoy*, 151 Pa. 460, 31 Am. St. Rep. 774, 18 L. R. A. 781, 25 Atl. 47; *Stewart v. Garrett*, 119 Ga. 386, 64 L. R. A. 99, 100 Am. St. Rep. 179, 46 S. E. 427.

2. *Bessemer Land, etc., Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26, 18 So. 565; *Pulsifer v. Douglass*, 94 Me. 556, 53 L. R. A. 238, 48 Atl. 118; *Smith v. Thompson*, 55 Md. 5, 39 Am. Rep. 409; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Thirkfield v. Mountain View Cemetery Ass'n*,

other easements have been judicially recognized. Among such may be mentioned the privilege of maintaining upon another's land a stairway,³ a reservoir,⁴ a sign-board,⁵ of utilizing another's dock,⁶ of placing a sign on a building,⁷ of placing clothes lines⁸⁻⁹ on or over another's land, of having one's building overhang another's land,¹⁰ of swinging shutters thereover,¹¹ and even of extending one's building or porch upon another's land.¹² Also a privilege of placing logs and lumber,¹³ or mer-

12 Utah, 76, 41 Pac. 564; Hollman v. Platteville, 101 Wis. 94, 70 Am. St. Rep. 899, 76 N. W. 1119.

3. Moon v. Mills, 119 Mich. 298, 75 Am. St. Rep. 390, 77 N. W. 926.

4. Riefler & Sons v. Wayne Storage Water Power Co., 232 Pa. 282, 81 Atl. 300.

5. Rex v. St. Pancras Assessment Committee, 2 Q. B. D. 581, 586; Borough Bill Posting Co. v. Levy, 144 N. Y. App. Div. 784, 129 N. Y. Supp. 740.

6. Sargent v. Ballard, 9 Pick. (Mass.) 251; Nichols v. Boston, 98 Mass. 42, 93 Am. Dec. 132. Or an easement of utilizing a canal basin. International Pottery Co. v. Richardson, 63 N. J. L. 248, 43 Atl. 692.

7. Moody v. Steggles, 12 Ch. D. 261; Levy v. Louisville Gunning System, 121 Ky. 510, 1 L. R. A. (N. S.) 359, 89 S. W. 528.

8-9. Drewell v. Towler, 3 Barn. & Ad. 735; Steiner v. Peterman, 71 N. J. Eq. 101, 63 Atl. 1102.

10. Ingals v. Plamondon, 75 Ill. 118; Taylor v. Wright, 76 N. J. Eq. 121, 79 Atl. 433; First Baptist Society v. Wetherell, 34 R. I.

155, 82 Atl. 1061.

11. Richardson v. Pond, 15 Gray (Mass.) 387.

12. Ensign v. Colt, 75 Conn. 111, 52 Atl. 829, 946; Wilson v. Riggs, 27 App. D. C. 550; Jeffrey v. Winter, 190 Mass. 90, 76 N. E. 282; Smith v. Lockwood, 100 Minn. 221, 110 N. W. 980; Taylor v. Wright, 76 N. J. Eq. 121, 99 Atl. 433; Ruffin v. Seaboard Air Line Ry., 151 N. C. 330, 66 S. E. 317.

So an easement of planning and maintaining a mound on an individual's land was recognized in Wilson v. Board of Chosen Freeholders of Gloucester County, 83 N. J. Eq. 545, 90 Atl. 1021.

Compare Littlefield v. Maxwell, 31 Me. 134; Cortelyou v. Van Brundt, 2 Johns. (N. Y.) 357, to the effect that any right involving exclusive occupancy is necessarily more than an easement. And see references to English authorities to this effect, *post*, § 361, note 34.

13. Pollard v. Barnes, 2 Cush. (Mass.) 191; Gurney v. Ford, 2 Allen (Mass.) 576; Lacy v. Green, 84 Pa. 514.

chandise,¹⁴ on another's land, of tying horses,¹⁵ mixing manure,¹⁶ and storing rolling chairs for hire¹⁷ thereon, of placing appliances to control the flow of water,¹⁸ or to catch fish.¹⁹

In a few states the statutes name certain easements which may be imposed upon land in favor of other land, and also certain easements which may be so imposed without making them appurtenant to other land.²⁰⁻²¹ These provisions do not appear to have had any substantial effect as regards the law of easements in those states.

* There are to be found occasional judicial expressions to the effect that new species of easements will not be recognized,²² that, in other words, "incidents of a novel kind cannot be attached to property at the fancy or caprice of any owner."²³ And this view received practical application in one case in which the court refused to recognize an easement consisting of an exclusive right to float boats on another's canal.²⁴ It cannot be said, however, that the courts have ordinarily shown any disposition thus to restrict the power of the owner of land to subject it to an easement in favor

14. *Richardson v. Pond*, 15 Gray, (Mass.) 387.

15. *Trauger v. Sassaman*, 14 Pa. 514; *Benham v. Minor*, 38 Conn. 252.

16. *Pye v. Mumford*, 11 Q. B. 666.

17. *Goldman v. Beach Front Realty Co.*, 83 N. J. L. 97, 83 Atl. 777.

18. *Wood v. Hewett*, 8 Q. B. 913.

19. *Rolle v. Whyte*, L. R. 3 Q. B. 286; *Leconfeld v. Lonsdale*, L. R. 5 Q. P. 657.

20-21. See California Civ. Code, §§ 801, 802; Montana Rev. Codes, 1907, §§ 4507, 4508; North Dakota

Comp. Laws 1913, §§ 5330, 5331; Oklahoma Rev. Laws 1910, §§ 6623, 6624; South Dakota Civil Code 1910, §§ 267, 268.

22. See *Eckert v. Peters*, 55 N. J. Eq. 379, 36 Atl. 491.

23. This is in effect the statement of *Brougham L. C.* in *Kepel v. Bailey*, 2 Myl. & K. p. 535, made in connection with the right to enforce an affirmative covenant as against a transferee of the covenantor. It is quoted with approval in *Ackroyd v. Smith*, 10 C. B. 164, and *Hill v. Tupper*, 2 Hurlst. & C. 121.

24. *Hill v. Tupper*, 2 Hurlst. & C. 121.

of another, and, as a matter of fact, as appears from the preceding paragraph, they have quite freely allowed incidents of a novel kind to be attached to property in the form of easements, as they have in the form of covenants.

II. THE CREATION OF EASEMENTS.

§ 361. **Express grant.** The various classes of vestitive facts by means of which an easement can be created may be enumerated as follows: (1) Express grant; (2) Reservation or exception in a conveyance of land; (3) Implied grant or reservation; (4) Prescription; (5) A statutory proceeding, usually under the power of eminent domain; (6) Estoppel. The first of these will be considered in this section, and the others in the sections following.

Easements, involving as they do no possession or seisin of the land, were never capable of creation by livery of seisin, and an owner of land desirous of creating an easement in favor of another could do so only by grant, that is, by a written instrument under seal. The necessity for this purpose of an instrument under seal still exists,²⁵ except in so far as seals may, in the particular jurisdiction, have been abolished or have lost their efficacy. In equity, however, it appears that an instrument, not under seal, by which it is sought to create an easement or right of profit, if based

25. *Wood v. Leadbitter*, 13 Mees. & W. 842; *Somerset v. Fogwell*, 5 Barn. & C. 875; *Bird v. Higginson*, 2 Adol. & E. 696, 6 Adol. & E. 824; *Hewlins v. Ship-pam*, 5 Barn. & C. 221; *Shipley v. Fink*, 102 Md. 219, 2 L. R. A. (N. S.) 1002, 62 Atl. 360; *Dyer v. Sanford*, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; *Morse v. Cope-*

land, 2 Gray (Mass.) 302; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484; *Blaisdell v. Portsmouth*, G. F. & C. R. Co., 51 N. H. 483; *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142; *Thompson v. Gregory*, 4 Johns. (N. Y.) 81, 4 Am. Dec. 255; *Wilkins v. Irvine*, 33 Ohio St. 138; *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 203.

on a valuable consideration, will be given effect as a contract to create an easement.^{25a}

Even apart from the common-law requirement that the grant of an easement shall be by writing under seal, a writing is necessary, under the Statute of Frauds, and an attempted oral grant of an easement is no more than a license.²⁶ In courts exercising equitable powers, however, as before stated,²⁷ if the intended grantee makes expenditures on the faith of the attempted oral grant, the intending grantor is estopped to deny the validity of the grant, or as it might be otherwise expressed, the attempted oral grant is given effect on the theory of part performance.

What is in form a covenant merely—that is, an agreement under seal—may operate as the grant of an easement, when this is clearly the intention of the parties.²⁸ For instance, a covenant by A that B shall

25a. *Frogley v. Lovelace*, Johns 333; *Jones v. Tankerville* (1909) 2 Ch. 440; *Ashelford v. Wills*, 194 Ill. 492, 62 N. E. 817.

26. *Profile Cotton Mills v. Calhoun Water Co.*, 189 Ala. 181, 66 So. 50; *Davis v. Tway*, 16 Ariz. 566, L. R. A. 1915E, 604, 147 Pac. 750; *Empire Investment Co. v. Mort*, 169 Cal. 732, 147 Pac. 960; *Workman v. Stephenson*, 26 Colo. App. 339, 144 Pac. 1126; *McReynolds v. Harrigfeld*, 26 Idaho, 26. 140 Pac. 1096; *Wilmington Water-Power Co. v. Evans*, 166 Ill. 548, 46 N. E. 1083; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550, 5 So. 228; *Banghart v. Flummerfelt*, 43 N. J. Law 28; *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 203; *Harris v. Miller*, Meigs (Tenn.) 158, 33 Am. Dec. 138; *Maple Orchard Grove & Vineyard Co. v. Marshall*, 27 Utah,

215, 75 Pac. 369; *Rice v. Roberts*, 24 Wis. 461, 1 Am. Rep. 195.

27. *Ante*, § 349(d), notes 44-49.

28. *Holms v. Seller*, 3 Lev. 305; *Rowbotham v. Wilson*, 8 H. L. Cas. 348, 362; *McCarthy v. Nicrcsi*, 72 Ala. 332, 47 Am. Rep. 418; *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356; *Harris v. Dozier*, 72 Ill. App. 542; *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253; *Ladd v. City of Boston*, 151 Mass. 585, 21 Am. St. Rep. 481, 24 N. E. 858; *Kettle River R. Co. v. Eastern Ry. Co.*, 41 Minn. 472, 6 L. R. A. 111, 43 N. W. 469; *Barr v. Lamaster*, 48 Neb. 114, 32 L. R. A. 451, 66 N. W. 1110; *First Nat. Bank v. Portsmouth Sav. Bank*, 71 N. H. 547, 53 Atl. 1017; *Wetmore v. Bruce*, 118 N. Y. 319, 23 N. E. 303; *Norfleet v. Cromwell*, 64 N. C. 1; *Morton v. Thompson*, 69 Vt. 432.

have a right of way over his, A's land, may be regarded as in effect a grant of a right of way by A, in favor of B.

The grant of an easement may properly provide for a future extension of the user of the servient tenement to correspond with future requirements in that regard.^{28a}

It has been the subject of learned discussion in England,²⁹ whether, in a grant of an easement, in order to confer an interest for longer than the grantee's life, words of inheritance must be used.³⁰ In this country it has occasionally been assumed that they are necessary for this purpose,³¹ in the absence of any statutory provision making a conveyance effective to create an estate in fee simple without the use of such words,³² such as has been before referred to.³³

Whether an instrument is a grant of an easement in particular land,^{33a} or a transfer of the ownership of

38 Atl. 88; *Kalinowski v. Jacobowski*, 52 Wash. 359, 100 Pac. 852; *Warren v. Syme*, 7 W. Va. 475; *In re Barhausen*, 142 Wis. 292, 124 N. W. 649, 125 N. W. 680.

Likewise what is in form a release may, under the particular circumstances of the case, be construed as the grant of an easement. *Walterman v. Norwalk*, 145 Wis. 663, 130 N. W. 479.

28a. *Patterson v. Chambers Power Co.*, 81 Ore. 328, 159 Pac. 568, and cases there cited. And see *post*, § 369.

29. See articles in 24 Law Quart. Rev. at pp. 199, 259, 264.

30. There is a *dictum* to the effect that such words are necessary in *Hewlins v. Shippam*, 5 B. & C. 221, 228. They are in practice invariably inserted.

31. *Bean v. French*, 140 Mass.

229, 3 N. E. 206; *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253. And see cases cited *post*, § 362, note 65.

But even in a state in which such words are regarded as necessary in the case of the grant of an easement, they are not necessary in order to give an easement by partition decree. *Bornstein v. Doherty*, 204 Mass. 280, 90 N. E. 531.

32. See *Stovall v. Coggins Granite Co.*, 116 Ga. 376, 42 S. E. 723; *Goodwillie Co. v. Commonwealth Electric Co.*, 241 Ill. 42, 89 N. E. 272; *Hagerty v. Lee*, 54 N. J. L. 580, 20 L. R. A. 631, 25 Atl. 319; *Karmuller v. Krotz*, 18 Iowa, 352; *Whitney v. Richardson*, 59 Hun. (N. Y.) 601; *Borst v. Empire*, 5 N. Y. 33 (semble).

33. *Ante*, § 21(a).

33a. As in *Pellissier v. Corker*,

such land, with a specification of the user which is expected to be made of the land,³⁴ is obviously a question of construction of the language used. That the conveyance is in terms of land does not necessarily prevent a construction thereof as creating only an easement in the land.^{34a}

One can obviously not create an easement upon land belonging to another, and for this reason one who has an undivided interest only in the land cannot create an easement therein.³⁵ There are, however, occasional

103 Cal. 516, 37 Pac. 465; Cincinnati, I. St. L. & C. Ry. Co., v. Geisel, 119 Ind. 77, 21 N. E. 470; Nichols v. New England Furniture Co., 100 Mich. 230, 59 N. W. 155; Maxwell v. McCall, 145 Iowa, 687, 124 N. W. 760; Samples v. Smythe, 32 Ky. L. Rep. 187, 105 S. W. 415; Callaway v. Forest Park Highlands Co., 113 Md. 1, 77 Atl. 141; Beasley v. Aberdeen & Rockfish R. Co., 145 N. Car. 272, 59 S. E. 60; Wason v. Pilz, 31 Ore. 9, 48 Pac. 701; Robinson v. Missisquoi R. Co., 59 Vt. 426, 10 Atl. 522; Reichenbach v. Washington Short Line Ry. Co., 10 Wash. 357, 38 Pac. 1126.

34. As in *Weihe v. Lorenz*, 254 Ill. 195, 98 N. E. 268; *Low v. Streeter*, 66 N. H. 36, 9 L. R. A. 271, 20 Atl. 247; *Blauvelt v. Passaic Water Co.*, 75 N. J. Eq. 351, 72 Atl. 1091; *Kilmer v. Wilson*, 49 Barb. (N. Y.) 86; *Aumiller v. Dash*, 51 Wash. 520, 99 Pac. 583; *Mitchell v. Prepont*, 68 Vt. 613, 35 Atl. 496. See *Abercrombie v. Simmons*, 71 Kan. 538, 114 Am. St. Rep. 509, 1 L. R. A. N. S. 806, 6 Ann. Cas. 239, 81 Pac. 208.

That there is given a right of exclusive user of a part of the

land, either on the surface, or in a stratum below the surface, appears, according to the English cases, to indicate conclusively that something more than an easement is transferred, that the ownership of the land is to that extent conveyed. See article by Charles Sweet, Esq., on "The 'Easement' of Tunnelling," 32 Law Quart. Rev. 70; *Taylor v. Corporation of St. Helens*, 6 Ch. D. 264; *Reilly v. Booth*, 44 Ch. D. 12. To the same effect appear to be the American cases, *Littlefield v. Maxwell*, 31 Me. 134; *Cortelyou v. Van Brunt*, 2 Johns. (N. Y.) 357. Compare cases cited *ante*, § 360, note 12.

34a. *Overton v. Moseley*, 135 Ala. 599, 33 So. 696; *Robinson v. Missisquoi R. R. Co.*, 59 Vt. 426, 10 Atl. 522; *Biles v. Tacoma R. Co.*, 5 Wash. 509, 32 Pac. 211.

35. *Pfeiffer v. University of California*, 74 Cal. 156, 10 Pac. 622; *Collins v. Prentice*, 15 Conn. 423; *Marshall v. Peck*, 28 Conn. 183; *Clark v. Parker*, 106 Mass. 554; *Crippen v. Morse*, 49 N. Y. 63; *Palmer v. Palmer*, 150 N. Y.

decisions to the effect that if a cotenant does grant an easement, the grantee can demand a partition in order that the easement may be established upon that part of the land allotted to his grantor.³⁶

The creation of an easement by devise, which occurs but infrequently, may be considered as one phase of the creation of easements by grant.^{36a} It occurs when the testator, in devising land, provides that the devisee shall have an easement over other land belonging to him.^{36b} And the acquisition of an easement by condemnation,^{36c} or, by what may be regarded as closely analogous thereto, the payment of a judgment for damages as on account of the maintenance of a permanent nuisance,^{36d} are also substantially varieties of acquisition of an easement by grant, as is the acquisition of an easement by force of a decree in partition proceedings.^{36e}

— **Party wall rights.** Occasionally the owner of land grants to an adjoining owner the privilege of utilizing a wall already constructed on the former's land as a party wall, that is, as a division wall and for purposes of support. More usually, however, a wall

139, 55 Am. St. Rep. 653, 44 N. E. 966. It follows that he cannot create it in favor of land owned by him in severalty. *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966; *City Club v. McGeer*, 198 N. Y. 160, 91 N. E. 539.

36. *Charleston, C. & C. R. Co. v. Leech*, 33 So. Car. 175, 26 Am. St. Rep. 667, 11 S. E. 631; *McElroy v. McLeay*, 71 Vt. 396, 45 Atl. 898.

36a. See *Goddard, Easements*, (6th Ed.) 125.

36b. See *c. g.*, *Lide v. Hadley*, 26 Ala. 627, 76 Am. Dec. 338; 2 R. P.—5

McKenney v. McKenney, 216 Mass. 248, 103 N. E. 631; *Wiley v. Ball*, 72 W. Va. 685, 79 S. E. 659.

36c. *Post*, § 561.

36d. See editorial note, 7 *Columbia Law Rev.* at p. 277; *Sedgwick, Damages*, §§ 93, 95, 924, 924a; *Lewis, Eminent Domain*, §§ 937, 948.

36e. See *c. g.*, *Mount Hope Iron Co. v. Dearden*, 140 Mass. 430, 4 N. E. 803; *Bornstein v. Doherty*, 204 Mass. 280, 90 N. E. 531; *Bean v. Coleman*, 44 N. H. 539; *Richardson v. Armington*, 10 R. I. 259.

acquires the characteristics of a party wall by reason of what is known as a party wall agreement, executed before the erection of the wall. For instance, if A and B own adjoining lots, and A contemplates the erection of a building on his lot, they may enter into an agreement by which A acquires from B the privilege of placing one wall of the building, to the extent of half its thickness, upon B's land, with a stipulation that B may use the wall for the purpose of such building as he may desire to erect, upon payment by him of one-half, or other proportioned part, of the cost of the wall. Or it may be that, without specifying which is to erect the wall, it is provided that the one erecting it may place one-half upon the other's land, and that the other may utilize the wall upon paying part of the cost. Assuming that A is the one who is to erect the wall, it would seem that B's agreement that he may erect it in part on B's land involves the grant to A of an easement in B's land, while A's agreement that B may utilize the wall on the payment of part of the cost of construction involves the grant of an easement in A's land as regards the part of the wall to be placed thereon. And likewise if it is not specified which owner is to erect the wall, there are, it appears, mutual grants of easements between the parties. As to the ownership of that part of the wall erected by A upon B's land, the cases are to the effect that it belongs to A until B makes use of it,³⁷ or pays a part of its cost for the purpose of utilizing it,³⁸ whereupon it passes into the ownership of B.

It appears somewhat singular that no question has ever been judicially suggested as to whether a party

37. *Maine v. Cumston*, 98 Mass. 317; *Berry v. Godfrey*, 198 Mass. 228, 84 N. E. 304; *Hill v. Huron*, 33 S. Dak. 324, 145 N. W. 570.

38. *Mickel v. York*, 175 Ill. 62, 51 N. E. 848; *Kuh v. O'Reilly*, 261

Ill. 437, 104 N. E. 5; *Nat. Life Ins. Co. of Montpelier v. Lee*, 75 Minn. 157, 77 N. W. 794; *Glover v. Mersman*, 4 Mo. App. 90; *Masson's Appeal*, 70 Pa. St. 26.

wall agreement of the character referred to is not invalid under the Rule against Perpetuities. If the agreement in effect provides that the ownership of part of the wall is to change at an indefinite time in the future, as stated in the cases last referred to, it is difficult to see why such provision is not within the rule. And even apart from such a provision for a change in the ownership of the wall, if the right of the non builder, or of his successor in interest, to use the wall, is dependent on the payment by him of part of the cost, a construction of the agreement which is sometimes adopted,³⁹ such an attempt to create an easement to arise at some indefinite time in the future would seem to be within the rule.⁴⁰ Conflict with the rule could be entirely avoided, it is conceived, by considering the part of the wall erected on the non builder's land as continuing to be the property of the builder even after user and payment therefor by the former, or as being from the first the property of the person on whose land it stands, and by furthermore considering the agreement as immediately creating cross easements in the land of each proprietor, with a contractual liability on the part of the non builder as regards part of the cost of the wall.

It has occasionally been suggested that such an agreement creates the relation of vendor and purchaser as regards that part of the wall placed on the non builder's land,⁴¹ that it, in other words, creates an option in the non builder to purchase that part of the wall. Such a construction of the agreement would not protect it from the operation of the Rule against Perpe-

39. As apparently in *Masson's Appeal*, 70 Pa. 26; *Conner v. Joy*, — Tex. Civ. App. —, 150 S. W. 485. But not in *Matthews v. Dixey*, 149 Mass. 595, 5 L. R. A. 102, 22 N. E. 61; *Hill v. Huron*, 33 S. Dak. 324, 145 N. W. 570.

40. *Gray, Perpetuities*, § 316.
41. See *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146, 3 N. E. 282; *McChesney v. Davis*, 86 Ill. App. 380; 8 *Columbia Law Rev.* at p. 121.

tuities,⁴² and it does not appear to be adopted in practice, a conveyance of that part of the wall not being executed upon payment by the non builder of part of the cost, as we might expect to be done if such payment involved the consummation of a purchase. Furthermore, while such an option would involve in effect a contract or covenant by the builder to convey to the non builder the part of the wall on the latter's land, whenever the latter may desire to use the wall, upon payment by the latter of the stipulated part of the cost, yet the possible existence of such a contract or covenant on the part of the builder is ignored in the numerous cases discussing whether the benefit or burden of the agreement to pay for the land will pass to successors in title.⁴³ In view of this omission to refer to any such contract or covenant in this connection, in which it would most properly be referred to, it seems reasonable to conclude that the theory that the parties stand in the relation of vendor and purchaser as regards the wall has not been generally adopted.

A party wall agreement of the character referred to, involving as it does the creation of easements in land, is invalid if merely oral.⁴⁴ If, however, the wall is erected in accordance with the agreement, the parties are, it appears, in the same position as if the agreement had been originally valid. The agreement involves an attempted oral grant by one proprietor to the other of an easement to place the wall in part on the former's land, which is, on the theory of part performance or estoppel,⁴⁵ validated by the subsequent construction of the wall on the faith thereof.⁴⁶ Such grant can, how-

42. Gray, *Perpetuities*, §§ 330-330c.

43. *Post*, §§ 393.

44. *Tillis v. Treadwell*, 117 Ala. 445, 22 So. 983; *Rice v. Roberts*, 24 Wis. 461, 1 Am. Rep. 195; *Hodgkins v. Farrington*, 150

Mass. 19, 5 L. R. A. 209, 15 Am. St. Rep. 168, 22 N. E. 73.

45. *Ante*, § 349(d), notes 44-49.

46. *Rawson v. Bell*, 46 Ga. 19; *Russell v. Hubbard*, 59 Ill. 335; *Wickersham v. Orr*, 9 Iowa, 253.

ever, be recognized and enforced only subject to the conditions and stipulations to which it was originally subject, including the right of the grantor to make use of the wall upon the payment by him of part of the cost thereof. So far as concerns the personal liability of such grantor under his contract to pay a portion of the cost of the wall in case of its use by him, conceding that such contract is within the Statute of Frauds, which appears somewhat questionable, it is validated, it seems, by reason of the part performance involved in the building of the wall,⁴⁷ and apart from the doctrine of part performance, the user of the wall, since this belongs to the builder thereof, would involve a liability in tort or upon the theory of *quasi* contract. That a contract to pay a certain sum in case one makes a particular use of another's property is invalid under the statute can not enable him to make such use of the property without incurring any liability.

If the proprietor who, by the terms of the agreement, is to construct the partition wall on the division line between the two properties, fails to extend it the full length of that line, the other, it has been held, has the privilege of so extending it.⁴⁸

What constitutes a user of the wall by B which will render him liable under his covenant to A, who constructed the wall, for part of the cost thereof, is

74 Am. Dec. 348; *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565; *Miller v. Brown*, 33 Ohio St. 547.

47. See *Rawson v. Bell*, 46 Ga. 19; *Rindge v. Baker*, 57 N. Y. 209; *Stuht v. Sweesy*, 48 Neb. 767, 67 N. W. 748; *Swift v. Calman*, 102 Iowa, 206, 37 L. R. A. 462, 63 Am. St. Rep. 443, 71 N. W. 233; *Rice v. Roberts*, 24 Wis. 461, 1 Am. Rep. 195.

Occasionally the user of the wall by the proprietor who did

not build it has been regarded as a performance which takes his contract to pay a part of the cost out of the statute. *Walker v. Shackelford*, 49 Ark. 503, 4 Am. St. Rep. 61, 5 S. W. 887; *Pireaux v. Simon*, 79 Wis. 392, 48 N. W. 674.

48. *Matthews v. Dixey*, 149 Mass. 595, 22 N. E. 61; *Negus v. Becker*, 72 Hun (N. Y.) 479, 25 N. Y. Supp. 640.

primarily a matter of the construction of the covenant. A user of the wall in the course of the reconstruction of an existing building, as distinguished from its use in the erection of a new building, has, in particular cases, been regarded as insufficient to impose a liability.⁴⁹ And a like view has been taken of the erection by B of another wall impinging upon the wall built by A, although the existence of this latter wall enables B to make his wall of lighter construction.⁵⁰ In one case a covenant to pay part of the cost of the wall when the covenantor used it was construed to involve an obligation upon his part to use the wall in a reasonable time,⁵¹ and in two cases the court appears to have construed such a covenant as involving a liability upon the covenantor if he conveyed his land and so put it out of his power to use the wall.⁵²

§ 362. Express reservation or exception. By the law of England, an "exception" in a conveyance merely withdraws from the operation of the conveyance a part of the thing conveyed as a whole, and a "reservation" merely provides for the rendition to the grantor of something, such as a rent or service, which is regarded as issuing from the thing granted.⁵³⁻⁵⁷ An easement

49. *Shaw v. Hitchcock*, 119 Mass. 254; *Fox v. Mission Free School*, 120 Mo. 349, 25 S. W. 172.

50. *Kingsland v. Tucker*, 115 N. Y. 574, 22 N. E. 268; *Sheldon Bank v. Royce*, 84 Iowa, 288, 50 N. W. 986.

That the builder of the wall failed to extend it over a small portion of the division line as he agreed to do was held not to prevent recovery upon the other's covenant. *Keith v. Ridge*, 146 Mo. 90, 47 S. W. 904.

The covenant to pay one-half of the cost of the wall was held

not to include one half the cost of additions made by a purchaser from the builder, on his own land, for the purpose of strengthening the wall for his own purposes. *Walker v. Stetson*, 162 Mass. 86, 44 Am. St. Rep. 350, 38 N. E. 18.

51. *Sherley v. Burns*, 22 Ky. L. Rep. 788, 58 S. W. 69.

52. *Rawson v. Bell*, 46 Ga. 19; *Nalle v. Paggi*, 81 Tex. 201, 13 L. R. A. 50, 16 S. W. 932. Compare *Hurford v. Smith*, 24 Okla. 448, 103 Pac. 851. And cases cited *post*, § 393(b), note 74.

53-57. See *post*, § 436.

in the land conveyed is regarded as neither a part of the land nor as issuing therefrom, and consequently, in that country, if, upon the conveyance of land, there is in terms a reservation or exception, in favor of the grantor, of an easement in the land, these words are construed as in effect a re-grant of the easement by the grantee of the land to the grantor, which can take effect only if the instrument is executed by such grantee.⁵⁸ In this country, however, the view of the common law as to the restricted functions of an exception and a reservation is not usually adopted,⁵⁹ and it is held that an easement in the land conveyed may be created by a reservation,⁶⁰ and in some states even by an exception,⁶¹ and consequently, the fact that the instrument is not executed by the grantee of the land as well as by the grantor is immaterial. Occasionally it has been decided that an easement may properly be created by a reservation but not by an exception,⁶² and, having

58. *Durham & S. Ry. Co. v. Walker*, 2 Q. B. 940; *Wickham v. Hawker*, 7 Mees. & W. 63; *Corporation of London v. Riggs*, 13 Ch. Div. 798.

59. See *post*, § 436.

60. *Chappell v. New York, N. H. & H. R. Co.*, 62 Conn. 195, 17 L. R. A. 420, 24 Atl. 997; *Kuecken v. Voltz*, 110 Ill. 264; *Morrison v. Chicago & N. W. Ry. Co.*, 117 Iowa, 587, 91 N. W. 793; *Wendell v. Heim*, 87 Kan. 136, 123 Pac. 869; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307; *Damron v. Justice*, 162 Ky. 101, 172 S. W. 120; *Kent v. Waite*, 10 Pick. (Mass.) 138; *Bowen v. Conner*, 6 Cush. (Mass.) 132; *Claffin v. Boston & A. R. Co.*, 157 Mass. 489, 20 L. R. A. 638, 32 N. E. 659; *Haggerty v. Lee*, 54 N. J. Law

580, 50 N. J. Eq. 464, 20 L. R. A. 631, 25 Atl. 319; *Borst v. Empie*, 1 Seld. N. Y. 33; *Rose v. Bunn*, 21 N. Y. 275; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974; *Richardson v. Clements*, 89 Pa. St. 503, 33 Am. Rep. 784; *Kister v. Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608; *Fischer v. Laack*, 76 Wis. 313, 45 N. W. 104.

61. *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307; *Ring v. Walker*, 87 Me. 550, 33 Atl. 174; *Claffin v. Boston & A. R. Co.*, 157 Mass. 489, 20 L. R. A. 638, 32 N. E. 659; *Bridger v. Pierson*, 45 N. Y. 601; *Leavitt v. Towle*, 8 N. H. 96.

62. *City Club of Auburn v. McGeer*, 198 N. Y. 160, 91 N. E. 539, 92 N. E. 105; *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433; *Kister v. Reeser*,

regard to the nature of a reservation and of an exception at common law, such a view appears to be a reasonable one. The assumption that an easement may be created by exception as well as by reservation has resulted in much confusion in particular cases.⁶⁴

In some states it is considered that words of inheritance must be used in the reservation of an easement in order that the grantor may acquire an easement to endure longer than his own life,⁶⁵ In other states such words are regarded as unnecessary by reason of the general statutory provisions dispensing with the necessity of such words in order to create an estate in fee simple.⁶⁶ In a few states the use of such words has been regarded as unnecessary on the theory that, the reservation being evidently intended to be for the benefit of neighboring land retained by the grantor, his easement is to be regarded as unlimited in point of duration.⁶⁷ This latter view harmonizes with

98 Pa. 1; *Riefler & Sons v. Wayne Storage Water Power Co.*, 232 Pa. 282, 81 Atl. 300.

64. *Post*, § 436.

65. *Koelle v. Knecht*, 99 Ill. 396; *Dawson v. Western Md. R. Co.*, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678, 68 Atl. 301; *Bean v. French*, 140 Mass. 229; *Childs v. Boston & M. R. R.*, 213 Mass. 91, 99 N. E. 957; *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 73; *Kister v. Rieser*, 98 Pa. 1. And so it has been said that the word "heirs" is necessary in the case of a reservation of oil and gas, but not in the case of an exception of oil and gas. *Mandle v. Gharing*, 256 Pa. 121, 100 Atl. 535.

66. *Webb v. Jones*, 163 Ala. 637, 50 So. 887; *Presbyterian Church of Osceola v. Harken*, 177

Iowa, 195, 158 N. W. 692; *Beinlem v. Johns*, 102 Ky. 570, 44 S. W. 128; *Ruffin v. Seaboard Air Line Rwy.*, 151 N. Car. 330, 66 S. E. 317; *Ruhnke v. Aubert*, 58 Ore. 6, 113 Pac. 38; *Forde v. Libby*, 22 Wyo. 464, 143 Pac. 1190.

67. *Webb v. Jones*, 163 Ala. 637, 50 So. 887 (*dictum*); *Chappell v. N. Y., N. H. & H. R. Co.*, 62 Conn. 195, 17 L. R. A. 420, 24 Atl. 997; *Teachout v. Capital Lodge I. O. O. F.*, 128 Iowa, 380, 104 N. W. 440; *Ring v. Walker*, 87 Me. 550, 33 Atl. 174; *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352; *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791; *Smith v. Furbish*, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398. But as to Maine see *Winthrop v. Fairbanks*, 41 Me. 307; *Dana v. Smith*, 114 Me. 262, 95 At. 1034.

the common law rule that the reservation of rent upon a lease by one having a fee simple estate, without the mention of heirs, gives the lessor an interest in the rent which passes upon his death to his heirs, as partaking of the character of the reversion to which it appertains.⁶⁸

In so far as it may be considered that an easement may be created by an exception, it is generally agreed that words of inheritance are unnecessary, in order to give to the grantor of the land an interest in the easement to endure beyond his life.⁶⁹

An easement in gross is ordinarily regarded, as above stated, as being purely personal to the person in favor of whom it is created,⁷⁰ and consequently a reservation of such an easement would usually create an easement for the grantor's life only, in the absence at least of language indicative of a contrary intention.

That an easement cannot be created by reservation in favor of a person other than the grantor in the conveyance has been frequently asserted,⁷¹ but there are to be found cases which are not in accord with such a view.⁷² The important consideration in that regard would appear to be whether the language of reservation in the particular case in favor of a third

68. Co. Litt. 47a; 2 Platt, Leases, 88; Gilbert, Rents, 64; Jaques v. Gould, 4 Cush. (Mass.) 384.

In *Smith's Ex'cr v. Jones*, 86 Vt. 258, 84 Atl. 866, that the easement was appurtenant appears to have been regarded as a reason for construing the language as an exception, in order that, although without words of inheritance, it might endure after the grantor's life.

69. *Chappell v. New York, N.*

H. & H. R. Co., 62 Conn. 195, 17 L. R. A. 420, 24 Atl. 997; *Winthrop v. Fairbanks*, 41 Me. 307; *McIntire v. Lauckner*, 108 Me. 443, 81 Atl. 784; *Foster v. Smith*, 211 Mass. 411, 98 N. E. 693; *Lipsky v. Heller*, 199 Mass. 310, 85 N. E. 453; *Smith's Ex'cr v. Jones*, 86 Vt. 258, 84 Atl. 866; *Ruffin v. Seaboard Air Line*, 151 N. Car. 330, 66 S. E. 317.

70. *Ante*, § 350, note 3.

71. *Post*, § 436.

72. *Post*, § 436.

person can be construed as the grant of an easement to such person.

As words of covenant may operate as a grant of an easement,⁷³ they may operate as a reservation, as when one accepts a conveyance of land to him, which contains an agreement on his part that the grantor of the land may use such land in a certain way, or that he, the grantee, shall allow it to be used in a certain way.⁷⁴⁻⁸¹

§ 363. "Implied" grant or reservation.—(a) **General considerations.** Frequently, although there is no grant of an easement in express terms, an easement is regarded as arising in connection with a conveyance of land, either for the benefit of the land conveyed as against land retained by the grantor, or for the benefit of land retained by the grantor as against the land conveyed, the former being referred to as a case of the "implied grant" of an easement, and the latter being referred to as a case of the "implied reservation" of an easement.

This doctrine of implied grant and implied reservation finds its practical application in connection with the question whether, upon a severance of ownership of land, an easement is created corresponding to a pre-existing "*quasi* easement,"⁸² and also in connection with the question of the existence of an "easement of necessity."⁸³

— **Theory of implied grant.** In the case of an easement arising in favor of the grantee of land as corresponding to a preexisting *quasi* easement, as well as in the case of an easement of necessity, the

73. *Ante*, § 361, note 28.

74-81. *Weller v. Brown*, 160 Cal. 515, 117 Pac. 517; *Hathaway v. Hathaway*, 159 Mass. 584, 35 N. E. 85; *Re Barkhausen*, 142 Wis. 292, 124 N. W. 649, 125 N. W.

680.

82. *Post*, this section, notes 85-50.

83. *Post*, this section, notes 51-3b.

easement is regarded as existing on the theory that the grantor and grantee of the land intend that it shall exist, and the courts merely declare in effect that the particular circumstances of the transaction raise a presumption of such an intention. Since the easement thus arises as the result of an intention imputed to the parties that it shall arise, it exists, properly speaking, by reason of an express rather than an implied grant. This being so, a question suggests itself as to how, in view of the Statute of Frauds, and the recognized necessity, at common law, of a grant under seal in order to create an easement, a grantee of land can be regarded as acquiring, as appurtenant to the land, an easement in other land, not previously existing, and not referred to in the conveyance. The explanation is, apparently, that the easement is to be regarded, for the purpose of the particular case, as included in the description of the land conveyed. Evidence is always admissible to aid in the interpretation of the language of a written instrument, and so evidence is admissible to show the surrounding circumstances to be such as to raise a presumption that the property conveyed was, not a mere piece of land, but a piece of land with a particular easement appurtenant thereto.⁸⁴ The rules declared by the courts as to the creation of easements corresponding to preexisting *quasi* easements, and of easements of necessity, constitute in reality merely rules of construction for the purpose of determining the scope of the conveyance. And the grant of the easement is implied only in the sense that the easement passes by the conveyance although not expressly mentioned, just as an easement previously created passes upon a conveyance of the land to which it is appurtenant without any express mention of the

84. As said by Justice Story, somewhat too sweepingly: "Whatever is actually enjoyed with the thing granted, as a beneficial

privilege at the time of the grant, passes as parcel of it." *Hazard v. Robinson*, 3 Mason, 272.

easement. It is immaterial, from a legal point of view, whether the easement passes because the instrument expressly says that it shall pass, or because the circumstances are such as to call for a construction of the language used as so saying. So in the case of the so called implied reservation of an easement upon a conveyance of land, the description of the land is, by reason of the surrounding circumstances, construed to refer, not to the land free from any easement, but to the land subject to an easement corresponding to the previous mode of utilizing the land or to the necessities of the case, and there is thus, properly speaking, an express reservation, in the sense that it is intended, or rather presumed to be intended, and the reservation is implied only in the sense that, instead of being explicitly stated, it is left to be inferred from the language used when construed with reference to the surrounding circumstances.

— (b) **Of easement corresponding to pre-existent quasi easement.** One cannot have an easement over one's own land, but one may make use of one part of his land for the benefit of another part, just as, if they were separately owned, the owner of the latter might make use of the former by reason of the existence of an easement in his favor. When one thus utilizes part of his land for the benefit of another part, it is frequently said that a *quasi* easement exists, the part of the land which is benefitted being referred to as the "*quasi* dominant tenement," and the part which is utilized for the benefit of the other part being referred to as the "*quasi* servient tenement." The so called *quasi* easement is evidently not a legal relation in any sense, but the expression is a convenient one to describe the particular mode in which the owner utilizes one part of the land for the benefit of the other, as bearing on the question now to be discussed, whether, when the two parts subsequently become the property of different persons, an actual easement is to be regarded as existing, which

corresponds to the use which was previously made of the land by the owner of both parts. The latter question is frequently, perhaps more usually, the subject of discussion and adjudication without the employment of the expression *quasi* easement, which is here employed merely because, in the view of the writer, the explanation and discussion of the matter will be thereby somewhat facilitated.

If the owner of land, one part of which is subject to a *quasi* easement in favor of another part, conveys the *quasi* dominant tenement, an easement corresponding to such *quasi* easement is ordinarily regarded as thereby vested in the grantee of the land, provided, it is said, the *quasi* easement is of an apparent continuous and necessary character.

It is perhaps unfortunate that the courts, in determining whether, in a particular case, an easement corresponding to a preexisting *quasi* easement has passed with the land, have usually failed to recognize that the question is primarily one of construction, and have instead undertaken to lay down absolute rules as to what characteristics the particular easement or *quasi* easement must have, implying that, if it has these characteristics, the easement will pass as a matter of law. The characteristics ordinarily referred to in this connection are, as above indicated, that the user be apparent, that it be continuous, and that it be necessary, each of which will be hereafter discussed in turn. But it does not seem that the presence or absence of any or all of these characteristics should be conclusive. Taking the case of a *quasi* easement which is not apparent, which is not continuous and which is not necessary, nevertheless a conveyance in terms of the *quasi* dominant tenement should, it is conceived, be construed as a conveyance of the lands with an easement appurtenant thereto corresponding to the pre existing *quasi* easement, if this accords with the probable intention of the parties. On the other hand, even though the *quasi* case-

ment has all the three characteristics named, an easement corresponding thereto evidently does not pass with the land if the language of the conveyance shows clearly an intention otherwise,⁸⁵ or if the circumstances are such as to exclude a construction of the language of the conveyance as inclusive of the easement. So it has been decided that an easement does not pass when the grantee of the land knows that the grantor has no intention that it shall pass.⁸⁶

— **Applications of doctrine.** The doctrine of an implied grant of an easement corresponding to a pre-existing *quasi* easement has been applied in various connections, of which the following may be mentioned. It has been held that where the owner of two pieces of land maintains on one of them a drain for the benefit of the other, a person to whom he conveys the latter is entitled to an easement of maintaining the drain as it was before maintained.⁸⁷ And so if one lays pipes for the supply of water from one part of his land to

85. *Webber v. Vogel*, 159 Pa. 235, 28 Atl. 226; *Hardy v. McCullough*, 23 Gratt. (Va.) 251; *Bloom v. Koch*, 63 N. J. Eq. 10, 50 Atl. 621 (*dictum*); *Greer v. Van Meter*, 54 N. J. Eq. 270, 33 Atl. 798 (*dictum*); *United States v. Appleton*, 1 Sumn. 492.

86. *Birmingham, Dudley & District Banking Co. v. Ross*, L. R. 38 Ch. Div. 295; *McPherson v. Acker*, *McArth. & M.* 150, 48 Am. Rep. 749; *Curtis v. Ayrault*, 47 N. Y. 473; *Lebus v. Boston*, 21 Ky. Law Rep. 411, 47 L. R. A. 79, 51 S. W. 609; *Kemp v. Pennsylvania R. R.*, 156 Pa. 430, 26 Atl. 1074.

In *Assets Investment Co. v. Hollingshead*, C. C. A. 200 Fed. 551, it was decided that upon a

sale of property under order of court there was no implication of the grant of an easement if the evident intention of the court was otherwise.

87. *Thayer v. Payne*, 2 Cush. Mass. 327; *Lampman v. Milks*, 21 N. Y. 505; *Denton v. Leddell*, 23 N. J. Eq. 64; *Shaw v. Etheridge*, 3 Jones L. (48 N. Car.) 300; *Sharpe v. Scheible*, 162 Pa. 341, 42 Am. St. Rep. 838, 29 Atl. 736; *Elliott v. Rhett*, 5 Rich. L. (S. C.) 405, 57 Am. Dec. 750; *Sarnderlin v. Baxter*, 76 Va. 299; *McElroy v. McLeay*, 71 Vt. 396, 45 Atl. 898. But see *Allers v. Bach*, 130 Md. 499, 100 Atl. 781, where the implied grant of an easement of drainage was negated, apparently as not being necessary.

another part, a grantee of the part so benefitted may have the privilege of obtaining a water supply in the same manner as it was previously obtained by his grantor.⁸⁸ The doctrine has also been applied in connection with the question of the right to utilize water power,⁸⁹ to flood land,⁹⁰ to demand support for a building from another building,⁹¹ or from a wall,⁹² to

88. *Nicholas v. Chamberlain*, Cro. Jac. 121; *Watts v. Kelson*, L. R. 6 Ch. 166; *Franciscioni v. Soledad Land & Water Co.*, 170 Cal. 221, 149 Pac. 161; *Quinlan v. Noble*, 75 Cal. 250, 17 Pac. 69; *Adams v. Gordon*, 265 Ill. 87, 106 N. E. 517; *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134; *Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. 182; *Larsen v. Peterson*, 53 N. J. Eq. 88, 30 Atl. 1094; *Paine v. Chandler*, 134 N. Y. 385, 19 L. R. A. 99, 32 N. E. 18; *Spencer v. Kilmer*, 151 N. Y. 390, 45 N. E. 865; *Coolidge v. Hager*, 43 Vt. 9, 5 Am. Rep. 256.

In *Nicholas v. Chamberlain*, Cro. Jac. 121, there is a *dictum* by Popham, C. J., that no such easement to have the water pass to one's land is created if the pipes were laid by a lessee of the grantor or by a disseisor, and they were not in any way adopted by the grantor as a part of the premises before making the conveyance. This dictum was applied in *Cogswell v. Cogswell*, 81 Wash. 315, 142 Pac. 655.

89. *Jarvis v. Seele Mill Co.*, 173 Ill. 192, 64 Am. St. Rep. 107, 50 N. E. 1044; *Smith v. Dresselhouse*, 152 Mich. 451, 116 N. W. 387; *Richardson v. Bigelow*, 15 Gray (Mass.) 154; *Simmons v.*

Cloonan, 81 N. Y. 557.

90. *Preble v. Reed*, 17 Me. 169; *Baker v. McGuire*, 53 Ga. 245, 57 Ga. 109; *Burr v. Mills*, 21 Wend. (N. Y.) 290; *Znamanacek v. Jelinek*, 69 Neb. 110, 111 Am. St. Rep. 533, 95 N. W. 28; *Latta v. Catawba Electric & Power Co.*, 146 N. Car. 285, 59 S. E. 1028.

91. *Jordan v. Otis*, 38 Me. 429; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Richards v. Rose*, 9 Exch. 217. But see *Griffiths v. Morrison*, 106 N. Y. 165, 12 N. E. 580; *Whyte v. Builders' League*, 164 N. Y. 429, 58 N. E. 517.

92. *Kahn v. Cherry*, 131 Ark. 49, 198 S. W. 266; *Nippert v. Warneke*, 128 Cal. 591, 61 Pac. 96, 270; *Goldschmid v. Starring*, 5 Mackey (D. C.) 582; *Ringgold Lodge v. De Kalb Lodge*, 157 Ky. 203, 16 S. W. 1111; *Carlton v. Blake*, 152 Mass. 176, 23 Am. St. Rep. 818, 25 N. E. 83; *Cherry v. Brizzolara*, 89 Ark. 309, 116 S. W. 668; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Eno v. Del Vecchio*, 4 Duer. (N. Y. —) 53, 6 Duer. 17; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Doyle v. Ritter*, 6 Phila. 577; *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135.

utilize a stairway on adjoining property,⁹³ and to have a building encroach on another's land,⁹⁴ and even to have water in an adjoining pond kept at a fixed level.^{94a}

— **Easement of light.** In England and one or two states, it is the ordinary rule that, if one conveys land on which there is a building which is lighted by windows opening on land retained by the grantor, the grantee is entitled to an easement of light over such land, and the grantor cannot obstruct his light by building on his land.⁹⁵ Generally, in this country, however, it has been held that no such grant of an easement of light will be implied, it being calculated unduly to burden land, and to interfere with its alienation and proper improvement;⁹⁶ or that it will be implied only in case the light

93. *Stephens v. Boyd*, 157 Iowa, 570, 138 N. W. 389; *National Exchange Bank v. Cunningham*, 46 Ohio St. 575, 22 N. E. 924; *Howell v. Estes*, 71 Tex. 690, 12 S. W. 62; *Geible v. Smith*, 146 Pa. 276, 28 Am. St. Rep. 796, 23 Atl. 437.

94. *Lead City Miner's Union v. Moyer*, 235 Fed. 376; *Wilson v. Riggs*, 27 App. D. C. 550; *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; *Smith v. Lockwood*, 100 Minn. 221, 110 N. W. 980; *Carrig v. Mechanics' Bank*, 136 Iowa, 261, 111 N. W. 329; *Katz v. Kaiser*, 154 N. Y. 294, 48 N. E. 532; *Grace M. E. Church v. Dobbins*, 153 Pa. 294, 34 Am. St. Rep. 706, 25 Atl. 1120.

94a. *Marshall Ice Co. v. La Plant*, 136 Iowa, 621, 12 L. R. A. (N. S.) 1073, 111 N. W. 1016.

95. *Swansborough v. Coventry*, 9 Bing. 305; *Broomfield v. Williams* (1897), 1 Ch. 602; *Greer v. Van Meter*, 54 N. J. Eq. 270,

33 Atl. 794; *Sutphen v. Therkelson*, 38 N. J. Eq. 318; *Fowler v. Wick*, 74 N. J. Eq. 603, 70 Atl. 682; *Liedtke v. Lipman*, (N. J. Ch.) 76 Atl. 463; *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300. See *Wood v. Grayson*, 22 Dist. Col. App. 432.

96. *Kennedy v. Burnap*, 120 Cal. 488, 40 L. R. A. 476, 52 Pac. 843; *Keating v. Springer*, 146 Ill. 481, 22 L. R. A. 544, 37 Am. St. Rep. 175, 34 N. E. 805; *Anderson v. Bloomheart*, 101 Kan. 691, 168 Pac. 900, 901; *Ray v. Sweeney*, 14 Bush (Ky.) 1, 29 Am. Rep. 388; *Keiper v. Klein*, 51 Ind. 316; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Bailey v. Gray*, 53 S. C. 503, 31 S. E. 354; *Roe v. Walsh*, 76 Wash. 148, 135 Pac. 1031, 136 Pac. 1146. See *Morrison v. Marquardt*, 24 Iowa, 35, 92 Am. Dec. 444; *White v. Bradley*, 66 Me. 254

entering the grantee's building over the grantor's land is actually necessary to the use of such building.⁹⁷

The same rule as that ordinarily applied in connection with a conveyance in fee simple has also been asserted in connection with a lease, it being held that the lessor, or one claiming under him, may erect a building on land adjoining the premises leased, although he thereby obstructs the passage of light to the latter premises.⁹⁸ Some courts have, however, indicated a disposition to protect a tenant under a lease to a greater extent in this regard than a grantee in fee simple, having in view perhaps that the burden on the adjoining land will endure only for the life of the lease, and that the tenant is not in a position to change the construction of the building in order to procure light otherwise. Thus it has in one state been decided that the lease of a room "with appurtenances" passes an easement in the yard attached to the building, for the procurement of light and air,^{98a} and in another that one who leases front rooms in his building cannot construct an addition to the building on an unenclosed space in front thereof so as to cut off the light and air from the

97. *Robinson v. Clapp*, 65 Conn. 365, 29 L. R. A. 582, 32 Atl. 939; *Turner v. Thompson*, 58 Ga. 268, 24 Am. Rep. 497; *Darrell v. Columbus Show Case Co.*, 129 Ga. 62, 12 L. R. A. (N. S.) 333, 58 S. E. 631; *Case v. Minot*, 158 Mass. 577, 22 L. R. A. 536, 33 N. E. 700; *Lipsky v. Heller*, 199 Mass. 310, 85 N. E. 453; *Rennyson's Appeal*, 94 Pa. St. 147, 39 Am. Rep. 577; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629.

98. *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175 (in this case, however, there was an express covenant on the subject):

2 R. P.—6

Palmer v. Wetmore, 4 N. Y. Super. Ct. (2 Sandf.) 316; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Lindsey v. First Nat. Bank*, 115 N. C. 553, 20 S. E. 621.

98a. *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 629. The opinion is apparently to the effect that if "appurtenances" had not been mentioned, no easement would have passed, but it also distinguishes the cases deciding that no easement of light is created by implication on the ground that in this particular case the yard had been appropriated to the use of the building and was a part of the same lot.

rooms and cover the lessee's signs.^{98b} A like view has been asserted as to the obstruction of the light passing to that part of the building which is leased, by reason of an alteration of the building itself, it having been decided that the lessor, or one standing in his place, cannot alter the building so as to prevent light and air from passing through a "well" as it did at the time of the lease.^{98c} And it has likewise been decided that the tenant of an upper floor cannot obstruct the passage of light to a lower floor through a grating^{98d} or skylight.^{98e} In the various cases referred to, the light in question was presumably necessary for any proper enjoyment of the premises, and they may perhaps be regarded as coming within the exception to the general rule, sometimes asserted,^{98f} that a grant of a right to light will be implied so far as it is absolutely necessary.^{98g}

— **User must be apparent.** That an easement may thus be created because corresponding to a pre-existing *quasi* easement, the *quasi* easement, that is, the user of one tenement for the benefit of the other by their common owner, must, it is said, have been apparent,^{98h} and it was apparent, it has been stated, if its

98b. *Brande v. Grace*, 154 Mass. 210, 31 N. E. 633.

98c. *Case v. Minot*, 158 Mass. 577, 22 L. R. A. 536, 33 N. E. 700.

98d. *Spies v. Damm*, 54 How. Pr. (N. Y.) 293.

98e. *O'Neill v. Breese*, 3 Misc. 219, 23 N. Y. Supp. 526. See *Morgan v. Smith*, 5 Hun (N. Y.) 220.

98f. *Ante*, § this section, note 97.

98g. In *Darnell v. Columbus Show Case Co.*, 129 Ga. 62, 58 S. E. 631, 13 L. R. A. N. S. 333, it was held that the lessee had an

easement in such light and air as was "essential to the beneficial enjoyment of the leased tenement." which he could assert against one subsequently taking a lease of adjoining land from the same lessor. And in *Stevens v. Salomon*, 39 Misc. 159, 79 N. Y. Supp. 136, that the lessor could not cut off light "essential to the beneficial use."

98h. *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85; *Hyde Park Thompson Houston Light Co. v. Brown*, 172 Ill. 329, 50 N. E. 327; *Powers v. Heffernan*, 233 Ill. 597, 84 N. E.

existence was indicated by signs which must necessarily have been seen, or which might be seen or known on a careful inspection by a person ordinarily conversant with the subject.⁹⁹ Accordingly, the question whether the user of land for a drain or aqueduct which is under ground or covered by buildings is apparent for the purpose of the rule depends, it seems, on whether there is any object in sight from the land purchased, as being thereon or near thereto, such as a pump or a sink, which indicate the presence of the aqueduct or drain.¹

The user of land for purposes of passage is apparent, it seems, so as to give to the transferee of the *quasi* dominant tenement a right of way over the land retained, if there is a well marked road or path, either constructed for the purpose,² or as a result of con-

661; *Fetters v. Humphreys*, 18 N. J. Eq. 260, 19 N. J. Eq. 471; *Lampman v. Milks*, 21 N. Y. 505; *Butterworth v. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

99. *Gale, Easements* (8th Ed.) 116; *Pyer v. Carter*, 1 Hurlst. & N. 916. See to this effect, *Ingalls v. Plamondon*, 75 Ill. 118; *Taylor v. Wright*, 76 N. J. Eq. 121, 79 Atl. 433; *Butterworth v. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352; *Rollo v. Nelson*, 34 Utah, 116, 26 L. R. A. (N. S.) 315, 96 Pac. 263.

In *Brown v. Dickey*, 106 Me. 97, 75 Atl. 382, it is said that the easement must be "indicated by objects which are necessarily seen or would be ordinarily observable by persons familiar with

the premises."

1. For cases in which a *quasi* easement involving the use of land for a drain or aqueduct was held to be apparent, see *Pyer v. Carter*, 1 Hurlst. & N. 916; *Schwann v. Cotton* (1916), 2 Ch. 120; *McPherson v. Acker*, *MacArthur & M.* (D. C.) 150, 48 Am. Rep. 749; *Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. 182; *Larsen v. Peterson*, 53 N. J. Eq. 88, 30 Atl. 1094; *Miller v. Skaggs*, 79 W. Va. 645, Ann. Cas. 1918D, 929, 91 S. E. 536. For cases in which it was held not to be apparent, see *Robinson v. Hillman*, 36 Dist. Col. App. 241; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688; *Covell v. Bright*, 157 Mich. 419, 122 N. W. 101; *Butterworth v. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352; *Scott v. Beutel*, 23 Gratt. (Va.) 1.

2. *Robinson v. Hillman*, 36 Dist. Col. App. 241; *Teachout v.*

stant or prolonged user.³ There are however occasional judicial expressions to the effect that a way is never to be regarded as apparent for this purpose.^{3a}

The requirement that the user of the land have been apparent is perhaps based on the consideration that if the user was not apparent, the one to whom the *quasi* dominant tenement is conveyed cannot be presumed to have had any knowledge thereof, or to have anticipated that he would enjoy a like right of user. But this consideration appears to be of uniform importance only on the assumption that every conveyance is a bilateral transaction, that, in other words, it is effective because representing an agreement between the parties. A conveyance is, no doubt, in the ordinary case, the result of a prior agreement, and the requirement of the "acceptance" of a conveyance, so frequently asserted in this country,^{3b} involves the idea that the conveyance, to be effective, must also be agreed to by the grantee after its execution. Nevertheless a conveyance may well be made which is not the result of agreement, and which is valid in spite of the inability of the grantee to accept. Suppose a conveyance of the *quasi* dominant tenement is made by way of gift to a child one year old. Why should the fact that the user of the *quasi* servient tenement is apparent or not apparent affect the question whether the conveyance

Duffus, 141 Iowa, 466, 119 N. W. 983; Keokuk Electric Ry. & Power Co. v. Weisman, 146 Iowa, 679, 126 N. W. 60; Hankins v. Hendricks, 247 Ill. 517, 93 N. E. 428; Scott v. Moore, 98 Va. 668. 71 Am. St. Rep. 749, 37 S. E. 342; Hammond v. Ryman, 120 Va. 131, 90, S. E. 613.

3. Stone v. Burkhead, 160 Ky. 47, 169 S. W. 489 (*semble*); Liquid Carbonic Co. v. Wallace, 219 Pa. 457, 68 Atl. 1021.

3a. Fetters v. Humphreys, 19

N. J. Eq. 471; Michelet v. Cole, 20 N. Mex. 357, 149 Pac. 310. In Duvall v. Ridout, 124 Md. 193, L. R. A. 1915C, 345, 92 Atl. 209, it is said that there is no implied grant of a way, though well defined, unless it is enclosed or improved, or is actually necessary. And Allers v. Beach, 130 Md. 499, 100 Atl. 781, is adverse to the "implied" grant of a right of way in any case, if not a way of necessity.

3b. *Post*, § 463.

creates an easement in favor of the infant? And the same difficulty suggests itself in connection with a devise of the *quasi* dominant tenement,⁴ in which case the devisee may be ordinarily supposed to be ignorant of the devise until after the testator's death. If the testator has habitually made use of one part of his land for the benefit of another, why should not a devise of this latter part be presumed to be intended to include the right of user to the same extent when the user is not apparent as when it is apparent? And even in the case of a conveyance of the *quasi* dominant tenement by way of sale, the fact that the user is not apparent might well be disregarded if the grantee knows otherwise of such user by the grantor.⁵

— **User must be continuous.** In order that an easement may thus be created as corresponding to a pre existing *quasi* easement, the previous user must also, it is ordinarily stated, have been continuous.⁶ In some

4. *Post*, note 30.

5. The statement that the user must be apparent, like the statement that it must be continuous appears to have originated in Gale and Whatley on Easements, published in 1839, these authors adopting the expressions "apparent" and "continuous" from the French Civil Code. See Lord Blackburn's remarks in L. R. 6 App. Cas. at p. 821. There were quite a number of cases prior to the date named, and indeed subsequent thereto, in which the doctrine of the grant of an easement as corresponding to a pre-existing *quasi* easement was recognized, but in which there was no suggestion of any necessity that the prior user have been apparent or continuous. See cases referred to, Gale, Easements (8th

Ed.) 117 *et seq.* The requirement of the French Code in this respect appears to have been based upon certain of the customary laws, and upon the decisions of the courts, of old France. See the references in a suggestive note in 65 University of Penna. Law Rev. at p. 77. In Brissaud, French Private Law (Continental Legal History Series) p. 424, it is said that in the old law the doctrine of implied grant based on previous usage, ordinarily referred to as "*destination du pere de famille*" seems to have applied only to visible servitudes, but that there is not a very clear distinction made between their being visible and being continuous.

6. *Worthington v. Gimson*, 2 El. & El. 618; *Wheeldon v. Barrows*, 12 Ch. Div. 31; *Walker v.*

cases the view is taken that the user is continuous if no further act of man is necessary to its continuous exercise,⁷ while in other cases the question is said to be whether there is a permanent adaptation of the two tenements to the exercise of the user.⁸ Giving the former signification to the expression, it is difficult to see any propriety in the requirement of continuousness. Giving the latter signification thereto, the requirement appears to be, not that the user be continuous, but that there be such an adaption of the two tenements for the purpose of such user as to indicate an intention that the user shall be permanent or approximately permanent, and there are cases in which this view is expressed.⁹

Clifford, 128 Ala. 67, 86 Am. St. Rep. 74, 29 So. 588; Whiting v. Gaylord, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85; Powers v. Heffernan, 233 Ill. 597, 84 N. E. 661; Larsen v. Peterson, 53 N. J. Eq. 88, 30 Atl. 1094; Lampman Milks, 21 N. Y. 505; Longendyke v. Anderson, 101 N. Y. 625, 4 N. E. 625; Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165.

7. Bonelli v. Blakemore, 66 Miss. 136, 14 Am. St. Rep. 550, 5 So. 228; Providence Tool Co. v. Corliss Steam Engine Co., 9 R. I. 564; Morgan v. Meuth, 60 Mich. 238, 27 N. W. 509. This is the meaning given to the expression by the French law. Code Napoleon Art. 688. See editorial note, 65 University Penna. Law Rev. 77.

8. Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. 182; Larsen v. Peterson, 53 N. J. Eq. 88, 30 Atl. 1094; John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; Paine v. Chandler, 134 N. Y. 385,

19 L. R. A. 99, 32 N. E. 18; Spencer v. Kilmer, 151 N. Y. 390, 45 N. E. 865.

9. John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; Starrett v. Baudler, — Iowa. —, 165 N. W. 216; Carmon v. Dick, 170 N. C. 305, 87 S. E. 224; Baker v. Rice, 56 Ohio St. 463, 47 N. E. 653; German Savings & Loan Society v. Gordon, 54 Ore. 147, 26 L. R. A. (N. S.) 331, 102 Pac. 736; Phillips v. Phillips, 48 Pa. St. 178, 86 Am. Dec. 577; Scott v. Moore, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 342 (*semble*).

In occasional New Jersey decisions continuous and apparent appear to be regarded as convertible terms. Fetters v. Humphreys, 18 N. J. Eq. 260; Taylor v. Wright, 76 N. J. Eq. 121, 79 Atl. 433. And see as to the lack of distinction in this regard, in the old French law, *ante*, this section note 5, *ad fin*.

The maintenance of a drain or aqueduct has been regarded as involving a continuous user,¹⁰ while, on the other hand, the going on land to obtain water has been regarded as not continuous.¹¹

Whether the user of land for purposes of passage is continuous within the meaning of this asserted requirement is a matter on which there has been considerable difference of opinion, and while some cases seem to regard it as necessarily discontinuous, because not constantly exercised,¹² other cases regard it as continuous if there is a clearly-defined road over the servient tenement, evidently intended for the use of the dominant tenement.¹³

10. *Larsen v. Peterson*, 53 N. J. Eq. 88, 30 Atl. 1094; *Paine v. Chandler*, 134 N. Y. 385, 19 L. R. A. 99, 32 N. E. 18; *Sanderlin v. Baxter*, 76 Va. 299; *Hoffman v. Shoemaker*, 69 W. Va. 233, 34 L. R. A. (N. S.) 632, 71 S. E. 198; *Dodd v. Burchell*, 1 Hurlst. & Colt 113; *Schwann v. Cotton* (1916), 2 Ch. 120.

11. *Polden v. Bastard*, L. R. 1 Q. B. 156; *O'Rorke v. Smith*, 11 R. I. 259, 23 Am. Rep. 440. *Contra*, *Eliason v. Grove*, 85 Md. 215, 36 Atl. 844, in which case, however, there was a continuous adaptation of the premises, in the shape of a gate near the well.

12. *Worthington v. Gimson*, 2 El. & El. 618; *Brett v. Clowser*, 5 C. P. Div. 376; *Oliver v. Hook*, 47 Md. 301; *Bentley v. Mills*, 174 Mass. 469, 54 N. E. 885 (*semble*); *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. 509; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550, 5 So. 228; *Fetters v. Humphreys*, 18 N. J. Eq. 260, 19 N. J. Eq. 471;

Kelly v. Dunning, 43 N. J. Eq. 62, 10 Atl. 276; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Carmon v. Dick*, 170 N. C. 305, 87 S. E. 224; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564; *O'Rorke v. Smith*, 11 R. I. 259; *Standiford v. Goudy*, 6 W. Va. 364.

13. *Brown v. Alabaster*, 37 Ch. Div. 490; *Thomas v. Owen*, 20 Q. B. Div. 225; *Watts v. Kelson*, 6 Ch. App. 166; *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421, 27 N. E. 344; *Stone v. Burkhead*, 160 Ky. 47, 169 S. W. 489; *Eliason v. Grove*, 85 Md. 215, 36 Atl. 844; *Gorton Pew Fisheries Co. v. Tolman*, 210 Mass. 412, 97 N. E. 54; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *Zell v. Universalist Society*, 119 Pa. St. 390, 4 Am. St. Rep. 654, 13 Atl. 447; *Com. v. Burford*, 225 Pa. 93, 73 Atl. 1064; *Hammond v. Ryman*, 120 Va. 131, 90 S. E. 613; And see *Martin v. Murphy*, 221 Ill. 632, 77 N. E. 1126; *Feitler v. Dobbins*, 263 Ill. 78, 104 N. E.

Occasionally it has been said to be of primary importance that the user, or the mode of exercising the user, have been in its nature permanent or approximately permanent,¹⁴ and certainly the mere fact that the grantor is, at the time of the conveyance, making a temporary use of the land retained for the benefit of the land conveyed, without any permanent adaptation of the land to the exercise of the user, is not calculated to induce the belief that the parties intend that the grantee shall be entitled to continue or repeat such user. Suppose for instance the grantor is piling on the land retained hay taken from the land conveyed, such temporary user of the land retained for the benefit of the land conveyed is an insufficient basis on which to support a construction of the conveyance as including a right in subsequent years so to pile the hay from the land conveyed. It is in this sense only, as involving a requirement of permanency in the mode of user that, as above indicated, the requirement of continuousness seems to be appropriate in this connection.

— **User must be necessary.** In this country the cases usually say that an easement is not thus created in favor of the transferee of land, as corresponding to a preexisting *quasi* easement, unless the easement, or the particular user involved therein, is “necessary,” qualifying this expression, however, by other words indicating that this requirement of necessity means little if any more than highly desirable.¹⁵ Thus it has been said that the easement must be necessary to the

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It has been said that the requirement of continuousness does not apply to the case of a way. *Hoffman v. Shoemaker*, 69 W. Va. 233, 34 L. R. A. (N. S.) 632, 71 S. E. 198.

14. See *Liquid Carbonic Co. v. Wallace*, 219 Pa. 457, 68 Atl. 1021;

Stephens v. Boyd, 157 Iowa, 570, 138 N. W. 389. And cases cited *ante*, this subsection, note 9.

15. The English cases do not ordinarily refer to such a requirement, but occasionally they do so. *Wheeldon v. Burrows*, 12 Ch. Div. 31; *Suffield v. Brown*, 9 Jur. (N. S.) 1001; *Watts v. Kelson*,

proper enjoyment of the land,¹⁶ or to its reasonable,¹⁷ or convenient,¹⁸ or beneficial¹⁹ enjoyment, or "reasonably necessary" to its enjoyment or use,²⁰ or to its convenient use,²¹ or "clearly necessary to its beneficial use."²²

6 Ch. App. 166; *Ewart v. Cochran*, 4 Macq. 117.

16. *Evans v. Dana*, 7 R. I. 306; *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85.

17. *Spencer v. Kilmer*, 151 N. Y. 390, 45 N. E. 865; *Cave v. Crafts*, 53 Cal. 135; *Robinson v. Clapp*, 65 Conn. 365, 29 L. R. A. 582, 32 Atl. 939; *Eliason v. Grove*, 85 Md. 215, 36 Atl. 844; *Powers v. Heffernan*, 233 Ill. 597, 84 N. E. 661.

18. *Kane v. Templin*, 158 Iowa, 24 138 N. W. 901; *Hankins v. Hendricks*, 247 Ill. 517, 93 N. E. 428 (highly convenient and beneficial); *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *McElroy v. McLeay*, 71 Vt. 396.

19. *Case v. Minot*, 158 Mass. 577, 22 L. R. A. 536, 33 N. E. 700; *Sandford v. Boss*, 76 N. H. 476, 84 Atl. 936; *Carmon v. Dick*, 170 N. C. 305, 87 S. E. 224.

20. *Gaynor v. Bauer*, 144 Ala. 448, 3 L. R. A. (N. S.) 1082, 39 So. 749; *Wilson v. Riggs*, 27 App. Cas. (D. C.) 550; *Robinson v. Hillman*, 36 App. Cas. (D. C.) 241; *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; *Teachout v. Duffus*, 141 Iowa, 466, 119 N. W. 983; *Irvine v. McCreary*, 108 Ky. 495, 22 Ky. L. Rep. 169, 49 L. R. A. 417, 56 S. W. 966; *Dolliff v. Boston & M. R. Co.*, 68 Me. 173 (clearly necessary to beneficial enjoyment);

Dinneen v. Corporation for Relief of Widows & Children of the Clergy of Protestant Episcopal Church of the Diocese of Maryland, 114 Md. 589, 79 Atl. 1021; *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134, 150 Mass. 267, 23 N. E. 40; *Bussmeyer v. Jablonsky*, 241 Mo. 681, 39 L. R. A. (N. S.) 549, Ann. Cas. 1913C, 1104, 145 S. W. 772; *Sanford v. Boss*, 76 N. H. 476, 84 Atl. 936 (to beneficial enjoyment); *Taylor v. Wright*, 76 N. J. Eq. 121, 79 Atl. 433 (ditto); *Fowler v. Wick*, 74 N. J. Eq. 603, 70 Atl. 682; *Paine v. Chandler*, 134 N. Y. 385, 19 L. R. A. 99, 32 N. E. 18; *Baker v. Rice*, 56 Ohio St. 463, 47 N. E. 653; *Rightsell v. Hale*, 90 Tenn. 556, 18 S. W. 245; *Rollo v. Nelson*, 34 Utah, 116, 26 L. R. A. (N. S.) 315, 96 Pac. 263 (for use and convenient enjoyment); *Goodal v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Hammond v. Ryman*, 120 Va. 131, 90 S. E. 613 (reasonably essential to its use); *Miller v. Skaggs*, 79 W. Va. 645, Ann. Cas. 1918D, 929, 91 S. E. 536.

21. *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190; *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188 (reasonably necessary to fair enjoyment).

22. *Stevens v. Orr*, 69 Me. 323.

It is impossible to deduce from the cases any general rule by which to determine the existence of this "necessity," so called, and such a rule is, perhaps, in the nature of things, impossible of formulation. That the necessity need not be absolute, in the sense that there can be no enjoyment whatsoever of the land without the exercise of the easement, is apparent from all the decisions.²³ In a few states it has been said that the question of necessity is determined by the consideration whether a substitute for the easement can be procured by "reasonable" trouble and expense.²⁴

23. See *McPherson v. Acker*, *MacArthur & M.* (D. C.) 150, 48 Am. Rep. 749; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; *Dolliff v. Boston & M. R. Co.*, 68 Me. 173; *Gorton Pew Fisheries Co. v. Tolman*, 210 Mass. 412, 97 N. E. 54; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550, 5 So. 228; *Kelly v. Duncomb*, 43 N. J. Eq. 62, 10 Atl. 276; *Lampman v. Milks*, 21 N. Y. 505; *Paine v. Chandler*, 134 N. Y. 385, 19 L. R. A. 99, 32 N. E. 18; *Spencer v. Kilmer*, 151 N. Y. 390, 45 N. E. 865; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671.

It has been said, in two states, that the grant of an easement will be implied in cases of "strict necessity" only. *Warren v. Blake*, 54 Me. 276; *Stillwell v. Foster*, 80 Me. 333, 14 Atl. 731; *Buss v. Dyer*, 125 Mass. 287. And see *Malsch*

v. Waggoner, 62 Wash. 470, 114 Pac. 446; *Roe v. Walsh*, 76 Wash. 148, 136 Pac. 1146, 135 Pac. 1031. But in view of other decisions in these states it is evident that it is not meant by this that the easement must be necessary for the purpose of any enjoyment whatsoever of the land. See cases previously cited in this note, and *Stevens v. Orr*, 69 Me. 233; *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134; *Case v. Minot*, 158 Mass. 577, 22 L. R. A. 536, 33 N. E. 700. Occasionally it has been said to be sufficient that the easement be highly convenient and beneficial. See *Adams v. Gordon*, 265 Ill. 87, 106 N. E. 517.

24. *Warren v. Blake*, 54 Me. 276; *Dolliff v. Boston & M. R. Co.*, 68 Me. 173; *Johnson v. Jordan*, 2 Metc. (Mass.) 234; *Thayer v. Payne*, 2 Cush. (Mass.) 327; *Carbrey v. Willis*, 7 Allen (Mass.) 264, 83 Am. Del. 688; *Randall v. McLaughlin*, 10 Allen (Mass.) 366; *Smith v. Blanpied*, 62 N. H. 652; *Scott v. Beutel*, 23 Gratt. (Va.) 1,

The fact that the easement is necessary for the purpose of a full enjoyment of the land conveyed is no doubt a consideration tending to show that the grantee of the land expects to have such an easement, corresponding to the preexisting *quasi* easement, as appurtenant to the land conveyed, and that the grantor expects him to have it. In other words the great desirability of the easement is a consideration, of greater or less weight, in favor of the assumption that the conveyance of the land is intended to be, not of the land alone, but of the land with the easement appurtenant thereto. Conversely, the fact that the easement is not highly desirable for the enjoyment of the land conveyed is a consideration adverse to the view that the grantor intends the grantee to acquire, or that the grantee expects to acquire, such easement. The courts tend in terms to base this requirement of necessity, so called, upon the impolicy of implying a grant in excess of the express words of the conveyance, and the desirability of making such implication only in case of necessity, but the meaning of this appears to be merely that the language of the conveyance is not to be extended by construction so as to include an easement not expressly referred to, and not before existing, unless this easement is so desirable for the full enjoyment of the land conveyed that a conveyance of the land without the easement is unlikely to have been within the contemplation of the parties.

— **Actuality of user.** The mere fact that the land retained is capable of user in a particular way for the benefit of the land conveyed is obviously in itself no reason for regarding an easement of that character as passing by the conveyance,²⁵ and the fact that such

25. See the excellent opinion of Dodge, J., in *Miller v. Hoeschler*, 126 Wis. 263, 8 L. R. A. (N. S.) 327, 105 N. W. 790.

26. *Haverhill Sav. Bank v. Griffen*, 184 Mass. 419, 68 N. E. 839; *Latta v. Catawba Elec. Co.*, 146 N. C. 285, 59 S. E. 1028;

user has taken place in the past, during the common ownership of the two properties, is immaterial if it was abandoned before the conveyance was made.²⁷ That there has been a temporary cessation of the user at that time is not however, it seems, conclusive against the construction of the conveyance as passing the land with the easement as appurtenant thereto.²⁸

— **Character of conveyance.** An easement has been regarded as thus passing because corresponding to a preexisting *quasi* easement, not only when the grantor retains the land which is sought to be subjected to the easement, but also when he disposes of this latter land by a contemporaneous conveyance.²⁹ And it has been regarded as so passing upon a devise of land as well as of a conveyance,³⁰ and upon a lease as well as upon a conveyance in fee simple.³¹ Likewise a mortgage

Brown v. Dickey, 106 Me. 97, 75 Atl. 382; *Belser v. Moore*, 73 Ark. 296, 84 S. W. 219.

27. *Gorton Pew Fisheries Co. v. Tolman*, 210 Mass. 412, 97 N. E. 54; *Bauer & Co. v. Chamberlain*, 159 Iowa, 12, 138 N. W. 903; *Van Rossum v. Grand Rapids Brewing Co.*, 129 Mich. 530, 89 N. W. 370; *McHart v. McMullin*, 30 Can. Sup. Ct. 245.

28. *Elliott v. Rhett*, 5 Rich. L. (S. C.) 405, 57 Am. Dec. 750; *Simmons v. Cloonan*, 81 N. Y. 557.

29. *Allen v. Taylor*, 16 Ch. D. 355; *Phillips v. Low* (1892), 1 Ch. 47; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Stephens v. Boyd*, 157 Iowa, 570, 138 N. W. 389; *Larsen v. Peterson*, 53 N. J. Eq. 88, 30 Atl. 1094; *Baker v. Rice*, 56 Ohio St. 463, 47 N. E. 653; *Cannon v. Boyd*, 73 Pa. St.

179. Compare *Whyte v. Builders' League of New York*, 164 N. Y. 429, 58 N. E. 517. As in the case of conveyances made by several cotenants for purposes of partition. *O'Daniel v. Baxter*, 112 Ky. 334, 65 S. W. 805; *Robinson v. Hillman*, 36 App. Cas. (D. C.) 241; *Johnson v. Gould*, 60 W. Va. 84, 53 S. E. 798; *Clark v. Debaugh*, 67 Md. 430, 10 Atl. 241.

30. *Jones v. Sanders*, 138 Cal. 405; *Cheda v. Bodkin*, 173 Cal. 7, 158 Pac. 1025; *Stephens v. Boyd*, 157 Iowa, 570, 138 N. W. 389; *Gorton Pew Fisheries Co. v. Tolman*, 210 Mass. 402, 38 L. R. A. (N. S.) 882, 97 N. E. 54; *Muse v. Gish*, 114 Va. 90, 75 S. E. 764; *Pearson v. Spencer*, 3 B. & S. 761; *Phillips v. Low*, L. R. (1892) 1 Ch. 47; *Schwann v. Cotton* (1916) 2 Ch. 120.

31. See *Snow v. Pulitzer* 142

of the *quasi* dominant tenement may have a similar operation in this regard, the purchaser at a foreclosure sale thereof thus acquiring an easement corresponding to the *quasi* easement existing at the time of the mortgage.³² And the same doctrine has been applied in favor of one acquiring title to the *quasi* dominant tenement by a judicial sale,³³ or a sale under execution,³⁴ and a conveyance in accordance therewith, and also in favor of one acquiring title from commissioners or other officials appointed to make partition.³⁵

— **Ownership of servient tenement.** Since a person cannot create an easement in another's land, a

N. Y. 263, 36 N. E. 1059; Thropp v. Field, 26 N. J. Eq. (11 C. E. Green) 82; Miller v. Fitzgerald Dry Goods Co., 62 Neb. 270, 86 N. W. 1078; Comm. v. Burford, 225 Pa. 52, 73 Atl. 1064; and other citations in 1 Tiffany, Landlord & Ten. § 128.

32. Pendola v. Ramm, 138 Cal. 517, 71 Pac. 624; John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; Carrig v. Mechanics Bank, 136 Iowa, 261, 111 N. W. 329; Havens v. Klein, 51 How. Pr. (N. Y.) 82; Pennsylvania R. Co. v. Jones, 50 Pa. St. 417.

In Harlow v. Whitcher, 136 Mass. 553, it was held that the fact that the mortgagee of land released a part thereof from the mortgage did not impose an easement on the other part, as against the mortgagee, corresponding to a user then made by the mortgagor of the other part for the benefit of the part released.

In Cannon v. Boyd, 73 Pa. St. 179, it was held, apparently, that

an easement passed to a purchaser at a sale under the mortgage although the *quasi* easement did not exist until after the making of the mortgage.

33. Zell v. Universalist Society, 119 Pa. St. 390, 4 Am. St. Rep. 654, 13 Atl. 447; Manbeck v. Jones, 190 Pa. St. 171, 42 Atl. 536.

34. Kieffer v. Imhoff, 26 Pa. St. 438; Building Association v. Getty, 11 Phila. 305.

35. Kilgour v. Ascham, 5 Har. & J. (Md.) 82; Muir v. Cox, 110 Ky. 560, 62 S. W. 73; Ellis v. Bassett, 128 Ind. 118, 25 Am. St. Rep. 421, 27 N. E. 344; Brakely v. Sharp, 9 N. J. Eq. 9, 10 Id. 206; Goodall v. Godfrey, 53 Vt. 219, 38 Am. Rep. 671; Burwell v. Hobson, 12 Gratt. (Va.) 322, 65 Am. Dec. 247; Powell v. Riley, 15 Lea (Tenn.) 153; Gentry v. Piercy, 175 Ky. 174, 193 S. W. 1017.

It has been applied in connection with the assignment of dower. Morrison v. King, 62 Ill.

30. Compare Smith v. Smith, 62 N. H. 652.

conveyance of land for the benefit of which other land, not belonging to the grantor, is used without right or merely under a license, does not have the effect of vesting in the grantee an easement corresponding to such prior use.³⁶ There are however decisions to the effect that if, in such case, the grantor subsequently acquires the other land, such an easement will then arise in favor of the grantee on the principle of estoppel.³⁷ The difficulty with this view would seem to be that there is nothing on which to base an estoppel. The original conveyance did not in terms purport to create an easement in favor of the grantee, and the user of another's land at the time does not, it seems, as does the user of his own land, seem a sufficient reason for construing it, as against the grantor, as an attempted conveyance of the land with an easement appurtenant thereto in such other's land.³⁸

Since one who has an undivided interest in particular land cannot burden such land with an easement,³⁹ there can be no implication of a grant as corresponding to a preexisting *quasi* easement if there is an outstanding undivided interest in the property subjected to the user.⁴⁰

36. *Trump v. McDonnell*, 129 Ala. 200, 24 So. 353; *Green v. Collins*, 86 N. Y. 246.

It has been decided that the fact that the owner of the land so used for the benefit of another's land joins in a conveyance of the latter, being the husband of the owner thereof, does not impose an easement on his land. *Farley v. Howard*, 60 N. Y. App. Div. 193, 172 N. Y. Supp. 28.

37. *Swedish-American Nat. Bank of Minneapolis v. Connecticut Mut. Life Ins. Co.*, 83 Minn. 377, 86 N. W. 420; *McElroy v. McLeay*, 71 Vt. 396, 45 Atl. 898;

Latta v. Catawba Elec. Co., 146 N. C. 285, 59 S. E. 1028; *Jarnigan v. Mairs*, 1 Humph. (Tenn.) 473.

38. See *Spencer v. Kilmer*, 151 N. Y. 390, 45 N. E. 865.

39. *Ante*, § 361, note 35.

40. *Farley v. Howard*, 60 N. Y. App. Div. 173, 70 N. Y. Supp. 51, 172 N. Y. 628, 65 N. E. 1116; *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966. But see *McElroy v. McLeay*, 71 Vt. 396, 45 Atl. 898, to the effect that in such case the grantee would have a right to call for partition.

— **Conveyance with “appurtenances.”** The decisions are ordinarily to the effect that the fact that a conveyance of the *quasi* dominant tenement is expressed to be “with the appurtenances” or with certain rights “appertaining and belonging” or that similar general terms are used, does not in itself operate to create an easement in the grantee equivalent to the pre-existing *quasi* easement.⁴¹ According to the English cases, however, a conveyance of land with the easements or rights “used and enjoyed therewith” will create in favor of the grantee an easement corresponding to a *quasi* easement previously existing in favor of the land conveyed.⁴²

41. *Worthington v. Gimson*, 2 Ell. & El. 618; *Baring v. Abingdon* (1892), 2 Ch. 374, 389; *May v. Smith*, 3 Mackey (D. C.) 55; *Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 166 Ky. 651, 179 S. W. 611; *Stevens v. Orr*, 69 Me. 323; *Oliver v. Hook*, 47 Md. 301; *Duvall v. Ridout*, 124 Md. 193, L. R. A. 1915C, 345, 92 Atl. 209; *Grant v. Chase*, 17 Mass. 443, 9 Am. Dec. 161; *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. 509; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550, 5 So. 228; *Spaulding v. Abbott*, 55 N. H. 423; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; *Georke v. Wadsworth*, 73 N. J. Eq. 448, 68 Atl. 71; *Michelet v. Cole*, 20 N. Mex. 357, 149 Pac. 310; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Morris v. Blunt*, 49 Utah, 243, 161 Pac. 1127; *Swazey v. Brooks*, 34 Vt. 451; *Standiford v. Goudy*, 6 W. Va. 364.

Occasionally, however, the use of the word “appurtenances” has been regarded as effective for

this purpose. *Thomas v. Owen*, 20 Q. B. Div. 225; *Wood v. Grayson*, 22 App. Cas. (D. C.) 432; *Thomas v. Wiggers*, 41 Ill. 470; *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 659; *Elliott v. Sallee*, 14 Ohio St. 10; *Miller v. Lapham*, 44 Vt. 416 (with privileges); *Tayler v. North*, 30 Utah, 156, 6 L. R. A. (N. S.) 410, 83 Pac. 762. See *Atkins v. Boardman*, 2 Mete. (Mass.) 457, 37 Am. Dec. 100.

42. *Kay v. Oxley*, L. R. 10 Q. B. 360; *Watts v. Kelson*, 6 Ch. App. 166; *Barkshire v. Grubb*, 18 Ch. Div. 616; *Bayley v. Great Western Ry. Co.*, 26 Ch. Div. 434. So, where the owner of two adjoining tracts has used one (the *quasi* servient tenement) for the purpose of passing to the other (the *quasi* dominant tenement), while a conveyance of the latter tenement “with appurtenances” will not pass a right of way, the conveyance, if with the rights and easements “used and enjoyed therewith,” will have that effect. Formerly it was held

— **Implied reservation.** In some of the English cases, and likewise in some decisions in this country, it was held that, upon the transfer of the *quasi* servient tenement by the owner, there was an implied reservation of an easement corresponding to the *quasi* easement before existing, that is, the same doctrine was applied in favor of the grantor of the land as in favor of the grantee.⁴³ The later English cases, however, are to the effect that there no such reservation of an easement as corresponding to a preexisting *quasi* easement is to be implied, this view being based mainly on the theory that the assertion of such an easement by the grantor is in derogation of his own grant.⁴⁴ There are likewise in several states decisions or *dicta* somewhat adverse to the recognition of any such easement in favor of the grantor as corresponding to a preexisting

that this principle applied only in case the *quasi* easement had, at a former time, when the *quasi* dominant and servient tenements belonged to different persons, existed as an actual easement. *Thomson v. Waterlow*, L. R. 6 Eq. 36; *Langley v. Hammond*, L. R. 3 Exch. 168. This distinction is, however, no longer recognized.

43. *Pyer v. Carter*, 1 Hurl. & N. 916; *Thomas v. Owen*, L. R. 20 Q. B. D. 225; *Cheda v. Bodkin*, 173 Cal. 7, 158 Pac. 1025; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; *Powers v. Heffernan*, 233 Ill. 597, 16 L. R. A. (N. S.) 523, 122 Am. St. Rep. 199, 84 N. E. 661; *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; *Lebus v. Boston*, 21 Ky. Rep. 411, 47 L. R. A. 79, 51 S. W. 609; *Irvine v. McCreary*, 108 Ky. 495, 49 L. R. A.

417, 56 S. W. 966; *Znamaneck v. Jelinek*, 69 Neb. 110, 11 Am. St. Rep. 533, 95 N. W. 28; *Dunklee v. Wilton R. Co.*, 24 N. H. 489; *Taylor v. Wright*, 76 N. J. Eq. 121, 79 Atl. 433; *Greer v. Van Meter*, 54 N. J. Eq. 270, 33 Atl. 794; *Carmon v. Dick*, 170 N. C. 305, 87 S. E. 224; *Seibert v. Levan*, 8 Pa. St. 383, 49 Am. Dec. 525; *Geible v. Smith*, 146 Pa. St. 276, 28 Am. St. Rep. 796, 23 Atl. 437; *Grace M. E. Church v. Dobbins*, 153 Pa. St. 294, 34 Am. St. Rep. 706, 25 Atl. 1120; *Rightsell v. Hale*, 90 Tenn. 556, 18 S. W. 245; *Harwood v. Benton*, 32 Vt. 724; *Bennett v. Booth*, 70 W. Va. 264, 39 L. R. A. (N. S.) 618, 73 S. E. 909.

44. *White v. Bass*, 7 Hurl. & N. 722; *Suffield v. Brown*, 4 De Gex, J. & S. 185; *Wheeldon v. Burrows*, 12 Ch. Div. 31; *Ray v. Hazeldene* (1904), 2 Ch. 17.

quasi easement, it being sometimes stated that an easement will be implied in favor of the grantor only when it is strictly necessary⁴⁵ or strictly necessary for the enjoyment of the land retained,⁴⁶ that is, when it can be implied as an easement of necessity. In some the fact that the conveyance contains a warranty or covenant against encumbrances is referred to as one consideration adverse to recognition of such an easement in favor of the grantor, a view which appears to be open to considerable question, the purpose of a covenant in a conveyance not being to determine the construction of the instrument as regards the rights conveyed.⁴⁷

The distinction asserted in the later English cases between the implication of a grant, and of a reservation,

45. *Cherry v. Brizzolara*, 89 Ark. 309, 21 L. R. A. (N. S.) 508, 116 S. W. 668; *Warren v. Blake*, 54 Me. 276; *Mitchell v. Seipel*, 53 Md. 251; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688; *Bass v. Dyer*, 125 Mass. 287; *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700; *Brown v. Fuller*, 165 Mich. 162, 33 L. R. A. (N. S.) 459, Ann. Cas. 1912C, 853, 130 N. W. 621; *Dabney v. Child*, 95 Miss. 585, 48 So. 897; *Meredith v. Frank*, 56 Ohio St. 479, 47 N. E. 656; *Sellers v. Texas Cent. Ry. Co.*, 81 Tex. 458, 13 L. R. A. 657, 17 S. W. 32; *Scott v. Peutel*, 23 Gratt. (Va.) 1; (so that substitute cannot be procured at reasonable expense); *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664. To this effect is *Attrill v. Platt*, 10 Can. Sup. Ct. 425. In *Crosland v. Rogers*, 32 S. C. 130, 10 S. E. 874, it is said that the necessity must be imperious.

67, 86 Am. St. Rep. 74, 29 So. 588; *Wells v. Garbutt*, 132 N. Y. 430, 30 N. E. 978. In *Starrett v. Baudler*, — Iowa, —, 165 N. W. 216 it is said that there must be no other reasonable mode of enjoying the dominant tenement without the easement.

47. *Cherry v. Brizzolara*, 89 Ark. 309, 21 L. R. A. (N. S.) 508, 116 S. W. 668; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688; *McSweeney v. Comm.* 185 Mass. 371, 70 N. E. 429; *Brown v. Fuller*, 165 Mich. 162, 33 L. R. A. (N. S.) 459, Ann. Cas. 1912C, 853, 130 N. W. 621; *Dabney v. Child*, 95 Miss. 585, 48 So. 897; *Denman v. Mentz*, 63 N. J. Eq. 613, 52 Atl. 1117; *Howley v. Chaffee*, 88 Vt. 468, 93 Atl. 120. That the presence of such a covenant in the conveyance is immaterial, see *Bennett v. Booth*, 70 W. Va. 264, 39 L. R. A. (N. S.) 618, 73 S. E. 909; *Harwood v. Benton*, 32 Vt. 724.

46. *Walker v. Clifford*, 128 Ala. 2 R. P.—7

of an easement corresponding to a preexisting *quasi* easement, has been decided not to apply in connection with what have been termed "reciprocal" easements, the only instance of which, given in the cases, is that of the support of buildings, the rule in regard to them being that, when buildings are erected together by the same owner in such a way as obviously to require mutual support, and he thereafter conveys one of them, the grantee is regarded as impliedly giving the grantor a right of support for the house retained by him in consideration of the right of support impliedly granted for the house sold.⁴⁸ Likewise, in this country, it appears to be considered that, if one builds houses separated by a partition wall, and the houses are afterwards conveyed to different persons, with the division line running longitudinally through the wall, each house is ordinarily entitled to an easement of support in the part of the wall on the other's land, irrespective of whether it was conveyed by the builder before or after the conveyance of the other, that is, upon the severance of ownership the partition wall becomes a party wall.⁴⁹ It may be questioned, however, whether the easement of support in favor of the grantor in such cases might not rather be regarded as an easement of necessity.

In order that an easement may thus be recognized in favor of the grantor, by way of implied reservation, as corresponding to a preexisting *quasi* easement, the

48. *Richards v. Rose*, 9 Exch. 218; *Suffield v. Brown*, 4 De Gex. J. & S. 185; *Wheeldon v. Burrows*, 12 Ch. Div. 31. See *Stevenson v. Wallace*, 27 Grat. (Va.) 77; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Adams v. Marshall*, 138 Mass. 228. Compare *Clemens v. Speed*, 93 Ky. 284, 19 L. R. A. 240, 19 S. W. 660.

49. *Bartley v. Spaulding* 21

App. Cas. (D. C.) 427; *Ingalls v. Plamondon*, 75 Ill. 118; *Everett v. Edwards*, 149 Mass. 588, 5 L. R. A. 110, 14 Am. St. Rep. 462, 22 N. E. 52; *Carlton v. Blake*, 152 Mass. 176, 23 Am. St. Rep. 818, 25 N. E. 83; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Heartt v. Kruger*, 121 N. Y. 386, 9 L. R. A. 135, 18 Am. St.

user of the land conveyed for the benefit of that retained must, it is said, be apparent.⁵⁰ And presumably any other requirement that may in the particular jurisdiction be regarded as essential to the implication of an easement in favor of the grantee of land, such as continuousness and necessity, will be regarded as essential to such an implication in favor of the grantor.

— (c) **Of easement of necessity.** An easement of necessity, so called, is an easement which arises upon a conveyance of land, in favor of either the grantor or grantee of the land, by reason of a construction placed upon the language of the conveyance in accordance with what appears to be the necessity of the case, in order that the land conveyed, or sometimes, the land retained, may be properly available for use.

The purpose for which a conveyance of land is made may call for a construction of the conveyance as vesting in the grantee an easement as appurtenant to the land, such an easement being necessary in order that the land may be used as intended. Thus one who conveys land to be used for a factory has been regarded as granting such an easement, as regards the pollution of air or water, as is evidently necessary to enable the land to be used for that business,⁵¹ and if he conveys it

Rep. 829, 24 N. E. 841; Schaefer v. Blumenthal, 169 N. Y. 221, 62 N. E. 175.

But see *Cherry v. Brizzolara*, 89 Ark. 309, 21 L. R. A. (N. S.) 503, 116 S. W. 668, to the effect that this is so only if another wall cannot be built at a reasonable expense. And as perhaps opposed to the implication of an easement of support in such case see *Clemens v. Speed*, 93 Ky. 284, 19 L. R. A. 240, 19 S. W. 660; *Williamson Inv. Co. v. Williamson*,

96 Wash. 529, 165 Pac. 385.

50. *Biddison v. Aaron*, 102 Md. 156, 62 Atl. 523; *Jobling v. Tuttle*, 75 Kan. 351, 9 L. R. A. (N. S.) 960, 89 Pac. 699; *Scott v. Beutel*, 23 Gratt. (Va.) 1; *Sellers v. Texas Cent. Ry. Co.*, 81 Tex. 458, 13 L. R. A. 657, 17 S. W. 32. As to this requirement, see *ante*, this subsection, notes 1-5.

51. *Gale, Easements* (8th Ed.) 113, note f; *Goddard, Easements*, (6th Ed.) 265; *Hall v. Lund*, 1 Hurl. & C. 676; *Huntington & K.*

for the purpose of erecting a building, he may well be regarded as granting such rights of support as are necessary for the building.⁵² So, if one conveys land for railroad purposes, the conveyance involves in effect a grant of the right to construct and operate the railroad in a proper manner, even in derogation of the grantor's natural rights as regards land retained by him,⁵³ and such an easement is likewise vested in the railroad when the land is taken under condemnation proceedings.⁵⁴ If one conveys minerals beneath his land, the grantee may be entitled, on the same theory of necessity, to the privilege of building air shafts and water storage facilities, of erecting machinery in or on the grantor's land, and of dumping waste thereon.^{54a} And in some states, while an easement of light is not recognized merely because of a preexisting *quasi* easement of light, such an easement will, it seems, be recognized, when the access of light to the land granted over the land retained can be regarded as actually necessary.^{54b} Likewise when buildings on adjoining

Land Devel. Co. v. Phoenix Powder Mfg. Co., 40 W. Va. 711, 21 S. E. 1037.

And if he sells and conveys land adjoining his pond for an ice business he in effect grants a privilege to demand that the pond be not drained. See Marshall Ice Co. v. LaPlant, 136 Iowa, 621, 12 L. R. A. (N. S.) 1073, 111 N. W. 1016.

52. Caledonian Ry. Co. v. Sprot, 2 Macq. H. L. Cas. 453; Rigby v. Bennett, 21 Ch. Div. 559; Siddons v. Short, 2 C. P. Div. 572; Freeholders of Hudson County v. Woodcliff Land Co., 74 N. J. L. 355, 65 Atl. 844.

53. See Lewis, Eminent Domain, § 474.

54. Elliot v. Northeastern

Ry., 10 H. L. Cas. 333; Manning v. New Jersey Short Line R. Co., 80 N. J. L. 349, 32 L. R. A. (N. S.) 155, 78 Atl. 200.

54a. Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368, 4 So. 350; Gordon v. Park, 219 Mo. 600, 117 S. W. 1163; Gordon v. Million, 248 Mo. 155, 154 S. W. 99; Marvin v. Brewster Co., 55 N. Y. 538; Fowler v. Delaplain, 79 Ohio St. 279, 21 L. R. A. (N. S.) 100, 87 N. E. 260; Turner v. Reynolds, 23 Pa. St. 199; Potter v. Rend, 201 Pa. 318, 50 Atl. 821; Dewey v. Great Lakes Coal Co., 236 Pa. 498, 84 Atl. 913; Armstrong v. Maryland Coal Co., 67 W. Va. 589, 69 S. E. 195; Dand v. Kingscote, 6 Mees. & W. 174.

54b. *Ante*, § 363(a), note 97.

lots belonging to a single person are dependent on one another for support, and he conveys one of the lots, retaining the other, it may be considered that an easement of support "by necessity" exists in each lot and building in favor of the other;^{54c} and even when there is a building upon but one of the lots, it would seem reasonable to recognize an easement of support, by way of necessity, for the land of such lot with the added weight of the building.^{54d}

— **Ways of necessity.** By far the most usual instance of an easement of necessity is a way of necessity. Such an easement ordinarily arises when one conveys to another land entirely surrounded by his, the grantor's, land,⁵⁵ or which is accessible only across either the grantor's land or the land of a stranger.⁵⁶ In such a case, unless the conveyance is regarded as giving, as appurtenant to the land conveyed, a right of way over the land retained by the grantor, the grantee can make but a limited use, if any, of the land

54c. *Ante*, § 363b, notes, 48, 49.

54d. See *Sterrett v. Baudler*, — Iowa, —, 165 N. W. 216.

55. *Pomfret v. Ricroft*, 1 Saund. 323, note 6; *Pinnington v. Galland*, 9 Exch. 1; *Taylor v. Warnaky*, 55 Cal. 350; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Mead v. Anderson*, 40 Kan. 203, 19 Pac. 708; *Leonard v. Leonard*, 2 Allen (Mass.), 543; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Board of Sup'rs of Lamar County v. Elliott*, 107 Miss. 841, 66 So. 203; *Kimball v. Cochecho R. Co.*, 27 N. H. 448, 59 Am. Dec. 387; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Bond v. Willis*, 84 Va. 796, 6 S. E. 136.

56. *Gilfoy v. Randall*, 274 Ill. 128, 113 N. E. 88; *Thomas v. McCoy*, 48 Ind. App. 403, 96 N. E. 14; *Fairchild v. Stewart*, 117 Iowa, 734, 89 N. W. 1075; *Adams v. Hodgkins*, 109 Me. 361, 84 Atl. 530; *Zimmerman v. Cockey*, 118 Md. 491, 84 Atl. 743; *Pleas v. Thomas*, 75 Miss. 495, 22 So. 820; *Higbee Fishing Club v. Atlantic City Elec. Co.*, 78 N. J. Eq. 434, 79 Atl. 326; *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. Rep. 653, 44 N. E. 966; *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S. E. 233; *Proudfoot v. Saffle*, 62 W. Va. 51, 12 L. R. A. (N. S.) 482, 57 S. E. 256.

"The deed of the grantor as much creates the way of necessity as it does the way by grant. The

conveyed to him, and the courts, in pursuance of considerations of public policy favorable to the full utilization of the land, and in accordance with the presumable intention of the parties that the land shall not be without any means of access thereto, have established this rule of construction that, in the absence of indications of a contrary intention, the conveyance of the land shall in such case be regarded as vesting in the grantee a right of way across the grantor's land.⁵⁷

Not only may a way of necessity arise in favor of the grantee of land, but it may also arise in favor of the grantor, when one conveys land which is so situated as to render land retained by him inaccessible except over the land conveyed or the land of a stranger.⁵⁸

only difference between the two is, that one is granted in express words and the other only by implication." *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302, per Morton, J.

57. "Although it is called a way of necessity, yet in strictness, the necessity does not create the way, but merely furnishes evidence as to the real intention of the parties. For the law will not presume, that it was the intention of the parties, that one should convey land to the other, in such manner that the grantee could derive no benefit from the conveyance; nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder. The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties." *Waite J., in Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61.

58. *Clark v. Cogge*, Cro. Jac. 170; *Pinnington v. Galland*, 9 Exch. 1; *Corporation of London v. Riggs*, 13 Ch. Div. 789; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Stamper v. McNabb*, 172 Ky. 253, 189 S. W. 216; *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743; *Jay v. Michael*, 92 Md. 198, 48 Atl. 61; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *New York & N. E. R. Co. v. Board of Railroad Com'rs*, 162 Mass. 81, 38 N. E. 27; *Pleas v. Thomas*, 75 Miss. 495, 22 So. 820; *Herrin v. Sieben*, 46 Mont. 226, 127 Pac. 323; *Pingree v. McDuffie*, 56 N. H. 306; *Shoemaker v. Shoemaker*, 11 Abb N. Cas. (N. Y.) 80; *Meredith v. Frank*, 56 Ohio St. 479, 47 N. E. 656; *Willey v. Thwing*, 68 Vt. 128, 34 Atl. 428; *Hoffman v. Shoemaker*, 69 W. Va. 233, 34 L. R. A. (N. S.) 632, 71 S. E. 198.

In such a case the conveyance is construed as passing, not land free from any easement, but land subject to an easement of a right of way in favor of the land retained. Such an implied reservation of an easement to a certain extent involves a violation of the rule which precludes one from derogating from his own grant, but it is recognized and upheld by the courts from the considerations of public policy above mentioned.⁵⁹ The fact that the conveyance contains a warranty or other covenant of title has been regarded as insufficient to exclude such an implication,⁶⁰ though it might no doubt be excluded by language in the conveyance or, it seems, by evidence of surrounding circumstances, calling for a different construction.^{60a}

Since a reservation as well as a grant of a right of way may thus be implied on the ground of necessity, it is immaterial, for the purpose of establishing a way on this ground, whether the asserted dominant tenement was disposed of by the common owner before or after the asserted servient tenement.

In case the owner of land conveys to another timber growing thereon, the conveyance is to a great extent nugatory unless the grantee has the privilege of going on the land in order to cut the timber, and consequently the instrument would ordinarily be construed as granting such privilege or, in other words, he has a way of necessity.⁶¹ And so a conveyance of minerals in the soil is ordinarily regarded as giving the privilege of passing over the grantor's land in

59. See *Packer v. Welsted*, 2 Sid. 39, 111; *Dutton v. Tayler*, 2 Lutw. 1487; *Pinnington v. Gal-land*, 9 Exch. 1.

60. *Meredith v. Frank*, 56 Ohio St. 479, 47 N. E. 656; *McEwan v. Baker*, 98 Ill. App. 271; *Powers v. Heffernan*, 233 Ill. 597, 84 N. E. 661; *Brigham v. Smith*, 4 Gray (Mass.) 297, 64 Am. Dec. 76; *New*

York etc. R. C. v. Board of Railroad Com'rs, 162 Mass. 81, 38 N. E. 27; *Jay v. Michael*, 92 Md. 198, 48 Atl. 61.

60a. *Post*, this section, notes 70-75.

61. *Pine Tree Lumber Co. v. McKinley*, 83 Minn. 419, 86 N. W. 414; *Worthen v. Garno*, 182 Mass. 243, 65 N. E. 243.

order to extract the minerals, and of constructing roads, tram and railway tracks to such an extent as may be necessary for this purpose,⁶² and such a conveyance, moreover, in order that it may be effective, ordinarily involves of necessity the privilege of sinking shafts through the surface of the land for the purpose of extracting the minerals.^{62a} What is in effect a way of necessity may also exist in connection with the grant of an easement, in so far as this involves the necessity of passing over the grantor's land in order to exercise the easement.⁶³

A way of necessity does not, as is sometimes supposed, exist merely by reason of the fact that otherwise one has no access to his land.⁶⁴ As above stated, it

62. *Dand v. Kingscote*, 6 M. & W. 174; *Consolidated Coal Co. v. Savitz*, 57 Ill. App. 659; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538, 14 Am. Rep. 322. *Baker v. Pittsburg C. & W. R. Co.*, 219 Pa. 398, 68 Atl. 1014; *Pearne v. Coal Creek M. & M. Co.*, 90 Tenn. 619, 18 S. W. 402; *Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 64 S. E. 853; 1 *Barringer & Adams, Mines & Mining*, 576, 2 Id. 598.

62a. *Cardigan v. Armitage*, 2 Barn. & C. 197; *Hooper v. Dora Coal Min. Co.*, 95 Ala. 235, 10 So. 652; *Ewing v. Sandoval C. & M. Co.*, 110 Ill. 290; *Ingle v. Bot-toms*, 160 Ind. 73, 66 N. E. 160; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; *Baker v. Pittsburg C. & W. R. Co.*, 219 Pa. 398, 68 Atl. 1014; 3 *Lindley, Mines*, § 813.

In *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286, 18 L. R. A. 702, 34 Am. St. Rep. 645, 25 Atl. 597, the owner of land having conveyed to another the strata

of coal beneath the surface and subsequently discovering the presence of oil beneath the coal, asserted the right to bore wells through the coal, and his claim was sustained. It was recognized however that it could not well be sustained on the theory of a way by necessity, without a considerable modification of that doctrine, and the view was asserted that the right of access in such case should be sustained as a natural right. See editorial note 17 *Harv. Law Rev.* at p. 47. And on the authority of this case it was held that there was a natural right to sink an artesian well through the strata of coal. *Pennsylvania Cent. Brew. Co. v. Le-high Valley Coal Co.*, 250 Pa. 300, 95 Atl. 47.

63. *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356; *R. J. Gunning v. Cusack*, 50 Ill. App. 290.

64. *Bullard v. Harrison*, 4 Maule & S. 387; *Banks v. School*

arises in connection with a conveyance of land by one who retains adjoining land, and consequently it is necessary, in order to establish such a way, to show that at some time in the past the land for the benefit of which the way is claimed and that in which it is claimed belonged to the same person.⁶⁵ Provided this unity of ownership is shown to have existed, its remoteness either in point of time or by reason of intervening conveyances appears to be immaterial.⁶⁶

Whether the previous ownership by the state or federal government of both pieces of land, with a subsequent grant or sale by it of one or both of them, is sufficient to justify a finding of a way of necessity, appears to be open to question. In one case⁶⁷ it was

Directors of Dist. No. 1 of McLean County, 194 Ill. 247, 62 N. E. 604; Whitehouse v. Cummings, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743; Brice v. Randall, 7 Gill & J. (Md.) 349; Nichols v. Luce, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; Roper Lumber Co. v. Richmond Cedar Works, 158 N. Car. 161, 73 S. E. 902; Ellis v. Blue Mountain Forest Ass'n, 69 N. H. 385, 42 L. R. A. 570, 41 Atl. 856; Carmon v. Dick, 170 N. C. 305, 87 S. E. 224; McKinney v. Duncan, 121 Tenn. 265, 118 S. W. 683; Tracy v. Atherton, 35 Vt. 52, 82 Am. Dec. 621; Schulenbarger v. Johnstone, 46 Wash. 202, 35 L. R. A. (N. S.) 941, 116 Pac. 843.

65. Thrump v. McDonnell, 120 Ala. 200, 24 So. 353; Stewart v. Hartman, 46 Ind. 331; Ellis v. Blue Mountain Forest Ass'n, 69 N. H. 385, 42 L. R. A. 570, 41 Atl. 856; Dudley v. Meggs, 54 Okla. 65, 153 Pac. 1122; McBurney v. Glenmary Coal & Coke Co., 121

Tenn. 275, 118 S. W. 694 (*semble*); Tracy v. Atherton, 35 Vt. 52, 82 Am. Dec. 621; Crotty v. New River etc. Coal Co., 72 W. Va. 68, 78 S. E. 233.

66. See Taylor v. Warnaky, 55 Cal. 350; Logan v. Stogsdale, 123 Ind. 372, 8 L. R. A. 58, 24 N. E. 135; Conley v. Fairchild 142 Ky. 271, 134 S. W. 142; Feoffees of Grammar School in Ipswich v. Jeffrey's Neck Pasture, 174 Mass. 572, 55 N. E. 462; Crotty v. New River & Pocahontas Consol. Coal Co., 72 W. Va. 68, 78 S. E. 233.

67. Herrin v. Siebern, 46 Mont. 226, 127 Pac. 323, where it was held that on a grant by the United States of odd numbered sections of land, there was implied reservation of a way of necessity in favor of the United States for the benefit of private persons desiring to settle on the land retained, or to go thereon for proper purposes, as to search for minerals or graze cattle.

held that a right of way of necessity was to be regarded as reserved upon a grant by the federal government, but there are two cases to the effect that the doctrine of ways of necessity has no application in connection with such a grant.⁶⁸ And it has also been decided that such a right does not exist in favor of a grantee of the state over land retained by the state.⁶⁹ It is not entirely clear why a conveyance by the government should be subject to a different rule in this respect from a conveyance by a private individual. The same intention may well be imputed to it as to an individual, not itself to hold or to vest in another land which cannot be utilized for lack of a means of approach, and the same considerations of public policy in favor of the utilization of the land apply in both cases.

Since the grant or reservation of a way of necessity is implied merely to accord with the presumed intention of the parties, such an implication may be excluded by particular language in the conveyance.⁷⁰ So the fact that there was an express provision for some particular mode of access has been regarded as preventing the recognition of a way of necessity.⁷¹ And a like effect has been given to a reference in the conveyance to adjoining land, which extended to the highway, as belonging to the grantee, the grantee claiming under such conveyance being precluded from denying the correctness of such reference and consequently from denying that he has this other means of access to the highway.⁷² It might also be excluded, it seems, by evidence of extrinsic facts.⁷³ An intention

68. *Bully Hill Copper Min. & Smelting Co. v. Bruson*, 4 Cal. App. 180, 87 Pac. 237; *United States v. Rindge*, 208 Fed. 611.

69. *Pearne v. Coal Creek M. & M. Co.*, 90 Tenn. 619, 18 S. W. 402.

70. *Seely v. Bishop*, 19 Conn. 128.

71. *Georke Co. v. Wadsworth*. 73 N. J. Eq. 448, 68 Atl. 71; *Bascom v. Cannon*, 158 Pa. 225, 27 Atl. 968.

72. *Doten v. Bartlett*, 107 Me. 351, 32 L. R. A. (N. S.) 1075, 78 Atl. 456.

73. See *Mead v. Anderson*, 40 Kan. 203, 19 Pac. 708; *Seeley v.*

to grant or reserve such an easement, for instance, could not well be presumed in case there was an oral agreement that no right of way should exist.⁷⁴ And so if land is conveyed with an explicit understanding that it is to be covered by a building, it could not well be contended that the grantor had a right of way of necessity through the building.

If, in a conveyance of land, a way is provided, it has been said, which gives access for ordinary purposes to the lot granted, no way of necessity will arise, although that way is not sufficient for all purposes,⁷⁵ or, to express it more in accordance with principle, the existence of a way for ordinary purposes is sufficient to exclude any presumption of an intention that a way for all purposes shall exist.

An easement of necessity, like any other easement, cannot be imposed upon land not owned by the grantor,⁷⁶ or in which he has an undivided interest only.⁷⁷

Since a way of necessity exists by reason of a construction of the conveyance, based on the necessity of such way to the user of the land conveyed or retained, it is the necessity which exists at the time of the conveyance which determines the existence of the way, and not a necessity which may subsequently arise by reason of a change of circumstances.^{77a} A conveyance is to be

Bishop, 19 Conn. 128.

74. *Lebus v. Boston*, 21 Ky. Law Rep. 411, 47 L. R. A. 79, 92 Am. St. Rep. 333, 51 S. W. 607. See *Ewert v. Burtis* (N. J. Ch.) 12 Atl. 893.

75. *Haskell v. Wright*, 23 N. J. Eq. 389.

76. Consequently there is no grant of a right of way by necessity when the land granted and that retained meet only at a mathematical point, that is, when merely a corner of one touches a corner of the other. *Green-*

wood v. West, 171 Ala. 463, 54 So. 694.

77. *Woodworth v. Raymond*, 51 Conn. 70; *Marshall v. Trumbull*, 28 Conn. 183. But if the various owners of the land make deeds for the purpose of partition one who acquires a tract not otherwise accessible would have a way of necessity. *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966.

77a. *Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 166 Ky. 651, 179 S. W. 611; *Cor-*

construed with reference to the circumstances existing at the time of its execution and not those subsequently arising.

The grant of a way of necessity is implied in order to enable one to utilize his own land and not to enable him to utilize other land, and consequently one has no such right over another's land merely because of his inability otherwise to reach public land where he desires to pasture his cattle.^{77b}

While the implication of a way of necessity is almost invariably for the purpose of access to the land from the highway, occasionally a way of necessity has been recognized, apparently without reference to the question of its necessity for the purpose of access from the highway, but merely to give access to other land belonging to the same person, when he has conveyed an intervening strip for a railroad right of way.⁷⁸

Upon a subsequent transfer of the dominant tenement a way of necessity appurtenant thereto, like any other easement, passes without any mention thereof.⁷⁹ And the burden passes upon the conveyance of the ser-

nell Andrews Smelting Co. v. Boston & P. R. Co., Corp., 202 Mass. 585, 89 N. E. 118. *Post*, this section, notes 97-99.

77b. *McIlquhain v. Anthony Wilkinson Live Stock Co.*, 18 Wyo. 53, 104 Pac. 20.

78. *Cleveland, etc., R. Co. v. Smith*, 177 Ind. 524, 97 N. E. 164; *Pittsburgh, C. C. & St. L. Rwy. Co. v. Kearns*, 58 Ind. App. 694, 108 N. E. 873; *Vandalia R. Co. v. Furnas*, 182 Ind. 306, 106 N. E. 401; *New York, etc., R. Co. v. Railroad Commissioners*, 162 Mass. 81, 38 N. E. 27. In one case the owner of land who had

conveyed a strip of land to a railroad company for a right of way was, upon the subsequent discovery of natural gas, regarded as entitled to a way by necessity thereover for a pipe line to conduct gas to his dwelling. *Uhl v. Ohio River R. Co.*, 47 W. Va. 59, 34 S. E. 934.

79. *Taylor v. Warnaky*, 55 Cal. 350; *Conley v. Fairchild*, 142 Ky. 271, 134 S. W. 142; *Bean v. Bean*, 163 Mich. 379, 128 N. W. 413; *Pleas v. Thomas*, 75 Miss. 495, 22 So. 820; *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S. E. 223.

vient tenement except as against a purchaser for value without notice.⁸⁰

— **Character of conveyance.** A way of necessity may arise upon a conveyance of land although at the same time the grantor conveys away the balance of his land to another,⁸¹ and so it may arise upon a devise.⁸² It may also arise by force of a lease.⁸³ It has been regarded as arising on a conveyance by a trustee,⁸⁴ and also by an executor.⁸⁵

A way of necessity has been regarded as arising not only when the severance of the ownership of the two pieces of land occurs as a result of voluntary transfer, but also when it occurs as a result of legal proceedings,⁸⁶ as when one piece is sold under a lien,⁸⁷ or under execution,⁸⁸ or is taken under condemnation proceedings.⁸⁹ And likewise when the severance of the

80. *Logan v. Stogsdale*, 123 Ind. 372, 8 L. R. A. 58, 24 N. E. 135; *Jay v. Michael*, 92 Md. 198; *Fairchild v. Stewart*, 117 Iowa, 734, 89 N. W. 1075; *Thomas v. McCoy*, 48 Ind. App. 403, 96 N. E. 14; *Higbee Fishing Club v. Atlantic City Electric Co.*, 78 N. J. Eq. 434, 79 Atl. 326.

81. *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966; *Mitchell v. Seipel*, 53 Ind. 251.

82. *McIntire v. Lauchner*, 108 Me. 443, 81 Atl. 784; *Conover v. Cade*, 184 Ind. 604, 112 N. E. 7.

In *Mancuso v. Riddlemoser*, 117 Md. 53, 82 Atl. 1051, it was held that when the control of a door in the cellar of a building was "strictly necessary" for purposes of ventilation and the management of the heating apparatus, the right to control it would be implied in favor of the owner

of the building as against one to whom he had leased a part of the building including the cellar

83. *Tutwiler Coal, Coke & Iron Co. v. Tuvlin*, 158 Ala. 657, 48 So. 79; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257.

84. *Howton v. Frearson*, 8 Term Rep. 50.

85. *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61.

86. See *Bean v. Bean*, 163 Mich. 379, 128 N. W. 413.

87. *San Joaquin Valley Bank v. Dodge*, 125 Cal. 77, 57 Pac. 687; *Proudfoot v. Saffle*, 62 W. Va. 51, 12 L. R. A. (N. S.) 482, 57 S. E. 256.

88. *Damron v. Damron*, 119 Ky. 806, 84 S. W. 747.

89. *Cleveland, C., C. & St. L. R. Co. v. Smith*, 177 Ind. 524, 97 N. E. 164.

ownership occurs as a result of partition proceedings.⁹⁰ It has also been regarded as arising when land is set off by appraisement under an execution, in such a way that either the land retained by the debtor or that set off is otherwise inaccessible.⁹¹ In all these cases in which a way of necessity is regarded as arising in favor of one who acquires land by legal proceedings, the "implied grant" of the way is, it seems, properly to be regarded as based on a construction of the language of the official conveyance, or of the decree, as intended to include the right of way.

— **Degree of necessity.** A way of necessity will not ordinarily be recognized if there is another mode of access to the land, though much less convenient, that is, as has been sometimes said, a way of convenience is not a way of necessity.⁹² And so the fact that the

90. *Blum v. Weston*, 102 Cal. 362, 36 Pac. 778, 41 Am. St. Rep. 188; *Mesmer v. Uharriet*, 174 Cal. 110, 162 Pac. 104; *Ritchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; *Goodal v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671.

91. *Pernam v. Wead*, 2 Mass. 203, 3 Am. Dec. 43; *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107; *Russell v. Jackson*, 2 Pick. (Mass.) 574; *Schmidt v. Quinn*, 136 Mass. 575.

92. *Dodd v. Burchell*, 1 Hurl. & C. 113; *Corea v. Higuera*, 153 Cal. 451, 17 L. R. A. (N. S.) 1019, 95 Pac. 882; *Sterrick v. McBride*, 157 Ill. 70; *Ward v. Robertson*, 77 Iowa, 159, 41 N. W. 603; *Hall v. McLeod*, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743; *Mitchell v. Seipel*, 53 Md. 251; *Nichols v.*

Luce, 24 Pick. (Mass.) 102; *Dabney v. Child*, 95 Miss. 585, 48 So. 897; *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004; *Roper Lumber Co. v. Richmond Cedar Works*, 158 N. C. 161, 73 S. E. 902; *Meredith v. Frank*, 56 Ohio St. 479, 47 N. E. 656; *Lankin v. Terwilliger*, 22 Ore. 97, 29 Pac. 268; *Valley Falls Co. v. Dolan*, 9 R. I. 489; *Bailey v. Gray*, 53 S. C. 503, 31 S. E. 354; *Alley v. Carleton*, 29 Tex. 74; *Dee v. King*, 73 Vt. 375, 50 Atl. 1109; *Malsch v. Waggoner*, 62 Wash. 470, 114 Pac. 446 (*semble*); *McIlquahain v. Anthony Wilkinson Live Stock Co.*, 18 Wyo. 53, 104 Pac. 20.

As to whether the use of a staircase on adjoining property could, under the circumstances, be regarded as necessary and not merely convenient, see *Galloway v. Bonesteel*, 65 Wis. 79, 56 Am. Rep. 616, 26 N. W. 262; *Stillwell*

existing way is steep or narrow,⁹³ or can be made available only by the expenditure of money or labor,⁹⁴ has been held not to justify a finding of a way of necessity. On the other hand there are decisions to the effect that if the cost of the construction of a road over one's own land, as a means of access to any particular portion thereof, would involve very great expense, out of proportion to the value of the land itself, there is such a necessity for a way over another's land as to justify the recognition of a way of necessity.⁹⁵

Whether the fact that the land is otherwise accessible only by water is a justification for assuming the existence of a way of necessity across the land is a matter as to which the cases are not entirely clear.⁹⁶

v. Foster, 80 Me. 333, 14 Atl. 731; Quimby v. Shaw, 71 N. H. 160, 51 Atl. 656.

93. Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Gaines v. Lunsford, 120 Ga. 370, 47 S. E. 967, 102 Am. St. Rep. 109; Dudgeon v. Bronson, 159 Ind. 562, 95 Am. St. Rep. 315; Turnbull v. Rivers, 3 McCord (S. C.) 131, 15 Am. Dec. 622; United States v. Rindge, 208 Fed. 611.

94. Carey v. Rae, 58 Cal. 159; Gaines v. Lunsford, 120 Ga. 370, 102 Am. St. Rep. 109, 47 S. E. 967; Nichols v. Luce, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; Dee v. King, 73 Vt. 375, 50 Atl. 1109; Shaver v. Edgell, 48 W. Va. 502, 37 S. E. 664; Fitchett v. Mellow, 29 Ont. Rep. 6. See Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104.

95. Smith v. Griffin, 14 Colo. 429, 23 Pac. 905; Watson v. French, 112 Me. 371, L. R. A. 1915C, 355, 92 Atl. 290; Pettin-gill v. Porter, 8 Allen (Mass.) 1,

85 Am. Dec. 671; Foeffees of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture, 174 Mass. 572; O'Rorke v. Smith, 11 R. I. 259, 23 Am. Rep. 440; Crotty v. New River & Pocahontas Consol. Coal Co., 72 W. Va. 68, 78 S. E. 230. See as to the criterion of disproportionate expense. U. S. v. Rindge, 208 Fed. 611.

96. In Feoffees of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture, 174 Mass. 572, it was decided that a way of necessity existed, although there was access by water, if the latter mode of access was not available for general purposes to meet the requirements of the uses to which the property would naturally be put. And in Jay v. Michael, 92 Md. 198, it is assumed that the fact of access by water is immaterial. But in Kingsley v. Gouldsbrough Land Improvement Co., 86 Me. 280; Hildreth v. Googins, 91 Me. 227;

Since the recognition of a way of necessity is based on the intention imputed to the parties at the time of the severance of the ownership, it follows that the existence of the privilege, and also its extent, is to be determined with reference to what is necessary for the use of the premises in the manner contemplated by the parties at the time of such severance.⁹⁷ So if the parties contemplate a use of the land for a particular business, there is a right of way of necessity sufficient for the purposes of the business, if no other way sufficient for that purpose exists,⁹⁸ and if the parties contemplate a use of the land for a residence, there is a way of necessity sufficient for that purpose, if no other way so sufficient exists.⁹⁹ The fact that a particular use of the land is being made at the time of the severance of ownership does not of itself show that the parties do not contemplate the possibility of another use of the land, and hence does not preclude the recognition of a way of necessity, upon a subsequent change of use, in accord with the requirements of the latter rather than of the former use.¹ And the view has been taken that the parties are to be presumed, in the absence of any evidence on the subject, to have in mind any lawful use of the land.²

Lawton v. Rivers, 2 McCord (S. C.) 445; Turnbull v. Rivers, 3 McCord (S. C.) 131; Fitchett v. Mellow, 29 Ont. Rep. 6,—it was decided that no such right of way existed, when there was access by water, it being left, in the second of the cases cited, to the jury to say whether the access by water was "available". See also Staples v. Cornwall 114 App. Div. 596, 99 N Y Supp. 1009.

97. Whittier v. Winkley, 62 N. H. 338; Camp v. Whitman, 51 N. J. Eq. 467, 26 Atl. 917, discussing Corporation of London v.

Riggs, L R. 13 Ch. D. 798. See Mitchell v. Seipel, 53 Md. 251.

98. Gaylord v. Moffat, L. R. 4 Ch. App. 133.

99. Camp v. Whitman, 51 N. J. Eq. 467 26 Atl. 917.

1. In Myers v. Dunn, 49 Conn. 71 it was decided that although there was an express grant of a right of way for carting wood from the land, a residence having subsequently been erected thereon, there was a way of necessity thereto for general purposes.

2. Whittier v. Winkley, 62 N.

The grantor or grantee of land obviously cannot, by the subsequent erection of obstacles to access to the land, create a necessity for this purpose which did not exist at the time of the severance of ownership,³ nor can he create such a necessity by such subdivision of his property as he may subsequently make on the sale thereof.^{3a}

That the grantee of land, being a municipality or subdivision of a state, has the right to obtain land for a road by condemnation proceedings does not preclude it from claiming a way of necessity.^{3b}

§ 364. Prescription. An easement may be acquired by the adverse user of another's land for a certain period, usually the same as that required to give title to land itself by disseisin or adverse possession. The acquisition of an easement in this manner is termed "prescription," and is based on the theory that if one makes use of another's land, not by permission, and the owner fails to interfere to prevent such use, such acquiescence is, in order to prevent litigation, and also to obviate the difficulty of proving title after lapse of time, to be considered as conclusive evidence that the user is rightful. The subject of prescription will be considered in another part of this work.⁴

H. 338, disapproving *Corporation of London v. Riggs*, 13 Ch. Div. 798; *Crotty v. New River & Pocahontas Consol. Coal Co.*, 72 W. Va. 68, 78 S. E. 233. Compare *Higbee Fishing Club v. Atlantic Electric Co.*, 78 N. J. Eq. 434, 79 Atl. 326.

In *Foeffes of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture*, 174 Mass. 572, it was said that the existence of a way of necessity was to be determined by the consideration whether any other mode

of access was available for general purposes to meet the requirements of the uses to which the plaintiff's property would naturally be put.

3. *Mitchell v. Seipel*, 53 Md. 251.

3a. *Lankin v. Terwilliger*, 22 Ore. 97, 29 Pac. 268; *U. S. v. Rindge*, 208 Fed. 611.

3b. *Board of Sup'rs of Lamar County v. Elliott*, 107 Miss. 368, 66 So. 203.

4. *Post*, §§ 514-533.

§ 365. **Acquisition under statute.** An easement may, by force of a particular statute, be acquired in the land of another for a public use, by proceedings under the power of eminent domain, and payment of adequate compensation. The most prominent instances of easements so acquired are the right of way privilege acquired by a railroad company through the land of an individual,⁵ and the privilege of the owner of land on a watercourse, under what are known as the "Mill Acts," of flooding the land of another by the erection of a dam for manufacturing or milling purposes.⁶ In some states the statute provides for the acquisition, by a company formed for irrigation purposes, of the privilege of constructing canals, aqueducts, or reservoirs on the land of individuals,⁷ and a somewhat similar privilege is frequently given by statute to local associations formed to construct canals and ditches for the drainage and reclamation of marshy districts.⁸ Another instance of an easement created by statute is the obligation, imposed by statute in some states, to contribute to the erection and maintenance of a partition fence.⁹⁻¹⁰

— **As to party walls.** In the absence of a statutory provision in this regard, or of the grant of an

5. 1 Lewis, Eminent Domain, §§ 263, 449, 584; 3 Elliott, Railroads, § 950 *et seq.*

6. Gould, Waters, §§ 253, 579 *et seq.*; *ante* § 339e.

7. 1 Lewis, Eminent Domain, § 308; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112; Oury v. Goodwin (Ariz.) 26 Pac. 376; *In re Madera Irrigation Dist.*, 92 Cal. 309, 27 Am. St. Rep. 106; Paxton & H. Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co., 45 Neb. 884, 50 Am. St. Rep. 585.

In Gulf & S. I. R. Co. v. Chapman, 102 Miss. 778, 59 So. 889,

it is decided that a landowner's right to have cattleguards maintained by a railway company is a "statutory easement," and that consequently a release thereof by him is binding on his successor in title. Such a view would probably not be accepted by all courts.

8. Lindsay Irrigation Co. v. Mehrstens, 97 Cal. 676; Neff v. Reed, 98 Ind. 341; Norfleet v. Cromwell, 70 N. C. 634, 16 Am. Rep. 787; Tidewater Co. v. Coster, 18 N. J. Eq. 518.

9-10. See *ante*, § 357.

easement to that effect, one of two adjoining owners cannot place a wall wholly or in part on the other's land. In several states, however, there are statutes in this regard, usually to the effect that one owner may place a wall to a certain extent upon the adjoining owner's land, which wall the other will have the right to use upon payment of half the cost.¹¹

A wall is not such as is contemplated by the statute, it has been decided, unless it is susceptible of user as a party wall,¹² and it has on this theory been decided that the wall cannot have openings, such as windows, therein.¹³ That is, though the wall belongs, when built, to the proprietor who builds it, until the other pays his proportion of the costs,¹⁴ he has no right, under the statute, to build in part on the other's land any but a solid wall.

A wall erected by one proprietor has been regarded as a party wall for the purpose of the statute, so as to give the adjoining owner certain rights therein, if its foundation is partly on the latter's land, even though

11. A statute providing that one may erect a wall in part upon the land of an adjoining owner, to be used by both as a party wall, has been held to be unconstitutional in Massachusetts. *Wilkins v. Jewett*, 139 Mass. 29. And there are *dicta* to that effect in New Jersey. *Traute v. White*, 46 N. J. Eq. 437, 19 Atl. 196; *Schmidt v. Lewis*, 63 N. J. Eq. 565, 52 Atl. 707. That such a statute is valid, see *Swift v. Calnan*, 102 Iowa, 206, 37 L. R. A. 462, 63 Am St. Rep. 443, 71 N. W. 233; *Evans v. Jayne*, 23 Pa. 34; *Heron v. Houston*, 217 Pa. 1, 118 Am. St. Rep. 898, 66 Atl. 108; *Hunt v. Ambuston*, 17 N. J. Eq. 208.

12. *Smoot v. Heyl*, 34 App. D.

C. 480; *Robinson v. Hillman*, 36 App. D. C. 576.

13. *Smoot v. Heyl*, 34 App. D. C. 480; *Kiefer v. Dickson*, 41 Ind. App. 543, 84 N. E. 523; *Traute v. White*, 46 N. J. Eq. 437, 19 Atl. 196; *Sullivan v. Graffort*, 35 Iowa, 531; *Vollmer's Appeal*, 61 Pa. 118. *Contra*, *Jeannin v. De Blance*, 11 La. Ann. 465; *Pierce v. Lemon*, 2 Houst. (Del.) 519.

The Iowa statute authorizes openings to be made upon taking measures to protect the other proprietor. See *Shoemaker v. Wallace*, 154 Iowa, 236, 134 N. W. 740.

14. *Jeannin v. De Blance*, 11 La. Ann. 465; *Cordill v. Israel*, 130 La. 138, 57 So. 778; *Bertram v. Curtis*, 31 Iowa, 46.

the part of the wall above the ground is wholly within the limits of the land belonging to the builder.¹⁵ When, however, the wall was not intended to encroach upon the other's land, but did so by accident and to but a slight extent, and there was nothing to indicate that it was intended to be used as a party wall, such other was considered to have no rights therein, though he could insist that the encroaching part should be removed.¹⁶ Even a wall erected entirely on one's own land may, it appears, under the Pennsylvania statute, be a party wall for the purposes of the adjoining owner if it was so intended by the one erecting it.¹⁷

The privilege, under the statute, of erecting a wall partly on the adjoining land for the use of both proprietors has been held to override the privilege of the adjoining owner of erecting a wall on his own land for his exclusive use, and a wall of the latter character may be destroyed if this is necessary for the purpose of erecting a wall of the former character.¹⁸

There has been held to be a user by one proprietor of a wall erected by the other, so as to make the former liable under the statute for part of the cost, when he utilized the wall as one side of a permanent frame building erected by him, though he did not use the wall for purposes of support,¹⁹ while the erection of a merely temporary shed against the wall was held

15. *Lukens v. Lasher*, 202 Pa. 327, 51 Atl. 887; *Benner v. Cassatt*, 236 Pa. 248, 84 Atl. 780. It is immaterial that the wall is on the adjoining land to the extent of less than one half its thickness. *Western National Bank's Appeal*, 102 Pa. 171; *Kosack v. Johnson*, 38 App. D. C. 62.

16. *Pile v. Pedrick*, 167 Pa. 296, 46 Am. St. Rep. 677, 31 Atl. 646.

17. *Mercantile Library Co. v*

University of Pennsylvania, 220 Pa. 328, 89 Atl. 861.

18. *Western National Bank's Appeal*, 102 Pa. 171; *Mercantile Library Co. v. University of Pennsylvania*, 220 Pa. 328, 89 Atl. 861; *Heron v. Houston*, 217 Pa. 1, 118 Am. St. Rep. 898.

19. *Deere, Wells & Co. v. Weir-Shugart Co.*, 91 Iowa, 422, 59 N. W. 255; *Pier v. Salot* (Iowa) 107 N. W. 420.

not to be such a user.²⁰ The erection of an inferior wall by the side of the other wall has also been decided not to involve a user of the latter.²¹

§ 366. **Estoppel.**—(a) **By reference to non-existent way.** If one, in conveying land, describes it as bounded on a street (or other highway) which is in fact nonexistent, he is, as against his grantee, it is said, estopped to deny the existence of such street, the result being that he in effect grants, in so far as he owns the land covered by the supposed street, a right of way along the route thereof for the purpose of access to the land conveyed,²² and also easements of light and air such as the grantee would have had were the street actually existent.²³ Likewise if land conveyed is de-

20. *Beggs v. Duling*, 102 Iowa, 13, 70 N. W. 732. As to what constitutes a new use of a new wall erected in place of an old one, so as to impose liability under the statute, see *Hoffstott v. Voigt*, 146 Pa. 632, 23 Atl. 351; *German Nat. Bank v. Mellor*, 238 Pa. 415, 86 Atl. 415.

21. *Sheldon Bank v. Royce*, 84 Iowa, 288, 50 N. W. 986.

22. *Teasley v. Stanton*, 136 Ala. 641, 96 Am. St. Rep. 88, 33 So. 823; *Rogers v. Ballinger*, 59 Ark. 12, 26 S. W. 12; *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690; *Billings v. McKenzie*, 87 Conn. 617, 89 Atl. 344; *Poole v. Greer*, 6 Del. 220, 65 Atl. 767; *Schreck v. Blum*, 131 Ga. 489, 62 S. E. 705; *Young v. Braman*, 105 Me. 494, 75 Atl. 120; *O'Linda v. Lathrop*, 21 Pick. (Mass.) 292; *Driscoll v. Smith*, 184 Mass. 221, 68 N. E. 210; *Dawson v. St. Paul F. & M. Ins. Co.*, 15 Minn. 136, 2

Am. Rep. 109; *Plumer v. Johnston*, 63 Mich. 65, 29 N. W. 687; *Crosby v. Greenville*, — Mich. —, 150 N. W. 246; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Lindsay v. Jones*, 21 Nev. 72; *White v. Tidewater Oil Co.*, 50 N. J. Eq. 1; *Imperial Realty Co. v. West Jersey & S. R. Co.*, 78 N. J. Eq. 110, 77 Atl. 1041; *United N. J. Railway & Canal Co. v. Crucible Steel Co.*, 86 N. J. Eq. 258, 98 Atl. 1087, affirming 85 N. J. Eq. 7, 95 Atl. 243; *White's Bank v. Nichols*, 64 N. Y. 65; *Niagara Falls v. New York Cent. & H. R. R. Co.*, 168 N. Y. 610, 61 N. E. 185; *Weeks v. New York W. & B. Ry. Co.*, 207 N. Y. 190, 100 N. E. 719; *Ott v. Kreiter*, 110 Pa. St. 370, 1 Atl. 724; *Shetter v. Welzel*, 242 Pa. 355, 89 Atl. 455; *Gish v. Roanoke*, 119 Va. 519, 89 S. E. 970; *Espley v. Wilkes*, L. R. 7 Exch. 298.

23. *Trowbridge v. Ehrich*, 191

scribed as bounded, not by a street or other highway, but by a private alley or passageway, the grantor is said to be estopped, as against the grantee, to deny that such an alley or passageway exists, that is, he grants to that extent a right of way appurtenant to the land conveyed.²⁴ And it has been decided that if the conveyance bounds the land on a way which is actually laid out, the grantee acquires a right of passage for the whole length of such way, so far as it is upon the grantor's land, and not merely for the length of the boundary of the land conveyed.²⁵

While a reference to a non existing street or way as a boundary has thus ordinarily been regarded as involving the grant of a right of way, a different view

N. Y. 361, 84 N. E. 297; *Dill v. Board of Education of City of Camden*, 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739; *Fitzgerald v. Barbour*, 55 Fed. 440, 5 C. C. A. 180.

24. *Garstang v. Davenport*, 90 Iowa, 359, 57 N. W. 876; *Riley v. Stein*, 50 Kan. 591, 32 Pac. 947; *Reccus v. Weber*, 142 Ky. 157, 134 S. W. 145; *Young v. Braman*, 105 Me. 494, 75 Atl. 120; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *McKenzie v. Gleason*, 184 Mass. 452, 100 Am. St. Rep. 566, 69 N. E. 1076; *Gould v. Wagner*, 196 Mass. 276, 82 N. E. 10; *Flagg v. Phillips*, 201 Mass. 216, 87 N. E. 598; *Carlin v. Paul*, 11 Mo. 32, 47 Am. Dec. 139; *Cox v. James*, 45 N. Y. 557; *Hennessy v. Murdoch*, 137 N. Y. 317, 33 N. E. 330; *Rhoads v. Walter*, 61 Pa. Super. Ct. 43. But see *Milliken v. Denny*, 135 N. C. 19, 47 S. E. 132.

The fact that land is bounded

by a private passageway does not, it has been decided, give any rights of light and air as regards the space occupied by such way, except in so far as required for the purposes of passage. *Bitello v. Lipson*, 80 Conn. 497, 16 L. R. A. (N. S.) 193, 125 Am. St. Rep. 126, 69 Atl. 21. And a description of the land conveyed as bounded on an "open court" was held to give no easements of light and air which would prevent the erection of a building on the court. *Lipsky v. Heller*, 199 Mass. 310, 85 N. E. 453.

25. *Thomas v. Poole*, 7 Gray. (Mass.) 83; *Rodgers v. Parker*, 9 Gray (Mass.) 445; *Ralph v. Clifford*, 224 Mass. 58, 112 N. E. 482; *Tobey v. Taunton*, 119 Mass. 404; *McConnell v. Rathbun*, 46 Mich. 303, 9 N. W. 426; *Schreck v. Blun*, 131 Ga. 489, 62 S. E. 705. Compare *Langmaid v. Higgins*, 129 Mass. 353.

has been adopted when the land was in terms bounded on the side line of the street or way,²⁶ when the street or way was referred to merely for the purpose of locating the starting point of the description, and the land was described by courses and distances, although one of the courses happened to correspond with the side line of such street or way;²⁷ and when the land was bounded on a "continuation" of a supposed street.²⁸ And generally the particular language used, or the circumstances of the case, may be referred to for the purpose of showing that there was no intention, in bounding the land on a non-existent street or way, to give any easement in the land retained.²⁹

One thus acquiring an easement by a grant to him of land as bounded by a street which is nonexistent has the right to have the supposed street kept open to its full width, as indicated on a plat referred to or otherwise.³⁰

In so far as one who has conveyed land as bounded on a street or way which is in fact nonexistent is pre-

26. McKenzie v. Gleason, 184 Mass. 452, 100 Am. St. Rep. 566, 69 N. E. 1076.

27. Lankin v. Terwilliger, 22 Ore. 97, 29 Pac. 268; Talbert v. Mason, 136 Iowa, 373, 113 N. W. 918 (*dictum*); Pierpoint v. Harrisville, 9 W. Va. 215 (*semble*). And see Neely v. Philadelphia, 212 Pa. 551, 61 Atl. 1096.

28. Atwood v. O'Brien, 80 Me. 447, 15 Atl. 44. But see Teasley v. Stanton, 136 Ala. 641, 96 Am. St. Rep. 88, 33 So. 823.

29. Pitts v. Baltimore, 73 Md. 326, 21 Atl. 52; Bushman v. Gibson, 15 Neb. 676, 20 N. W. 106, 289; Hopkinson v. McKnight, 31 N. J. Law 422; King v. New York, 102 N. Y. 171, 6 N. E. 395; Re Brook Ave., 40 App. Div. 519.

58 N. Y. Supp. 163; Neely v. Philadelphia, 212 Pa. 551, 61 Atl. 1096.

30. Fitzgerald v. Barbour, 55 Fed. 440, 5 C. C. A. 180; White v. Tidewater Oil Co., 50 N. J. Eq. 1, 25 Atl. 199; Livingston v. New York, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622.

That a conveyance of land bounds it on a non-existent street does not impose any obligation on the grantor to make a street or way accordingly, which will be fit for travel. Loring v. Otis, 7 Gray (Mass.) 563; Hennessy v. Old Colony & N. R. Co., 101 Mass. 540, 100 Am. Dec. 127; Durkin v. Cobleigh, 156 Mass. 108, 17 L. R. A. 270, 32 Am. St. Rep. 436, 30 N. E. 474.

cluded from denying the existence of an easement in favor of his grantee on the land retained by him, one to whom he subsequently conveys the latter land is also so precluded,³¹ but not one claiming under title paramount, as for instance at a sale under a prior mortgage.³²

One can obviously not create an easement by describing the land conveyed as bounded by a street or way, if he does not own the land on which the street or way is supposed to be located, that is, he cannot thus create a right of way over another's land.³³ And it has been decided that such a reference to a nonexistent street or way does not, merely because it cannot operate as creating a way, take effect as a covenant as to the existence of the street or way, for breach of which damages may be claimed.³⁴ The statement not infrequently found in the cases,^{34a} that the reference to a street involves an "implied covenant" on the part of the grantor that there is such a street, appears ordinarily to

31. *Fitzgerald v. Barbour*, 55 Fed. 440, 5 C. C. A. 180; *Thomas v. Poole*, 7 Gray (Mass.) 83; *Rogers v. Ballinger*, 59 Ark. 12, 26 S. W. 12; *Cox v. James*, 45 N. Y. 557; *Shetter v. Welzel*, 242 Pa. 355, 89 Atl. 455. *Contra* *Briz-zalero v. Senour*, 82 Ky. 353.

32. See *Tuttle v. Sowadzki*, 41 Utah, 501, 126 Pac. 959.

That a subsequent grantee of part of the land, away from the asserted street, cannot assert the existence of the way, see *Dawson v. S. Paul Fire & Marine Insur. Co.*, 15 Minn. 136, 2 Am. Rep. 139.

33. *Dorman v. Bates Manuf'g Co.*, 82 Me. 438, 19 Atl. 915; *Cole v. Hadley*, 162 Mass. 579, 39 N. E. 279.

34. *Wimpey v. Smart*, 137 Ga. 325, 73 S. E. 586; *Howe v. Alger*, 4 Allen (Mass.) 206; *Fulmer v. Bates*, 118 Tenn. 731, 10 L. R. A. (N. S.) 964, 121 Am. St. Rep. 1059, 102 S. W. 900. *Contra*, *Trutt v. Spott*, 87 Pa. 339; *Talbert v. Mason*, 136 Iowa, 373, 14 L. R. A. (N. S.) 878, 113 N. W. 918 (*semble*).

34a. See *c. g. Rogers v. Bel-linger*, 59 Ark. 12, 26 S. W. 12; *Haynes v. Thomas*, 7 Ind. 38. *White v. Flannigan*, 1 Md. 525, 54 Am. Dec. 668; *Tufts v. Charles-town*, 2 Gray (Mass.) 272; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Greenwood v. Wilton R. R.*, 23 N. H. 261; *Bellinger v. Union Burial Ground Soc.*, 10 Pa. 135.

mean merely that he is precluded from denying the existence of the street.

There are quite occasional decisions and *dicta* to the effect that if one conveys land as abutting on a legally existent highway, the fee of which he owns, and the highway is subsequently discontinued, the grantee still has a right of passage where the highway previously existed, which cannot be obstructed by the grantor or one claiming under him.³⁵ This view involves the assumption that the description in a conveyance of land as abutting on a highway has the effect of creating a private right of way, irrespective of whether the highway does or does not exist.

While the courts, as above stated, in deciding that the grantee of land may acquire an easement in the grantor's adjoining land by reason of the fact that the conveyance bounds the land on a nonexistent street or way, base this in terms on the ground of estoppel, they give practically no satisfaction as regards the character and theoretical basis of the estoppel. If they regard it as a case of estoppel by deed, that is, if they mean that the grantor having, in a formal conveyance, referred to a street as existing on his land in a particular location, he is estopped to deny that it does so exist,³⁶ the fact that the grantee knows that the street does not exist would presumably be immaterial, as would the fact that the conveyance is by way of gift.³⁷ The courts,

35. Bayard v. Hargrove, 45 Ga. 342; Leffler v. Burlington, 18 Iowa, 361. Parker v. Farmingham, 1047; Dobson v. Hohenadel, 148 Pa. St. 367, 23 Atl. 1128. Shetter v. Welzel, 242 Pa. St. 355, 111. Van Buren v. Trumbull, 92 8 Metc. (Mass.) 260; Plumer v. Johnston, 63 Mich. 165, 29 N. W. 687; White's Bank v. Nichols, 64 N. Y. 65; Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. 89 Atl. 455; Sowadski v. Salt Lake

County, 36 Utah, 127, 104 Pac. Wash. 691, L. R. A. 1917A, 1120, 159 Pac. 891; Central Trust Co. v. Hennen, 90 Fed. 593, 33 C. C. A. 189. But see Kimball v. Kenosha, 4 Wis. 321.

36. It is referred to as a case of estoppel by deed in Billings v. McKenzie, 87 Conn. 617, 89 Atl. 344; Shetter v. Welzel, 242 Pa. 355, 89 Atl. 455; Bigelow, Estoppel (6th Ed.) 403.

37. That the fact that the con-

however, occasionally refer to the probability that the supposed existence of the street constituted part of the consideration which induced the purchase, and from this point of view the estoppel is not by deed, but is by representation, and the fact that the purchaser was aware of the facts and was consequently not misled, or that the conveyance was by way of gift, would prevent the estoppel taking effect.³⁸

If the grantee's acquisition of the easement is by reason merely of the fact that the conveyance purported to bound the land by a street, without reference to whether the grantee was induced to suppose that a street actually exists, the rule might as well be stated, it seems, without reference to the doctrine of estoppel. So considered, the rule appears to be merely one of construction, that a conveyance of land as bounding on a nonexistent street is presumed, if no such street exists, to be intended to vest in the grantee, as appurtenant to such land, easements of passage and of light and air, similar to those which he would have acquired had the street actually existed.^{38a} If on the other hand the purchaser's acquisition of the easement is by reason of his having been induced to believe that a street exists, without reference to whether the grantor intended to create such an easement in his favor, the rule is, it seems, properly expressed in terms of estoppel, and the language of the conveyance in reference to the street would appear to be material only as raising a presumption that similar language was used by the vendor in the negotiations which preceded the conveyance. So far as estoppel by representation is concerned, the fact

veyance is by way of gift is immaterial see *Flersheim v. City of Baltimore*, 85 Md. 489, 36 Atl. 1098.

38. That the grantor had previously told the grantee that he did not intend to give him such an easement was regarded as im-

material in *Kenyon v. Hookway*, 17 N. Y. Misc. 452, 41 N. Y. Supp. 230. A contrary view is taken in *Bushman v. Gibson*, 15 Neb. 676, 20 N. W. 106, 289.

38a. *Post*, this section, note 54a.

that the conveyance bounds the land by a street is immaterial if the purchaser has been expressly told, or has reason to believe, that no such street exists. The same considerations apply in the case of a reference to a private passage way as a boundary. If the language of the instrument operates to create an easement in the grantee, irrespective of whether the grantee was induced to believe in the existence of the passage way, the easement is created by the language of the conveyance, and the introduction of the doctrine of estoppel is unnecessary, while if the instrument creates an easement in the grantee merely because it indicates that the grantee was induced to purchase in the belief that the passage way existed, the easement is properly said to be created by estoppel.

— (b) **By reference to plat.** It is frequently stated that if one sells land, or conveys it, with reference to a plat, on which plat appear streets, squares, quays, or the like, the plat is in effect made a part of the transaction of sale or conveyance, with the result that the vendee or grantee acquires a right to insist that, in so far as the property belongs to the vendor or grantor, the parts designated on the plat as streets, squares, quays or the like, shall continue to be devoted to such public use free from interference by the grantor or one claiming under him.³⁹ The cases ordi-

39. *Danielson v. Sykes*, 157 Cal 689, 109 Pac. 87, 28 L. R. A. (N. S.) 1024; *Pierce v. Roberts*, 57 Conn. 31, 17 Atl. 275; *Fisk v. Ley*, 76 Conn. 295, 56 Atl. 559; *East Atlanta Land Co. v. Mower*, 138 Ga. 380, 75 S. E. 418; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866; *Swedish Evangelist Lutheran Church v. Jackson*, 229 Ill. 506, 82 N. E. 348; *Field v. Barling*, 149 Ill. 556, 24 L. R. A. 406, 41 Am. St. Rep.

311, 37 N. E. 850; *Fisher v. Beard*, 32 Iowa, 346; *Cleaver v. Manhanke*, 120 Iowa, 77, 94 N. W. 279; *Rowan's Exors. v. Portland*, 8 B. Mon. (47 Ky.) 232; *Memphis & St. L. Packet Co. v. Grey*, 9 Bush (72 Ky.) 13; *Bartlett v. City of Bangor*, 67 Me. 460; *Burnham v. Mahoney*, 222 Mass. 524, 111 N. E. 396. *Horton v. Williams*, 99 Mich. 423; *Lennig v. Ocean City Ass'n* 41 N. J. Eq. 606, 56 Am. Rep. 16, 7 Atl. 491; *Dill v. Board*

narily refer to this as arising from a sale according to a plat rather than from a conveyance according to a plat, but when the sale is according to a plat the conveyance by which the sale is consummated is usually according to the same plat, and it may be questioned whether, when the courts refer to a sale according to a plat, they do not usually have in mind such a sale followed by a similar conveyance. As is subsequently indicated,⁴⁰ whether a sale according to a plat, that is, a reference to a plat in connection with the negotiations for a sale, will have the same effect in this regard as such a reference incorporated in the instrument of conveyance of the land, has been questioned.

In some cases,⁴¹ in giving this effect to a conveyance according to a plat, language is used by the court indicative of the view that this result is attained by an application of the same principle which operates to preclude one who conveys land as bounded on a street or way from denying the existence of the street or way, and that the cases are exceedingly analogous appears not to be open to question. In some cases the view is asserted that the reference to the plat operates to vest an easement in the grantee as inducing him to believe that the streets or other public places exist as indicated on the plat,⁴² thus in effect applying the doctrine of estoppel

of Education of City of Camden, 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739. Bissell v. Railroad Co., 23 N. Y. 61; Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330; Buffalo L. & R. Co., v. Hoyer, 214 N. Y. 236, 108 N. E. 455; Chapin v. Brown, 15 R. I. 579, 10 Atl. 639; Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co., 240 Pa. 519, 87 Atl. 968; Oney v. West Buena Vista Land Co., 104 Va. 580, 2 L. R. A. (N. S.) 832, 113 Am. St. Rep. 1066, 52 S. E. 343

(bridge). Wilson v. Acree, 97 Tenn. 378, 37 S. W. 90; Tuttle v. Sowadzki, 41 Utah, 501, 126 Pac. 959.

40. *Post*, § 366(c), note 54.

41. See Booraem v. North Hudson R. Co., 40 N. J. Eq. 557, 5 Atl. 106. Dodge v. Pennsylvania R. Co., 43 N. J. Eq. 351, 45 N. J. Eq. 366; Wyman v. New York, 11 Wend. (N. Y.) 486; Bissell v. N. Y. Cent. R. Co., 23 N. Y. 61; McCall v. Davis, 15 R. I. 579.

42. Prescott v. Edwards, 117 Cal 298, 59 Am. St. Rep. 186; May-

by representation. Frequently the courts refer in this connection to the fact that, as appears to be agreed in this country,⁴³ a sale of lots with reference to a plat involves a dedication to public use by the vendor of those parts indicated on the plat as intended to be so used,⁴⁴ apparently regarding this as the basis for recognizing a right of way in the vendee. But this, it is conceived, involves a misapplication of the doctrine of dedication. The existence of a right of way in the vendee by reason of a sale to him by reference to a plat is entirely independent of whether any right exists in the public.⁴⁵ For instance, although the public authorities refuse to accept the dedication, or vacate a street appearing on a plat, so that the dedication of the street is practically a nullity, nevertheless the vendee's rights remain the same as if the authorities had not taken such action. That the right of the vendee or grantee in such case is not dependent on the doctrine of dedication is apparent upon consideration of the analogous case of a private right of way appearing on the plat with reference to which the sale or conveyance is made. The doctrine of dedication is absolutely inapplicable in connection with a private way, and yet the vendee or

wood Co. v. Village of Maywood, 118 Ill. 61, 186, 49 Pac. 178; Clark v. Elizabeth, 40 N. J. L. 172; McFarland v. Linderkugel, 107 Wis. 474, 83 N. W. 757. McCall v. Davis, 15 R. I. 579; Van Buren v. Trumbull, 92 Wash. 691, L. R. A. 1917A, 1120, 159 Pac. 891.

43. *Post*, § 482.

44. Highland Realty Co. v. Avondale Land Co., 174 Ala. 326, 56 So. 716; Harrison v. Augusta, Factory, 73 Ga. 447; Logansport v. Dunn, 8 Ind. 38; Schneider v. Jacob, 86 Ky. 101, 5 S. W. 350; Horton v. Williams, 99 Mich. 423, 58 N. W. 369. Heitz v. St. Louis,

110 Mo. 618, 19 S. W. 735; Hawley v. Baltimore, 33 Md. 270; Carter v. Portland, 4 Ore. 339; Dobson v. Hohenadel, 148 Pa. 367, 23 Atl. 1128.

45. See Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186; 49 Pac. 178; Danielson v. Sykes, 157 Cal. 686, 109 Pac. 87, 28 L. R. A. (N. S.) 1024; Overland Machinery Co. v. Alpenfels, 30 Colo. 163, 69 Pac. 574; White v. Tidewater Canal Co., 50 N. J. Eq. 1, 25 Atl. 199; Lennig v. Ocean City Ass'n, 41 N. J. Eq. 606, 56 Am. Rep. 16, 7 Atl. 491; Carroll v. Asbury, 28 Pa. Super. Ct. 351;

grantee in such case ordinarily acquires a right of way.⁴⁶

The authorities are not entirely harmonious as to whether one receiving a conveyance of land described with reference to a plat acquires a right of way over, or rather, corresponding to, every street which, though nonexistent, appears upon the plat. Some cases are to the effect that, while the grantee is not restricted to such supposed streets as are actually adjacent to his land, he acquires rights only in such as are reasonably necessary for convenient access to and exit from the land conveyed, and that the grantor is not, as against him, estopped to deny the actual existence of streets appearing on the plat which he would not ordinarily have occasion to use for such purpose,⁴⁷ while some recognize rights in the grantee along the routes of all the streets designated on the plat.⁴⁸ In one or two states the rights

Wolf v. Brass, 72 Tex. 133, 12 S. W. 159.

46. Smith v. Young, 160 Ill. 163, 43 N. E. 486; Marshall v. Lynch, 256 Ill. 522, 100 N. E. 289; Kaatz v. Curtis, 215 Mass. 311, 102 N. E. 424; Lowenberg v. Brown, 79 N. Y. App. Div. 414, 79 N. Y. Supp. 1060 (*semble*).

47. Pearson v. Allen 151 Mass. 79, 21 Am. St. Rep. 426, 23 N. E. 731; Downey v. Hood, 203 Mass. 4, 89 N. E. 24; Bell v. Todd, 51 Mich. 21, 16 N. W. 304; State v. Hamilton, 109 Tenn. 276, 70 S. W. 619.

Occasionally the view has been taken that while the grantee may have a legal right as to all strips designated as streets on the plat, he has a right to an injunction only as to those which are more or less necessary for his purposes. Daniel-

son v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87; Thorpe v. Clanton, 9 Ariz. 351, 85 Pac. 1061; Chapin v. Brown, 15 R. I. 579, 10 Atl. 639.

48. Price v. Stratton, 45 Fla. 535, 33 So. 644 (*semble*); Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Nagel v. Dean, 94 Minn. 25, 101 N. W. 954 (*semble*); Rowan v. Portland, 8 B. Mon. 232; Bartlett v. Bangor, 67 Me. 460; Collins v. Land Co., 123 N. C. 563, 83 Am. St. Rep. 720, 29 S. E. 21; Jessop v. Kittaning Borough, 225 Pa. 583, 74 Atl. 553; Thaxter v. Turner, 17 R. I. 799, 24 Atl. 829; Sipe v. Alley, 117 Va. 819, 86 S. E. 122; Cook v. Totten, 49 W. Va. 177, 87 Am. St. Rep. 792, 38 S. E. 491; Edwards v. Moundsville Land Co., 56 W. Va. 43, 48 S. E. 754.

of the grantee are said to be limited to the street on which his land purports to abut, so far as is necessary in order to reach a cross street in either direction.⁴⁹

In so far as the vendee thus acquires an easement in the strips designated as streets on the plat he has, it appears, the right to have them kept open to the full width indicated on the plat.⁵⁰

It has occasionally been stated that, when land is sold or conveyed according to a plat, the grantee acquires the right, not only to use the streets appearing on the plat, but also the right to have the public use them,⁵¹ the theory being that, having purchased with this expectation, he should not be disappointed therein. Such a view is not entirely satisfactory. Assuming that there is a dedication by the sale or conveyance, the public obviously acquires a right to use the streets, or strips designated as streets, because in that case they are streets. But this is a right in the public, not in the individual grantee, and the conception of an easement, appurtenant to land, to have the members of the public use the property in the neighborhood along certain designated routes, not for the purpose of access to such land, but for their own individual purposes, is a difficult one. Such an easement in one's favor would mean, it seems, that though all those desiring to go to or from his land, including himself, were allowed to use these designated streets, he could maintain an action because other persons were not allowed to do so. Even when the streets are actually existent, it does not seem that an abutting owner on one street could complain because the public generally are not allowed to

49. *Reis v. City of New York*, 188 N. Y. 58, 80 N. E. 573; *Hawley v. Baltimore*, 33 Md. 270.

50. *Molitor v. Sheldon*, 37 Kan. 246, 15 Pac. 231; *White v. Tidewater Oil Co.*, 50 N. J. Eq. 1, 25 Atl. 199; *Livingston v. New York*,

8 Wend. (N. Y.) 85, 22 Am. Dec. 622.

51. *Highland Realty Co. v. Avondale Land Co.*, 174 Ala. 326, 56 So. 716; *Earl v. City of Chicago*, 136 Ill. 277, 26 N. E. 370; *Alden Coal Co. v. Challis*, 200 Ill.

use other streets in the neighborhood, this being for the individual members of the public, or the municipal authorities, to do, and his rights can not well be greater when the streets are nonexistent.

The failure of the decisions clearly to explain the true nature of the estoppel operating to give to the grantee of land an easement corresponding to a street or way, which though actually nonexistent, is referred to as a boundary, or of that operating to give to him an easement corresponding to a street or other public place appearing on a plat referred to in the conveyance, as well as the difficulties involved in the question whether a sale according to a plat, as distinct from a conveyance according to a plat, operates to preclude the grantor from denying the existence of the easement, appear to emphasize the desirability of treating the matter, for the most part at least, as one of the construction of the instrument of conveyance rather than as one of estoppel. The question then in each case becomes one of the meaning of the language used as regards the property conveyed, whether, that is, it means the land alone, or the land with an easement annexed thereto? While a conveyance of land as bounded on a street or way is ordinarily presumed, in case the street or way is nonexistent, to mean the land with a private easement annexed thereto, this presumption has no operation in case a different intention appears from the particular language used.⁵² And it would seem, as evidence is always admissible to aid in the construction of an instrument, this presumption may be rebutted by reference to the surrounding circumstances at the time of the transaction. So the fact that the grantee knew that

222, 65 N. E. 665; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Heitz v. City of St. Louis*, 110 Mo. 618, 19 S. W. 735; *Quicksall v. Philadelphia*, 177 Pa. 301; *Clark v. Providence*, 10 R. I. 437; *Oswald*

v. Grenet, 22 Tex. 94; *City of Corsicana v. Zorn*, 97 Tex. 317, 78 S. W. 924; *Lins v. Seefeld*, 126 Wis. 610, 611, 105 N. W. 917.

52. *Ante*, this section, note 38a.

no street or way existed would be a material consideration, not only as showing that he was not misled by the reference to the street or way, but also as showing that the reference to the street or way was not to be considered for the purpose of ascertaining whether an easement passed by the conveyance. So a conveyance of land by reference to a plat on which streets and squares or the like appear, is presumed, in case the streets or squares do not actually exist, to mean the land with corresponding private easements annexed thereto, but presumably evidence that the words used meant the land without any easements appurtenant thereto would be admissible. In case the conveyance makes no reference to any street or way, or to a plat, but the grantor, previous to making the conveyance, states to the grantee that there is a street or way, such statement may be referred to for the purpose of determining whether the language of the conveyance meant the land with an easement appurtenant thereto of the character referred to, or the land without such an easement. And the same may be said as regards the exhibition by the vendor of a plat on which streets or squares appear, which plat is not referred to in the conveyance. Such act on his part is, it is conceived, to be considered because it serves to explain the meaning of the language used in the conveyance as applying, not to the land alone, but to the land with easements appurtenant thereto corresponding to the public easements depicted on the plat. Just as in the case of what is ordinarily referred to as the implied grant of an easement, the basic principle is that a conveyance of land in general terms may be shown, by reference to extrinsic facts, to be intended as a conveyance of land with an easement annexed, so in this case a conveyance of land may be shown, by reference to an extrinsic fact, to be intended as a conveyance of land with an easement or easements annexed. The application of the doctrine of estoppel might well be confined to those cases in

which there is an actual misrepresentation by the vendor, on which the purchaser relies, as indicated in the following subsection.

— (c) **By representation or acquiescence.** If, in order to effect a sale of land, the intending vendor states that there is a street or way adjacent to or near the land, or an easement appurtenant thereto, and on the faith of such statement the purchase is made, the vendor is ordinarily estopped to deny the existence of the way, street or other easement,⁵³ and the same effect has occasionally been given to the exhibition by the vendor to the vendee, before the sale, of a plat showing a particular street or way as existing in connection with the property.⁵⁴

The doctrine of estoppel by representation, by means of conduct of a particular character, has occasionally

53. *Prescott v. Edwards*, 117 Cal. 304, 59 Am. St. Rep. 156, 49 Pac. 178; *Kirkpatrick v. Brown*, 59 Ga. 450; *Mattes v. Frankel*, 157 N. Y. 603, 52 N. E. 585, 68 Am. St. Rep. 804; *Cleaver v. Manhanke*, 120 Iowa, 77, 94 N. W. 279; *Kixmiller v. Balt. & O. S. W. R. Co.*, 60 Ind. App. 686, 111 N. E. 401.

So it was held that purchaser of lots to whom the vendor had stated that there were appurtenant thereto rights as to sewers and a water system could not be deprived by the vendor of the right to make use of such sewer and water systems as existed, *Eiggs v. Sea Gate Ass'n*, 211 N. Y. 482, 105 N. E. 664.

The purchase must obviously be made in reliance on the statement by the vendor in order that the latter be estopped. *Poronto*

v. Sinnott, 89 Vt. 479, 95 Atl. 647.

54. *Ford v. Harris*, 95 Ga. 97, 22 S. E. 144; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; *Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Babcock v. Heenan*, 193 Mich. 229, 159 N. W. 494; *In re Edgewater Road*, 13 N. Y. App. Div. 203, affirmed 199 N. Y. 560; *In re Sedgwick Ave.*, 162 N. Y. App. Div. 236, 147 N. Y. Supp. 661.

In *Pyper v. Whitman*, 32 R. I. 510, 80 Atl. 6, such an effect was denied to the exhibition of a plat, apparently on the theory that it would involve a violation of the "parol evidence" rule. In *Dawson v. St. Paul Fire & Marine Ins. Co.*, 15 Minn. 36, 2 Am. Rep. 139, it was questioned whether the exhibition of a plat should have this effect.

54d. *Ante*, § 339(h).

been applied or asserted for the purpose of establishing an easement when the one claiming the easement has made improvements, or otherwise adopted a particular course of action on the assumption that a changed condition already existing in connection with a stream or body of water would be allowed to continue, with the result that the owner of the land on which such condition existed was precluded from changing back to the original condition,^{54d} and one might be estopped to deny the existence of an easement by his conduct in inducing another to make improvements for the purpose of utilizing the supposed easement.^{54e}

In case there is an attempted oral grant of an easement, and the intended grantee makes improvements for the purpose of exercising the easement, equity will recognize and enforce the easement on the theory of what is ordinarily referred to as that of part performance^{54f} but which is essentially the theory of estoppel.

54e. See *Miller & Lux v. Enterprise Canal & Land Co.*, 169 Cal. 415, 147 Pac. 567; *Morris Canal & Banking Co. v. Diamond Mills Paper Co.*, 71 N. J. Eq. 481, 64 Atl. 746, 73 N. J. Eq. 414, 75 Atl. 1101; *Smith v. Rowland*, 243 Pa. 306, 90 Atl. 183. See cases cited, note to L. R. A. (N. S.) 1916C, at p. 940 *et seq.*

Ordinarily, however, one's mere acquiescence in the making of improvements by another for the purpose of making a use of the latter's land which involves a violation of a natural right appertaining to the former's land involves no estoppel to deny the existence of an easement in diminution of such natural right. See *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Johnson*

v. Lewis, 13 Conn. 303, 33 Am. Dec. 405; *Penn American Plate Glass Co. v. Schwinn*, 177 Ind. 645, 98 N. E. 715; *Townsend v. Epstein*, 93 Md. 537, 52 L. R. A. 409, 86 Am. St. Rep. 441, 49 Atl. 629; *Morrill v. St. Anthony Falls Water Power Co.*, 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; *Laird v. Atlantic Coast Sanitary Co.*, 73 N. J. Eq. 49, 67 Atl. 387; *New York Rubber Co. v. Rothery*, 107 N. Y. 310, 1 Am. St. Rep. 822, 14 N. E. 269; *Lavery v. Arnold*, 36 Ore. 84, 57 Pac. 908, 58 Pac. 524; *Silver Spring Bleaching & Dyeing Co. v. Wanskuck*, 13 R. I. 611.

54f. *Ante*, § 349(d), notes 44-49.

III. RIGHTS OF USER.

§ 367. **Easements created by grant.** The mode in which an easement may be exercised, that is, the character and extent of the rights and privileges involved therein, is, in the case of an easement created by grant, determined by construction of the language of the grant.⁵⁵ So it is a question of construction whether the easement is restricted by the use made of the dominant tenement at the time of the grant, or whether the burden of the easement may be increased with any increase or change in the use of the dominant tenement.⁵⁶

Since the language used in the grant of an easement is ordinarily of a general character, containing no mention of specific rights and privileges, the process of construction involves not only the ascertainment of the actual intention from the language used, but also the establishment of a presumed, a fictitious, intention, in regard to matters as to which, so far as appears, there was no actual intention,⁵⁷ and for this purpose the courts have established certain rules of construction to be applied in connection with such a grant. Frequently these rules are stated as positive rules of law and not of construction, but they are, in their last analysis, merely rules of construction, since they are controlled by any expression of intention in the grant. For instance, when it is said that the owner of the dominant tenement may make such changes on the servient tenement as are necessary for the proper exercise of the

55. *Whitehead v. Parks*, 2 Hurl. & N. 370; *Williams v. James*, L. R. 2 C. P., 577; *Field v. Leiter*, 118 Ill. 17, 6 N. E. 877; *Moore v. Fletcher*, 16 Me. 63, 33 Am. Dec. 633; *French v. Marstin*, 24 N. H. 440, 57 Am. Dec. 294; *Abbott v. Butler*, 59 N. H. 317; *Wells v. Tolman*, 156 N. Y. 636, 51 N. E.

271; *Kinney v. Hooker*, 65 Vt. 333, 36 Am. St. Rep. 864, 26 Atl. 690; *Stephen Putney Shoe Co. v. Richmond F. & P. R. Co.*, 116 Va. 211, 81 S. E. 93.

56. *Post*, § 369.

57. See *Salmond, Jurisprudence* (4th Ed.) 141, note.

easement,⁵⁸ this properly means that the grant of an easement is *prima facie* to be construed as intended to confer such a privilege. This practice of stating a rule of construction in the form of a rule of law is of such obvious convenience in this connection that it will be adopted to some extent in the following pages, in spite of the technical inaccuracy involved therein.

As in the case of other written instruments, the circumstances under which the grant was made are to be considered as aids in its construction.⁵⁹ In case of doubt the grant of an easement is construed, as are conveyances generally, in favor of the grantee rather than the grantor.⁶⁰ While a reservation of an easement is, it seems, to be construed in favor of the grantee of the land.⁶¹

The mode in which the grantee of the easement, with the grantor's acquiescence, exercised the easement after its acquisition, that is, the practical construction of the grant by the parties, may be referred to in order to aid in ascertaining its meaning,⁶² but the fact that

58. *Post* § 370.

59. *Wood v. Saunders*, 44 Law J. Ch. 514; *Currier v. Howes*, 193 Cal. 431, 37 Pac. 521; *Peck v. Mackowsky*, 85 Conn. 190, 82 Atl. 199; *Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506; *Mendell v. Delano*, 7 Metc. (Mass.) 176; *Rowell v. Doggett*, 143 Mass. 483, 10 N. E. 182; *McConnell v. Rathbun*, 46 Mich. 303, 9 N. W. 426; *White v. Eagle & Phenix Hotel Co.*, 63 N. H. 38, 34 Atl. 672; *Cheswell v. Chapman*, 38 N. H. 14, 75 Am. Dec. 158; *Cooper v. Louanstein*, 37 N. J. Eq. 284; *Herman v. Roberts*, 119 N. Y. 37, 7 L. R. A. 226, 16 Am. St. Rep. 800, 23 N. E. 442; *Hotchkiss v. Young*, 42 Ore. 446, 71 Pac. 324; *Mercantile Library Co. v. Fidelity Trust Co.*,

235 Pa. 5, 83 Atl. 592; *Smith v. Duncan*, 35 Utah, 203, 99 Pac. 673.

60. *Sweeney v. Landers, Frary & Clark*, 80 Conn. 575, 69 Atl. 566; *Frisbie v. Bigham Masonic Lodge No. 256*, 133 Ky. 588, 118 S. W. 359; *Atkins v. Bordman*, 2 Metc. (Mass.) 457; *Duross v. Singer*, 224 Pa. 573, 73 Atl. 951; *First Baptist Soc. v. Wetherall*, 34 R. I. 155, 82 Atl. 1061; *Stephen Putney Shoe Co. v. Richmond F. & P. R. Co.*, 116 Va. 211, 81 S. E. 93.

61. *Mitchell v. Reid*, 192 N. Y. 255, 85 N. E. 65; *Redemptorists v. Wenig*, 79 Md. 348, 29 Atl. 667. See *Reese Howell Co. v. Brown*, 48 Utah, 142, 158 Pac. 684.

the grantee made for a considerable time a more limited use of the land than that justified by the grant cannot affect the construction of a grant which is in terms unambiguous.⁶³

It has been said in one state that the owner of an easement in the land of another need not use it in the particular manner prescribed by the instrument which creates it, and may use it in a different manner, provided he does not increase the servitude or change it to the injury of the servient tenement.⁶⁴ The exact meaning of this statement does not clearly appear. It can hardly mean that one having an easement of a certain character can substitute an easement of a different character, provided this does not operate to the prejudice of the servient tenement.⁶⁵ The statement was made on the authority of decisions that in the case of an easement to flow land or to have water pass to one's

62. *Fox v. Milldr*, 150 Fed. 320; *Winslow v. City of Vallejo*, 148 Cal. 723, 5 L. R. A. (N. S.) 851, 113 Am. St. Rep. 349, 84 Pac. 191; *Drummond v. Foster*, 107 Me. 401, 78 Atl. 470; *Blais v. Clare*, 207 Mass. 67, 92 N. E. 1009; *Onthank v. Lake Shore & M. S. R. Co.*, 71 N. Y. 194; *Bernero v. McFarland Real Estate Co.*, 134 Mo. App. 290, 114 S. W. 531; *Mercantile Library Co. v. Fidelity Trust Co.*, 235 Pa. 5, 83 Atl. 592; *Cram v. Chase*, 35 R. I. 98, 43 L. R. A. N. S. 824, 85 Atl. 642; *Sked v. Pennington Spring Water Co.*, 72 N. J. 599, 65 Atl. 713.

So when one having an easement of light availed himself of such easement by maintaining windows in a wall for many years, this was regarded as fixing the character and extent of

the easement. *Kessler v. Bowditch*, 223 Mass. 265, 111 N. E. 887.

63. *Bowers v. Myers*, 237 Pa. 533, 85 Atl. 860; *Hammond v. Hammond*, 250 Pa. 51, 101 Atl. 855. This, even though the person having the easement consented to an erection which prevented it full exercise. *Cotting v. Murray*, 209 Mass. 133, 95 N. E. 212.

64. *Tallon v. City of Hoboken*, 60 N. J. L. 212, 37 Atl. 895, it being there decided that if one dedicating land for a street reserved the right to lay tracks for horse cars and steam cars he could lay tracks and string wires for electric cars.

65. See *United States Pipe Line Co. v. Delaware, etc., R. Co.*, 62 N. J. L. 254, 42 L. R. A. 572.

land, the use to which the water is put is immaterial.⁶⁶ These decisions do not appear to support the statement.

If the owner of an easement enters on the servient tenement for a purpose not included in the rightful exercise of the easement, he is liable as a trespasser to the same extent as if he had no easement.⁶⁷

— **Rights of way.** A right of way appurtenant to a particular tenement, as being intended for the purpose of access to and egress from such tenement, cannot be utilized by the owner of such tenement for the purpose of reaching other land.⁶⁸ He may, however, after going to the dominant tenement by the right of way, pass to a place beyond, if he did not have this in mind when going to the dominant tenement, the question being of his *bona fides* in making use of the way.⁶⁹

66. *Luttrell's Case*, 4 Co. Rep. 87; *Sanders v. Norman*, 1 B. & Ald. 258; *Johnston v. Hyde*, 33 N. J. Eq. 632; *Angell, Water-courses*, §§ 228-230.

67. *Kaler v. Beaman*, 49 Me. 207; *Appleton v. Fullerton*, 1 Gray (Mass.) 186; *Ganley v. Looney*, 14 Allen (Mass.) 40; *Elliot v. Rhett*, 5 Rich. (S. C.) 405, 57 Am. Dec. 750.

68. *Howell v. King*, 1 Mod. 190; *Colchester v. Roberts*, 4 Mees. & W. 769; *West v. Louisville & N. R. Co.*, 137 Ala. 568, 54 So. 852; *Anderson v. Sweeney*, 82 Conn. 694, 75 Atl. 76; *Goodwillie Co. v. Commonwealth Electric Co.*, 241 Ill. 42, 89 N. E. 272; *Hoosier Stone Co. v. Malott*, 130 Ind. 21, 29 N. E. 412; *Louisville, N. A. & C. Ry. Co. v. Malott*, 135 Ind. 113, 34 N. E. 709; *Albert v. Thomas*, 73 Md. 1, 20 Atl. 912; *Davenport v. Lamson*, 21 Pick. (Mass.) 72; *Greene v. Canny*, 137

Mass. 64; *Randall v. Grant*, 210 Mass. 302, 96 N. E. 672; *French v. Marstin*, 32 N. H. 316; *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606; *Hales v. Atlantic Coast Line R. Co.*, 172 N. C. 104, 90 S. E. 11; *Shroder v. Brenneman*, 23 Pa. St. 348; *Springer v. McIntyre*, 9 W. Va. 196; *Reise v. Enos*, 76 Wis. 634, 8 L. R. A. 617, 45 N. W. 414.

So it was held that one could not bring materials to the dominant tenement by a right of way appertaining thereto, and after leaving them there a short time, carry them to a point beyond, to be used in the construction of buildings. *Skull v. Glenister*, 16 C. B. (N. S.) 81.

69. *Williams v. James*, L. R. 2 C. P. 577; *French v. Marstin*, 32 N. H. 316. The use of a right of way for access to a highway stands on a different basis, and the owner of the dominant tene-

A right of way may be general, as capable of use for all purposes, or may be limited to use by foot passengers only, or horses only, or particular species of vehicles, or for the transportation of certain classes of articles.⁷⁰ So one may have a right of way for carriages, without the right of driving cattle along the way, or of using it for the transportation of farm products;⁷¹ or he may have a way for agricultural purposes, without any right to transport other classes of articles, such as coal taken from the dominant tenement.⁷²

A grant in general terms will ordinarily be construed as creating a general right of way capable of use for all reasonable purposes,⁷³ but the circumstances may demand a different construction,⁷⁴ as for instance when the physical condition of the servient tenement is such that a general user of the way would involve an injury to such tenement,⁷⁵ and the named

ment may go therefrom to the highway, though he intends thereafter to go from the highway to a point beyond, since this is the obvious purpose of a right of way to a highway. *Colchester v. Roberts*, 4 Mees. & W. 769.

70. As a privilege of transporting wood (*Myers v. Dunn*, 49 Conn. 71), stone (*Hoosier Stone Co. v. Malott*, 130 Ind. 21, 29 N. E. 412; *Shoemaker v. Cedar Rapids, I. F. & N. W. R. Co.*, 45 Minn. 366, 48 N. W. 191), or coal (*Webber v. Vogel*, 159 Pa. 235, 28 Atl. 226).

71. *Ballard v. Dyson*, 1 Taunt. 279; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *Perry v. Snow*, 165 Mass. 23; *Myers v. Dunn*, 49 Conn. 71.

72. *Cowling v. Higginson*, 4 Mees. & W. 245.

That an automobile was a carriage within a grant of a right of way for carriages, see *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606.

73. *Thomas Cusack Co. v. Mann*, 160 Ill. App. 649; *Frost v. Jacobs*, 204 Mass. 1, 90 N. E. 357; *Randall v. Grant*, 210 Mass. 302, 96 N. E. 672; *Abbott v. Butler*, 59 N. H. 317; *Shreve v. Mathis*, 63 N. J. Eq. 170, 52 Atl. 234; *Arnold v. Fee*, 148 N. Y. 214, 238, 42 N. E. 588; *Bowers v. Myers*, 237 Pa. 533, 85 Atl. 860; *Central Christian Church v. Lennon*, 59 Wash. 425, 109 Pac. 1027; *United Land Co. v. Great Eastern Ry. Co.*, 10 Ch. App. 586.

74. See *Cannon v. Villars*, 8 Ch. Div. 420.

75. *Rowell v. Daggett*, 143 Mass. 483, 10 N. E. 182.

width of the way may be such as to render it apparent that a foot way only is intended.⁷⁶

A right of way may, by the terms of the grant, be limited to certain seasons⁷⁷ or persons,⁷⁸ or even to a particular time of day.⁷⁹ It may also be subject to interruption by reason of a particular use that may be made by the owner of the servient tenement.⁸⁰

In the absence of express restrictions in that regard in the grant, it seems that all persons who can be regarded as having permission, express or implied, to enter on the dominant tenement, may use a way for the purpose of access to such tenement and of egress therefrom.⁸¹ Consequently members of the family of the dominant owner,⁸² his servants and employees,⁸³ his guests,⁸⁴ and tradesmen and other persons with whom he does business,⁸⁵ may do so. Such persons are

76. *Perry v. Snow*, 165 Mass. 23, 42 N. E. 117.

77. *Wells v. Tolman*, 156 N. Y. 636, 51 N. E. 392.

78. *Hollins v. Verney*, 13 Q. B. D. 304.

79. *Collins v. Slade*, 23 Weekly Rep. 199.

80. *Wells v. Tolman*, 156 N. Y. 636, 51 N. E. 392; *Mercer v. Woodgate*, L. R. 5 Q. B. 26.

81. *Shreve v. Mathis*, 63 N. J. Eq. 170, 52 Atl. 234; *Gunson v. Healy*, 100 Pa. 42.

82. *Griffith v. Rigg*, 18 Ky. Law Rep. 463, 37 S. W. 58; *Baxendale v. North Lambeth Liberal, etc.*, Club (1902) 2 Ch. 427.

83. *Metcalfe v. Westaway*, 24 L. J. C. P. 113; *Cleaves v. Braman*, 103 Me. 154, 68 Atl. 857; *Shreve v. Mathis*, 63 N. J. Eq. 170, 52 Atl. 234.

84. *Baxendale v. North Lambeth Liberal Club* (1902) 2 Ch. 427.

85. *Shreve v. Mathis*, 63 N. J. Eq. 170, 52 Atl. 234; *Commonwealth v. Burford*, 225 Pa. 93, 73 Atl. 1064.

In *Tutwiler Coal, Coke & Iron Co. v. Tuvin*, 158 Ala. 657, 48 So. 79, it was apparently held that a person was not justified in using a way to go to a residence to collect a furniture bill unless circumstances appeared showing an invitation to such person on the part of the person entitled to the way, to use the way, or his consent to such use. It would seem that the purchase of the furniture might have been regarded as justifying the inference that the purchaser consented to have the vendor send to collect the bill. The court emphasises the fact that the way was one of necessity, but it is difficult to see the materiality of this consideration.

not guilty of trespass in using the way, and the owner of the easement would, it seems, have a right of action in case there was an interference with the use of the way by a member of one of these classes.

The owner of the right of way may have, in some cases, in addition to the privilege of passage, and as incidental thereto, the privilege of placing goods temporarily on that part of the servient tenement on which the way is located,⁸⁶⁻⁸⁷ of letting horses and carriages stand thereon,⁸⁸ or of swinging a gate thereover.⁸⁹ The grant of a right of way in general terms has been construed as not enabling the grantee to lay a pipe for the transportation of gas or oil,⁹⁰ to string electric light wires,⁹¹ to fence off the way,⁹² or to take ice,⁹³ or herbage.⁹⁴ One to whom was granted a right of way across a creek was regarded as entitled to build a bridge although for twenty years after the grant there was merely a ford.^{94a}

The person entitled to use a private way cannot deviate therefrom on the land outside of the way because the way is impassable, unless, perhaps, there is an obligation upon the servient owner to repair the

86-87. *Appleton v. Fullerton*, 1 Gray (Mass.) 186. Compare *Kaler v. Beanan*, 49 Me. 207.

88. *Van O'Linda v. Lathrop*, 21 Pick. (Mass.) 292, 32 Am. Dec. 261.

89. Ditto.

90. *United States Pipe Line Co. v. Delaware, L. & W. R. Co.*, 62 N. J. L. 254, 42 L. R. A. 572, 41 Atl. 759; *Allen v. Scheib*, 257 Pa. 6, 101 Atl. 102.

91. *Carpenter v. Capital Electric Co.*, 178 Ill. 29, 43 L. R. A. 645, 69 Am. St. Rep. 286, 52 N. E. 973.

92. *Moffitt v. Lytle*, 165 Pa. 173, 30 Atl. 922; *Wiley v. Ball*, 72 W. Va. 683, 79 S. E. 659; *Sizer v. Quinlan*, 82 Wis. 390, 16 L. R.

A. 512, 33 Am. St. Rep. 55, 52 N. W. 590; *Contra*, *Murray v. Murray v. Dickson*, 57 Tex. Civ. 620, 123 S. W. 179, where there were circumstances to show that it was contemplated that the way was to be used for driving cattle, and *Harvey v. Crane*, 85 Mich. 316, 12 L. R. A. 601, 48 N. W. 582, where the right of way was not created by grant but was laid off under the statute.

93. *Julien v. Woodsmall*, 82 Ind. 568.

94. *Emans v. Turnbull*, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427.

94a. *Hammond v. Hammond*, 258 Pa. 51, 101 Atl. 855.

way,⁹⁵ or unless the latter has caused the obstruction of the way.⁹⁶

— **Location.** If the location and limits of the right of way are not defined in the grant, a reasonably convenient and suitable way is presumed to be intended, and the right cannot be exercised over the whole of the land.⁹⁷ Subject to the requirement of reasonable convenience and suitability, the owner of the servient tenement may ordinarily, in such case, fix the location, and it has been considered that if he fails to do so, the owner of the easement is entitled to fix it.⁹⁸ And this is the case as regards a way of necessity to the same extent as any other way created by grant.⁹⁹

95. Taylor v. Whitehead, 2 Doug. 745; Lund v. Wilcox, 34 Utah, 205, 97 Pac. 33.

96. Selby v. Nettlefold, 9 Ch. App. 111; Farnum v. Platt, 8 Pick. (Mass.) 339; Bass v. Edwards, 126 Mass. 445; Kent v. Judkins, 53 Me. 162; Rockland Water Co. v. Tillson, 75 Me. 170; Haley v. Colcord, 59 N. H. 7, 47 Am. Rep. 176; Jarsdadt v. Smith, 51 Wis. 96. *Contra*, Williams v. Safford, 7 Barb. (N. Y.) 309. See Holmes v. Seely, 19 Wend. (N. Y.) 507.

97. Long v. Gill, 80 Ala. 403; Johnson v. Kinnicutt, 2 Cush. (Mass.) 153; Gardner v. Webster, 64 N. H. 520, 15 Atl. 144; Grafton v. Moir, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974 (reservation).

98. Ballard v. Titus, 157 Cal. 673, 110 Pac. 118. Shedd v. America Maize Products Co., 60 Ind. App. 146, 108 N. E. 610; Bangs v. Parker, 71 Me. 458; McKenney

McKenney, 216 Mass. 248, 103 N. E. 631; Bunch v. Wheeler, 210 Mo. 622, 109 S. W. 654; Callen v. Häuse, 91 Minn. 270, 97 N. W. 973; Smith v. Wiggins, 52 N. H. 112; Peduzzi v. Restelli, 79 Vt. 349, 64 Atl. 1128; Stephens v. Gordon, 22 Can. Sup. Ct. 61. In McKell v. Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765, it is said that the owner of the way may locate it. The opinion refers to Hart v. Connor, 25 Conn. 331, but there the right to locate the way was expressly reserved.

99. Gale, Easements [8th ed.] 1982; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Ritchey v. Welsh, 149 Ind. 214, 40 L. R. A. 105, 48 N. E. 1031; Russell v. Jackson, 2 Pick. (Mass.) 574; Bass v. Edwards, 126 Mass. 445; Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154; Herrin v. Siebern, 46 Mont. 226, 127 Pac. 323; Holmes v. Seely, 19 Wend. (N. Y.) 507; Capers v. Wilson, 3 McCord, (S. C.) 170; McMil-

In case there has been, up to the time of the grant and at the time thereof, a user of the land for purposes of passage along a certain line, this will, it has been said, be presumed to be the location intended.¹

Frequently, the location of the way is determined by subsequent agreement,^{1a} or by the exercise of the right of way in a particular line with the acquiescence of the owner of the servient tenement,² the parties to the grant thus placing their own construction thereon in this regard.

The power of a court of equity to fix the location has been recognized in a number of cases,³ apparently

len v. McKee, 129 Tenn. 39, 164 S. W. 1197; Jenne v. Piper, 69 Vt. 497, 38 Atl. 147.

But not, it has been said, when the way of necessity resulted from a partition proceeding between several persons, so that the recognition of an option to locate in one of them would involve a power to discriminate between the others. Mesmer v. Uharriet, 174 Cal. 110, 162 Pac. 104.

1. Karnmuller v. Krotz, 18 Iowa, 352; Cotting v. Murray, 209 Mass. 133, 95 N. E. 212; Thompson v. Flint & P. M. R. Co., 131 Mich. 95, 90 N. W. 1037; Crocker v. Crocker, 5 Hun, (N. Y.) 587; Kraut's Appeal, 71 Pa. St. 64; Kinney v. Hooker, 65 Vt. 333, 36 Am. St. Rep. 864.

1a. Gerrish v. Shattuck, 128 Mass. 571; Eureka Land Co. v. Watts, 119 Va. 506, 89 S. E. 968; See Morris v. Blunt, 49 Utah, 243, 161 Pac. 1127.

2. Roberts v. Stevens, 40 Ill. App. 138; Dickenson v. Crowell, 120 Iowa, 254, 94 N. W. 495; Roland v. O'Neal, (Ky.) 122 S. W. 827, (way of necessity); Bannon v. An-

gier, 2 Allen (Mass.) 128; O'Brien v. Goodrich, 177 Mass. 32, 58 N. E. 151; Board of Sup'rs of Lamar County v. Elliott, 107 Miss. 841, 66 So. 203; Davis v. Watson, 89 Mo. App. 15; Wynkoop v. Burger, 12 Johns. (N. Y.) 222; Crocker v. Crocker, 5 Hun, (N. Y.) 587; Warner v. Columbus, etc., R. Co. 39 Ohio St. 70; Eureka Land Co. v. Watts, 119 Va. 506, 89 S. E. 968; Fritsche v. Fritsche, 77 Wis. 266, 45 N. W. 1088; Kalinowski v. Jacobowski, 52 Wash. 359, 100 Pac. 852.

But it was held that the acquiescence by the servient owner in the passage by the dominant owner over a particular line did not show a location of the way in this line if the condition of the servient tenement was such that it was immaterial where the other passed. Smith v. Wiggin, 52 N. H. 112. And see Colt v. Redfield, 59 Conn. 427, 22 Atl. 426.

3. Lide v. Hadley, 36 Ala. 627, 76 Am. Dec. 338; Ballard v. Titus, 157 Cal. 673, 110 Pac. 118; Davidson v. Ellis, 9 Cal. App. 145, 98 Pac. 254; McKenney v. McKen-

on the ground that a multiplicity of suits is thereby avoided.

— **Width of way.** As regards the width of the way, a specific statement in the grant obviously governs,⁴ and such a statement is not controlled by considerations as to what is reasonable or necessary.⁵ A specification of the way as being of a certain width has been regarded as not entitling the grantee to utilize more than that width in order to be able to make a road of that width.⁶

If the width is not fixed by the terms of the grant, the grantee is ordinarily entitled to a way of such width as is sufficient to afford reasonable access and egress.⁷ And if the way is granted for a particular purpose, what is reasonably necessary for that purpose is to be considered.⁸ That the grantee used a particular width with the acquiescence of the grantor has been regarded as controlling in this regard as a practical location of the way.⁹ And the particular grant may call for a

ney, 216 Mass. 248, 103 N. E. 6731; *Burnham v. Mahoney*, 222 Mass. 524, 111 N. E. 396; *Higbee Fishing Club v. Atlantic City Electric Co.*, 78 N. J. Es. 434, 79 Atl. 326 (way of necessity); *Gardner v. Webster*, 64 N. H. 520, 15 Atl. 144; *McMillan v. McKee*, 129 Tenn. 39, 164 S. W. 1197 (way of necessity).

4. See *Stetson v. Curtis*, 119 Mass. 266; *Gray v. Kelley*, 194 Mass. 533, 80 N. E. 651.

5. *Ballard v. Titus*, 157 Cal. 673, 110 Pac. 118.

6. *Ballard v. Titus*, 157 Cal. 673, 110 Pac. 118; *Dewire v. Hanley*, 79 Conn. 454, Atl. 573.

In *Stevenson v. Stewart*, 7 Phila. 293, it was considered that a grant of a right to use an alley three feet wide did not give a right to

a way three feet wide, the alley being clearly defined by permanent structures as an alley less than three feet wide. The reference to width was obviously not a statement of the width of the way to be exercised, but merely an inaccurate description of the place where it was to be exercised.

7. *Bright v. Allan*, 203 Pa. 386; *Lipsky v. Heller*, 199 Mass. 310, 85 N. E. 453; *Walker v. Pierce*, 38 Vt. 94; *Wiley v. Ball*, 72 W. Va. 685, 79 S. E. 659.

8. *Drummond v. Foster*, 107 Me. 401, 78 Atl. 470; *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700.

9. *George v. Cox*, 114 Mass. 382.

10. *Salisbury v. Andrews*, 19 Pick. (Mass.) 250; *Gerrish v. Shattuck*, 128 Mass. 571; *Stevenson v. Stewart*, 7 Phila. (Pa.) 293.

construction as intending a way as already existent and defined by use or paving or the like.¹⁰ A grant or reservation of a right of passage over a space of a named width has been construed as giving a right of way, not of that width, but of merely a convenient width, to be located upon that space.¹¹

— **Change of location.** After the point or place at which, or line along which, an easement is to be exercised has once been fixed, whether by the express terms of the grant, or by agreement or acquiescence, one of the parties cannot change such location without the consent of the other.¹² There are in this country, however, several cases to the effect that the location of a way may be changed by oral agreement of the parties, or agreement inferred from conduct.¹³ These

But a grant of a right of way over an existing road does not necessarily involve a right of way as to the whole width of the road, so as to preclude the erection of an obstruction on the road not interfering with the reasonable exercise of the easement. *Grafton v. Moir*, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 533; *Abney v. Twombly*, 39 R. I. 304, 97 Atl. 806; *Clifford v. Hoare*, L. R. 9 C. P. 362. See *Gimble v. Wehr*, 165 Wis. 1, 160 N. W. 1080.

11. *Johnson v. Kinnicut*, 2 Cush. (Mass.) 153; *Short v. Devine*, 146 Mass. 119, 15 N. E. 148.

In *Cleaves v. Braman*, 103 Me. 154, 68 Atl. 857, it was held that the grant of a way over "a piece of land forty feet wide in every part" did not entitle the grantee to use the whole forty feet if not needed. Compare *Tudor Ice Co. v. Cunningham*, 8 Allen

(Mass.) 139.

12. *Richey v. Welsh*, 149 Ind. 214, 40 L. R. A. 105, 48 N. E. 1031; *Jennison v. Walker*, 11 Gray, (Mass.) 423 (aqueduct); *Kesseler v. Bowditch*, 223 Mass. 265, 111 N. E. 887 (windows); *Galloway v. Wilder*, 26 Mich. 97; *Jaqui v. Johnson*, 27 N. J. Eq. 526; *Manning v. Port Reading R. Co.*, 54 N. J. Eq. 46, 33 Atl. 802; *Johnson v. Hahne*, 61 N. J. Eq. 438, 49 Atl. 5 (easement of light); *Onthank v. Lake Shore R. Co.*, 71 N. Y. 174 (aqueduct); *Moore-Lead v. Snyder*, 31 Pa. 514 (tall race); *Garraty v. Duffy*, 7 R. I. 476; *Eureka Land Co. v. Watts*, 119 Va. 506, 89 S. E. 968 (way); *Rhoades v. Barnes*, 54 Wash. 145, 102 Pac. 884 (right to take water from stream).

13. *Durkee v. Jones*, 27 Colo. 159, 60 Pac. 618; *Peck v. Lloyd*, 38 Conn. 566; *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222; *Hamilton*

cases do not explain how, since an easement can be created only by grant or its equivalent, one can acquire, by oral agreement, an easement not previously existing, even though he does, in exchange therefor, relinquish a similar easement which he has in the same land. A right of way along line A is not the same easement as a right of way along line B, even though the dominant and servient tenements are identical in the two cases. There are cases in this country,¹⁴ as in England,¹⁵ in which the view is indicated that the substituted way is to be regarded as temporary only, so that if such way is withdrawn by the owner of the servient tenement, the other has a right to use the old way. If, however, there is an intention permanently to change the route, it might well be found, it would seem, that the way over the old route is extinguished by abandonment.¹⁶ And in case the owner of the easement makes expenditures on the servient tenement on the faith of the oral agreement, he might be regarded as acquiring an easement in accordance therewith by estoppel.¹⁷ The court would no doubt endeavor to avoid a finding that the easement over the original route was abandoned unless it could recognize a valid easement over the new route.

v White, 4 Barb. (N. Y.) 60; Smith v. Barnes, 101 Mass. 275; Chenault v. Gravitt, 27 Ky. L. Rep. 403, 85 S. W. 184; Berkey & Gay Furniture Co. v. Valley City Milling Co., 194 Mich. 234, 166 N. W. 548; Rumill v. Robbins, 77 Me. 193 (way of necessity); Tarrutt v. Grant, 94 Me. 371, 47 Atl. 899; Smith v. Lee, 14 Gray (Mass.) 473; Gage v. Pitts, 8 Allen (Mass.) 531; Davidson v. Kretz, 127 Minn. 313, 149 N. W. 652; Lawton v. Tison, 12 Rich. (S. C.) 88; Stockwell v. Fitz-

gerald, 70 Vt. 468, 41 Atl. 504; See Mary Helen Coal Co. v. Hatfield, 75 W. Va. 148, 83 S. E. 292.

14. Wright v. Willis, 23 Ky. Law Rep. 556, 63 S. W. 991; Hamilton v. White, 5 N. Y. 9.

15. Lovell v. Smith, 3 C. B. N. S. 120.

16. Crounse v. Wemple, 29 N. Y. 540; Pope v. Devcreux, 5 Gray (Mass.) 409. Nichols v. Peck, 70 Conn. 439, 40 L. R. A. 81, 66 Am. St. Rep. 122, 39 Atl. 830.

17. *Ante*, § 366(c).

— **Party walls.** The grant of an easement to use a wall for party wall purposes *prima facie* involves the privilege of increasing the height of the wall in order to erect a higher building, if this does not unduly burden the wall, or in any way operate to the detriment of the adjoining proprietor,¹⁸ and subject to any express restriction in the grant as to the height to which the easement may extend.¹⁹

18. *Graves v. Smith*, 87 Ala. 450, 13 Am. St. Rep. 60, 6 So. 304; *Tate v. Fratt*, 112 Cal. 613, 44 Pac. 1061; *Bright v. Bacon & Sons*, 131 Ky. 848, 116 S. W. 386, 20 L. R. A. N. S. 386; *Field v. Leiter*, 118 Ill. 17, 6 N. E. 877; *Everett v. Edwards*, 149 Mass. 588, 5 L. R. A. 110, 14 Am. St. Rep. 462, 22 N. E. 52; *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627.

That he can raise the wall to the extent that it is on his own land, see *Andrae v. Haseltine*, 58 Wis. 395, 46 Am. Rep. 635. That he may raise a party wall although it is entirely on the land of the adjacent owner, see *Tate v. Fratt*, 112 Cal. 613, 44 Pac. 1061; *Dorsey v. Habersack*, 84 Md. 117, 35 Atl. 96.

It has been held, in at least one case, that, upon using the addition to the wall, the other proprietor is bound to contribute part of the cost. *Sanders v. Martin*, 2 Lea. (Tenn.) 213, 31 Am. Rep. 598. And *Citizens Fire Ins. Co. v. Lockridge & Ridgeway*, 132 Ky. 1, 20 L. R. A. (N. S.) 226, 116 S. W. 303, contains a *dictum* to that effect. *Contra*, *Allen v. Evans*, 161 Mass. 485.

The assumption in *Walker v. Stetson*, 162 Mass. 86, that he is so bound, appears to be based on the language of the original agreement under which the wall was constructed. The statute occasionally provides that he shall be so liable. *Howell v. Goss*, 128 Iowa, 569, 105 N. W. 61; *Yunker v. McCutchen*, 177 Iowa, 634, L. R. A. 1917B, 949, 159 N. W. 441.

The grant of a right to insert girders in a wall or to build against the wall does not confer party wall rights, so as to entitle the grantee to raise the wall. *Moore v. Rayner*, 58 Md. 411; *Miller v. Stuart*, 107 Md. 23, 68 Atl. 273.

19. *Frowenfeld v. Casey*, 139 Cal. 421, 73 Pac. 152; *Heune v. Lankershim*, 146 Cal. 70, 79 Pac. 853; *Calmelet v. Sichel*, 48 Neb. 505, 67 N. W. 467, 58 Am. St. Rep. 700; *Fidelity Lodge v. Bond*, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825.

It appears to be the rule in England that if the adjoining owners are tenants in common of the wall, one of them cannot raise the wall without the others consent. *Watson v. Gray*, 12 Ch. Div. 192. A contrary view is as-

An addition thus made to the wall by virtue of one's right to use the wall as a party wall partakes of the character of the original wall, as regards the right of user thereof.^{19a} And the requirement which exists in the case of the original wall, when placed on the division line, that it contain no openings, such as windows,^{19b} applies as well to the addition placed upon the wall.²⁰

It has been decided in one case that when a party wall is erected one-half on each of the two adjoining properties, one proprietor can extend his beams into the wall only so far as the limits of his own land,²¹ and there are occasional intimations to this effect in other cases.²² There cannot well be, however, any absolute rule to this effect. A could no doubt grant to B in express terms the privilege of extending his beams entirely through the wall, and in any case the extent to which beams can be inserted is a question of the construction of the "party wall agreement," that is, of the grant of the easement, in each particular case, the usage of builders in that community being a weighty consideration in this connection. If the wall is entirely on the land of one proprietor, the adjoining proprietor, having a party wall easement therein, has almost necessarily the privilege of extending beams in the

sented in *Wallis v. First Nat. Bank of Racine*, 155 Wis. 306, 143 N. W. 670.

19a. *Graves v. Smith*, 87 Ala. 450, 13 Am. St. Rep. 60; *Allen v. Evans*, 161 Mass. 485. See *Field v. Leiter*, 118 Ill. 17.

For cases construing a contract as requiring contribution to the cost of such an addition only for a building subsequently erected, see *Shaw v. Hitchcock*, 119 Mass. 254; *Fox v. Mission Free School*, 120 Mo. 349, 25 S. W. 172. And see *Yunker v. McCutchen*, 177

Iowa, 634, L. R. A. 1917B, 949, 159 N. W. 441 (statute).

19b. *Post*, this section, note 31.

20. *Graves v. Smith*, 87 Ala. 450, 13 Am. St. Rep. 60, 6 So. 304; *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627.

21. *Loderer & Strauss v. Colonial Investment Co.*, 130 Iowa, 157, 8 Ann. Cas. 317, 106 N. W. 357.

22. *McMinn v. Karter*, 116 Ala. 390, 22 So. 17; *Walker v. Stetson*, 162 Mass. 86, 38 N. E. 18.

wall beyond the limits of his own land, and there is no legal objection to his having that privilege when the wall is partially on his own land.

One of the two adjoining owners cannot ordinarily remove or impair the party wall,²³ except as such removal or impairment is merely temporary and for the purpose of strengthening the wall or substituting therefor another wall more suitable for his purposes.²⁴ Even in the latter case he is liable for any damage caused to the other by his failure properly to support and protect the latter's property during the operation,²⁵ or, if it is left to the other to protect his property, the latter is entitled to be indemnified the necessary expenses of such protection.²⁶ It does not seem that one altering a party wall by raising it or otherwise is absolutely liable for any injury which may result to the other in the course of the work. He is merely bound to use diligence to prevent such injury.²⁷

23. *Nippert v. Warneke*, 128 Cal. 501, 61 Pac. 270; *Montgomery v. Trustees of Masonic Hall*, 70 Ga. 38; *Schile v. Brokhahus*, 80 N. Y. 619; *Briggs v. Klosse*, 5 Ind. App. 129, 51 Am. St. Rep. 238, 31 N. E. 208; *Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279. But see *Hieatt v. Morris*, 10 Ohio St. 523, 78 Am. Dec. 280. *Clemens v. Speed*, 93 Ky. 284, 19 L. R. A. 240, 19 S. W. 660; *Williamson Inv. Co. v. Williamson*, 96 Wash. 529, 165 Pac. 385.

24. *Eno v. Del Vecchio*, 4 Duer (N. Y.) 53, 6 Duer, 17; *Putzel v. Drovers & M. Nat. Bank*, 78 Md. 349, 44 Am. St. Rep. 298, 22 L. R. A. 632, 28 Atl. 276; *Lexington Lodge v. Beal*, 94 Miss. 521, 49 So. 833; *Mann v. Riegler*, 33 Ky. L. Rep. 774, 111 S. W. 300;

Bellenot v. Laube, 104 Va. 842, 52 S. E. 698. That he cannot substitute another wall, see *Partridge v. Lyon*, 67 Hun, 29, 21 N. Y. Supp. 848.

In some states the statute authorizes him to make alterations in the wall for his own purposes. *Fowler v. Saks*, 7 Mackey (D. C.) 570, 7 L. R. A. 649; *Haine v. Merrick*, 41 La. Ann. 194. *Evans v. Jayne*, 23 Pa. 34.

25. *Eno v. Del Vecchio*, 4 Duer (N. Y.) 53, 6 Duer, 17.

26. *Putzel v. Drovers & M. Nat. Bank*, 78 Md. 349, 44 Am. St. Rep. 298, 22 L. R. A. 632, 28 Atl. 276.

27. *Negus v. Becker*, 143 N. Y. 303, 25 L. R. A. 667, 42 Am. St. Rep. 68, 38 N. E. 290, explaining *Brooks v. Curtis*, 50 N. Y. 639,

If the wall is in a ruinous or unsafe condition, one proprietor may repair it or replace it by a new wall, and he is not liable for the cost of protecting the adjoining property during the prosecution of the work, or for any loss necessarily incident thereto, as of business or rent,²⁸ though he is liable for any injury caused by negligence in the doing of the work.²⁹

There is at least one decision to the effect that, if the party wall becomes unsafe or ruinous, it may be rebuilt by one of the adjoining owners, and the other will be compelled to pay part of the cost.³⁰

A grant of the privilege of placing on the grantor's land a wall to be used as a party wall does not ordinarily enable the grantee to place thereon a wall with openings, such as windows, therein, the expression party wall meaning *prima facie* a solid wall.³¹ A right to have openings in the wall may, however, be included in the grant,³² or rather, as the owner of the land may grant the privilege of placing or maintaining

10 Am. Rep. 545; Lexington Lodge v. Beal, 94 Miss. 521, 49 So. 833. See Putzel v. Drovers & M. Nat. Bank, 78 Md. 349, 44 Am. St. Rep. 298, 22 L. R. A. 632, 28 Atl. 273, and Heine v. Merrick, 41 La. Ann. 194, 5 So. 760, 6 So. 637. Compare Fleming v. Cohen, 186 Mass. 323, 104 Am. St. Rep. 572, 71 N. E. 563.

28. Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632; Maypole v. Forsyth, 44 Ill. App. 494; Crawshaw v. Sumner, 56 Mo. 517; Hoffman v. Kuhn, 57 Miss. 746, 34 Am. Rep. 491.

29. Negus v. Becker, 143 N. Y. 303; Crawshaw v. Sumner, 56 Mo. 517.

30. Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 334. See Howze v. Whitehead, 93 Miss. 578, 46 So.

401; Bellenot v. Laube's Ex'r, 101 Va. 842, 52 S. E. 698; Sanders v. Martin, 2 Lea (Tenn.) 213.

31. Bartley v. Spaulding, 21 Dist. Col. 47; Kuh v. O'Reilly, 261 Ill. 437, 104 N. E. 5; Bonney v. Greenwood, 96 Me. 335, 52 Atl. 786; Coggins & Owens v. Carey, 106 Md. 204, 10 L. R. A. (N. S.) 1191, 124 Am. St. Rep. 468, 66 Atl. 673; Normille v. Gill, 159 Mass. 427, 38 Am. St. Rep. 441, 34 N. E. 94; Harber v. Evans, 101 Mo. 661, 10 L. R. A. 41, 20 Am. St. Rep. 646, 14 S. W. 750; De Baun v. Moore, 167 N. Y. 598, 60 N. E. 1110; Cutting v. Stokes, 72 Hun. (N. Y.) 376, 25 N. Y. Supp. 365; Holden v. Tidwell, 37 Okla. 553, 133 Pac. 54. Dauenhauer v. Devine, 51 Tex. 480, 32 Am. Rep. 627.

a solid wall on his land, so he may grant the privilege of placing or maintaining thereon a wall with openings.³³ It has been said that the right to have openings in a partition wall may be acquired by prescription,³⁴ but this appears to be questionable.³⁵

The grant of the privilege of placing or maintaining a wall in part on one's land may expressly include a right to have flues therein.³⁶ Or there may be an implied grant of such a right based on the existence of the flues before the severance of ownership of the two properties.³⁷ Whether the grant of the privilege of erecting a wall, or of utilizing it, for party wall purposes, involves a right to maintain flues therein, is a question of construction, in the solution of which the practice of builders in that community as regards the placing of flues in party walls is entitled to consideration.³⁸

§ 368. Easements created by prescription. In the case of prescriptive easements, the mode and extent of user of the servient tenement permissible are determined, generally speaking, by the mode and extent

32. *Grimley v. Davidson*, 133 Ill. 116, 24 N. E. 439; *Weigmann v. Jones*, 163 Pa. 230, 30 Atl. 198; *Reynolds v. Union Sav. Bank*, 155 Iowa, 519, 136 N. W. 529.

33. *Lengyel v. Meyer*, 70 N. J. Eq. 501, 62 Atl. 548; *Dunscomb v. Randolph*, 107 Tenn. 89, 89 Am. St. Rep. 915, 64 S. W. 21; *Stein v. Bernsford*, 108 Minn. 177, 121 N. W. 879. *Hammann v. Jordan*, 129 N. Y. 61, 29 N. E. 294.

34. *Graves v. Smith*, 87 Ala. 450, 5 L. R. A. 298, 13 Am. St. Rep. 60, 6 So. 308.

35. *Post* § 517.

36. *Pier v. Salot*, — (Iowa), —, 107 N. W. 420.

37. *Ingals v. Plamandon*, 75 Ill. 118; *De Baun v. Moore*, 167 N. Y. 598, 60 N. E. 1110.

In *Koolbeck v. Baughn*, 126 Iowa, 194, it was held that in view of a statutory provision that the builder of the wall shall insert flues at the request of the other, such other, having failed to make such request, cannot utilize flues placed in the wall by the builder, though they extend over the limits of his lot.

38. See *Hammann v. Jordau*, 129 N. Y. 61, 29 N. E. 294; *De Baun v. Moore*, 167 N. Y. 598, 60 N. E. 1110.

of the user during the prescriptive period.³⁹ Accordingly a prescriptive right to divert or pollute water enables one to divert or pollute it to the extent to which the diversion or pollution extended during such period,⁴⁰ and one having a prescriptive right to overflow another's land can overflow it to the extent to which he was accustomed to overflow it during the prescriptive period.^{40a} But a question of very considerable difficulty may arise by reason of the assertion, by the person entitled to the easement, of a right of user of the same general character and extent as the prescriptive user, but varying in some degree therefrom. This matter is considered elsewhere in connection with the subject of prescription.^{40b}

§ 369. **Effect of change in dominant tenement.** The fact that, after the making of a grant of an easement, there is a change in the mode in which the dominant tenement is utilized, so that as a result thereof the easement is more constantly exercised, has usually been regarded as not affecting the existence of the easement.⁴¹ Occasionally, however, a different view

39. *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Postlethwaite v. Payne*, 8 Ind. 104; *Barry v. Edlavitch*, 84 Md. 95, 33 L. R. A. 294, 35 Atl. 170; *Prentice v. Geiger*, 74 N. Y. 341; *Lewis v. New York etc. R. Co.*, 162 N. Y. 202, 56 N. E. 540. *Elliott v. Rhett*, 5 Rich. L. (S. C.) 405, 57 Am. Dec. 750; *Arbuckle v. Ward*, 29 Vt. 43.

40. *Crossley v. Lightowler*, 2 Ch. App. 478; *McCallum v. Germantown Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656; *Middlesex Co. v. City of Lowell*, 149 Mass. 509, 21 N. E. 872.

40a. *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243; *Car-*

lisle v. Cooper, 21 N. J. Eq. 576; *Gilford v. Winnipiseogee Lake Co.*, 52 N. H. 262; *Tucker v. Salem Flouring Mills Co.*, 13 Ore. 28, 7 Pac. 53. *Sabine v. Johnson*, 35 Wis. 185.

40b. *Post*, § 531.

41. *Greist v. Amrhyhyn*, 80 Conn. 280, 68 Atl. 521 (*semble*); *Randall v. Grant*, 210 Mass. 302, 96 N. E. 672; *Parsons v. New York N. H. & H. R. Co.*, 216 Mass. 269, 103 N. E. 693; *Abbott v. Butler*, 59 N. H. 317; *Kretz v. Fireproof Storage Co.*, 127 Minn. 304, 149 N. W. 648; *Gillespie v. Weinberg*, 148 N. Y. 238, 42 N. E. 676, *Flint v. Bacon*, 13 Hun. (N. Y.) 454; *Benner v. Junker*, 190 Pa. 423, 43 Atl. 72;

was adopted in the particular case.⁴² It is, properly speaking, a question of the construction of the grant, that is, of whether the parties thereto intended that the easement should be exercised irrespective of a change in the user of the dominant tenement, and, by the weight of authority, the presumption appears to be, as above indicated, that such was the intention. The increase of the burden on the servient tenement is, it would seem, immaterial, except as it may render it less probable that such a change of user was within the contemplation of the parties at the time of the grant.

In accordance with the view ordinarily taken, that a change in the mode of utilizing the dominant tenement does not affect the existence of the easement, is the view generally adopted, that upon the subsequent subdivision of the original dominant tenement, a right of way is appurtenant to each and every part.⁴³ And

Frazier v. Berry, 4 R. I. 440; *United Land Company v. Great Eastern Railway Co.*, L. R. 10 Ch. 586; *Newcomen v. Coulson*, L. R. 5 Ch. Div. 133; *Finch v. Great Western R. Co.*, L. R. 5 Ex. D. 254; *White v. Grand Hotel, Eastbourne, Limited* (1913) 1 Ch. 113.

42. It was held that, where there was a grant of a way to a loft, and the space or opening under the loft then used as a wood house, the way no longer existed after the open space had been built over and changed into a dwelling house. *Allan v. Gomme*, 11 Adol. & E. 759. This decision was, however, questioned by *Parke, B.*, in *Henning v. Burnett*, 8 Exch. 187.

In *Wood v. Saunders*, 10 Ch. App. 582, it was held that one to whom was granted a right of drainage through adjacent land

for the benefit of land on which was a private residence at the time of the grant could not exercise the right for the benefit of large additions made to the house for the purpose of changing it into a sanitarium. See also *Great Western Railway v. Talbot* (1902) 2 Ch. 759.

In *Goodwillie v. Commonwealth Electric Co.*, 241 Ill. 42, 89 N. E. 272, it was held that the grant of a right to use a switch track, in favor of owners of a lumber yard, did not justify the use of the track for carrying coal to an electric plant thereafter constructed on the site of the lumber yard.

43. *Currier v. Howes*, 103 Cal. 431, 37 Pac. 521; *Sweeney v. Landers Frary & Clark*, 80 Conn. 575, 69 Atl. 566; *Durkee v. Jones*, 27 Colo. 159, 60 Pac. 618; *Brossart*

the same rule has been applied in connection with an easement of another character.⁴⁴

An easement of necessity has been regarded as not limited, as regards its utilization, by the mode in which the dominant tenement was used at the time of the creation of the right, but as available for any use incident to a change in the use of such tenement.⁴⁵ And accordingly a way of necessity has been regarded as available to each one of various grantees of a part of the tenement to which the way was originally appurtenant.⁴⁶

In the case of a prescriptive easement, the question whether a change in the dominant tenement affects the right to exercise the easement depends, in a general way, upon whether the effect of the change is materially to increase the burden upon the servient tenement or alter the character of the user thereof.^{46a}

v. Corlett, 27 Iowa, 288; Garrison v. Rudd, 19 Ill. 559; Underwood v. Carney, 1 Cush. (Mass.) 285; Durkin v. Cobleigh, 156 Mass. 108, 17 L. R. A. 270, 32 Am. St. Rep. 436, 30 N. E. 474; Forbes v. Commonwealth, 172 Mass. 289, 52 N. E. 511. Moore v. White, 159 Mich. 460, 124 N. W. 62; Dawson v. St. Paul F. & M. Ins. Co., 15 Minn. 136, (Gil 102), 2 Am. Rep. 109; Diocese of Trenton v. Toman, 74 N. J. Eq. 702, 70 Atl. 606; Lansing v. Wiswall, 5 Denio (N. Y.) 213. Gunson v. Healy, 100 Pa. 42; Ehret v. Gunn, 166 Pa. 384, 31 Atl. 200; Dee v. King, 77 Vt. 230, 68 L. R. A. 860, 59 Atl. 839; Linkenhofer v. Graybill, 80 Va. 835; Newcomen v. Coulson, L. R. 5 Ch. Div. 141. A different rule "would force every person who has a right of way to preserve his property entire, in order to

preserve his passage." Tilghman, C. J., in Watson v. Bioren, 1 S. & R. (Pa.) 227, 7 Am. Dec. 617.

44. Harris v. Drewe, 2 B. & Ad. 164 (church pew); Blood v. Millard, 172 Mass. 65, 51 N. E. 527 (right to take water from spring); Hills v. Miller, 3 Paige (N. Y.) 254, 24 Am. Dec. 218 (right to have strip of land left vacant).

45. Myers v. Dunn, 49 Conn. 71; Whittier v. Winkley, 62 N. H. 338; Crotty v. New River & Pocahontas Coal Co., 72 W. Va. 68, 78 S. E. 233; *Contra*, Corporation of London v. Riggs, L. B. 13, Ch. Div. 798.

46. Erie R. Co. v. S. H. Kleinman Realty Co., 92 Ohio St. 96, 110 N. E. 527.

46a. *Post*, § 531.

§ 370. **Alterations and repairs.** The owner of the easement may enter on the servient tenement and make such changes therein as are necessary for the proper exercise of the easement.⁴⁷ Thus, one having a right of way may prepare the land for its exercise, according to the nature of the way, that is, according as it may be a foot way, a horseway, or a way for all teams and carriages.⁴⁸ And he may subsequently make alterations in the servient tenement in so far as this may be necessitated by a change of conditions for which he is not responsible.⁴⁹ He cannot, however, make alterations in the servient tenement, which are not necessary for the exercise of the easement, even though they conduce to the convenience of its exercise, if such alterations will injuriously affect the servient tenement.⁵⁰

The owner of the easement may likewise enter on the servient tenement in order to make any repairs necessary to the exercise of the easement, and may make use of the servient tenement for this purpose to a reasonable extent;⁵¹ and he may even prevent the con-

47. *Newcomen v. Coulson*, 5 Ch. Div. 133; *Burris v. People's Ditch Co.*, 104 Cal. 248, 37 Pac. 922; *White v. Eagle & Phenix Hotel Co.*, 68 N. H. 38, 34 Atl. 672; *Freeman v. Sayre*, 48 N. J. Law, 37; *Herman v. Roberts*, 119 N. Y. 37, 7 L. R. A. 226, 16 Am. St. Rep. 800, 23 N. E. 442; *Hammond v. Hammond*, 258 Pa. 51, 101 Atl. 855; *Wallis v. First Nat. Bank of Racine*, 155 Wis. 306, 143 N. W. 670.

48. *Senhouse v. Christian*, 1 Term. Rep. 560; *Newcomen v. Coulson*, 5 Ch. Div. 133; *Knudson v. Frost*, 56 Colo. 530, 139 Pac. 533; *White v. Eagle & Phenix Hotel Co.*, 68 N. H. 38, 34 Atl. 672; *Herman v. Roberts*, 119 N.

Y. 37, 7 L. R. A. 226, 16 Am. St. Rep. 800, 23 N. E. 442.

49. *Nichols v. Peck*, 70 Conn. 439, 40 L. R. A. 81, 66 Am. St. Rep. 122, 39 Atl. 493; *Finlinson v. Porter*, L. R. 10 Q. B. 188.

50. *Capers v. McKee*, 1 Strob. L. (S. Car.) 164; *McMillen v. Cronin*, 13 Hun (N. Y.) 68; *Knudson v. Frost*, 56 Colo. 530, 139 Pac. 533; *Hotchkiss v. Young*, 42 Gre. 446, 71 Pac. 324; *Redemptorists v. Wenig*, 79 Md. 348, 29 Atl. 667; *Draper v. Varnerin*, 220 Mass. 67, 107 N. E. 350.

51. *Pomfret v. Ricroft*, 1 Wms. Saund. 323, note 6; *Pico v. Colinas*, 32 Cal. 578; *Lamott v. Ewers*, 106 Ind. 310, 55 Am. St. Rep. 746, 6 N. E. 636; *Hammond*

struction of a building necessary to the beneficial use of the land, if the building would prevent the making of repairs.⁵²

In the absence of an express stipulation or prescriptive obligation to that effect, there is no requirement that the owner of the servient tenement put or keep it in proper condition for the exercise of the easement, though he must not actively obstruct its exercise.⁵³ So the fact that the owner of a building has a right of support from an adjoining building does not entitle him to demand that the owner of the latter keep it in repair so as to furnish sufficient support,⁵⁴ nor can the owner of an upper floor compel the repair of the lower floor by the owner thereof.⁵⁵

v. Woodman, 41 Me. 177, 66 Am. Dec. 219; Prescott v. White, 21 Pick. (Mass.) 341; Brown v. Stone, 10 Gray (Mass.) 61, 69 Am. Dec. 303; McMillan v. Cronin, 75 N. Y. 474; Thompson v. Uglow, 4 Ore. 369; Walker v. Pierce, 38 Vt. 94.

In Kepler v. Border, 179 Iowa, 218, 161 N. W. 302, where several different persons had the right to use a private road, the court made an order apportioning the cost of repairs as between them.

52. Goodhart v. Hyett, 25 Ch. Div. 182.

53. Nichols v. Peck, 70 Conn. 439, 49 L. R. A. 81, 66 Am. St. Rep. 122, 39 Atl. 493; Hastings v. Chicago, R. I. & P. R. Co., 148 Iowa, 390, 126 N. W. 786; Bridwell v. Neltner, 173 Ky. 847, 191 S. W. 633; Gillis v. Nelson, 16 La. Ann. 275; Ballard v. Butler, 39 Me. 94; Rowe v. Nally, 81 Md. 367, 32 Atl. 198; Doane v. Badger, 12 Mass. 65; Harvey v.

Crane, 85 Mich. 316, 12 L. R. A. 601, 48 N. W. 582; Wynkoop v. Burger, 12 Johns. (N. Y.) 222; Herman v. Roberts, 119 N. Y. 371; 7 L. R. A. 226, 16 Am. St. Rep. 860, 23 N. E. 442.

So he is under no obligation to fence off a way to which his land is subject. Brill v. Brill, 108 N. Y. 511, 15 N. E. 538; Wiley v. Ball, 72 W. Va. 685, 79 S. E. 659, and in the case of a ditch for the supply of drinking water, it is not prima facie for the owner of the servient tenement to fence off the ditch so that the water will not be polluted by his cattle. Bellevue v. Daly, 14 Idaho, 545, 15 L. R. A. (N. S.) 592, 94 Pac. 1036. And see McCoy v. Chicago, M. & St. P. R. Co., 176 Iowa, 139, 155 N. W. 995.

54. Pierce v. Dyer, 109 Mass. 374, 12 Am. Rep. 716.

55. Tenant v. Goldwin, 1 Salk. 360, 2 Ld. Raym. 1089; Colebeck v. Girdlers Co., 1 Q. B. Div. 234;

That one has party wall rights in a wall or a part of a wall imposes no obligation on him, or on the owner of the wall, to reconstruct it when destroyed by fire or other accidental cause.^{55a} And it would seem questionable, on principle, whether one person entitled to use a party wall should have contribution from the other on account of expenditures for repairs, additions or reconstruction, undertaken by the former for his own benefit, though enuring to the benefit of the latter.^{55b}

The question of the liability for damage caused by the failure to repair or properly to construct an appliance or structure on the servient tenement, the purpose of which is to make the exercise of the easement feasible or convenient, would seem ordinarily to depend on who is in control thereof. If the owner of the dominant tenement, for instance, constructs a conduit or ditch on the servient tenement of which he retains control, he is liable, it would seem, if, by reason of failure to keep it in repair, the servient tenement is flooded,⁵⁶ and so it has been held that he is liable if damage accrues to cattle belonging to the owner of the servient tenement by reason of failure to protect them from the danger of falling into a "washout" occurring in a ditch constructed by him.⁵⁷ On the other

Pierce v. Dyer, 109 Mass. 374, 12 Am. Rep. 716; Jackson v. Bruns, 129 Iowa, 616, 3 L. R. A. (N. S.) 510, 106 N. W. 1; Gale, Easements (9th Ed.) 479. But see dictum in Graves v. Berdan, 26 N. Y. 498.

55a. Antomarehi's Ex'r v. Russell, 63 Ala. 356, 35 Am. Rep. 40; Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632; Odd Fellows' Hall Ass'n v. Hegele, 24 Ore. 16, 32 Pac. 679; Duncan v. Rodecker, 90 Wis. 1, 62 N. W. 533.

55b. But that there is a right of contribution. Howze v. Whitehead, 93 Miss. 578, 46 So. 401; Campbell v. Mesier, 4 Johns. Ch. 334; Sanders v. Martin, 2 Lea (Tenn.) 213. *Contra*, Antimarchi's Ex'r v. Russell, 63 Ala. 356, 35 Am. Rep. 40. See citations, *ante*, § 356, notes 64-66.

56. Egremont v. Pulman, M. & M. 404. See Williams v. Groucott, 4 Best & S. 199; Jones v. Fritchard (1908), 1 Ch. 630.

57. Big Goose and Beaver Ditch Co. v. Morrow, 8 Wyo. 547,

hand, it is well recognized that while the tenant of a room in an office building has an easement in the halls and elevators for the purpose of access to his room, the owner of the building, as having control of the halls and elevators, is the one liable for injuries caused by defects therein.⁵⁸ And one whose land is crossed by a railroad right of way is not liable for personal injuries caused to another by reason of defective railway equipment or negligent management thereof.^{58a}

§ 371. Interference with user. Any act which interferes with the proper exercise of the easement, whether done by the owner of the servient tenement, or by a third person, is a "disturbance" or "obstruction" of the easement, for which an action will lie. A disturbance of the easement is usually by the owner of the servient tenement, and not by a third person, and what constitutes a disturbance by him may be best defined by stating what acts he may do without being guilty of a disturbance.

The owner of the servient tenement may make any use thereof, which is not calculated to interfere with the exercise of the easement.⁵⁹ Accordingly, it has been held that one whose land is subject to an easement of flowage in favor of another may take ice formed on the water,^{59a} unless this would interfere with the purpose

80 Am. St. Rep. 955, 59 Pac. 159.

58. See 1 Tiffany, Landlord & Ten., §§ 89, 90.

58a. Earley v. Hall, 89 Conn. 606, 95 Atl. 2.

59. Long v. Gill, 80 Ala. 408; Rice v. Ford (Ky.), 120 S. W. 288; Kansas Cent. R. Co. v. Allen, 22 Kan. 285, 31 Am. Rep. 190; Chandler v. Goodridge, 23 Me. 78; Kendall v. Hardy, 208 Mass. 20, 94 N. E. 254; Harvey v. Crane, 35 Mich. 316, 12 L. R. A. 601, 48

N. W. 582; Pomeroy v. Salt Co., 37 Ohio St. 520; Smith v. Rowland, 243 Pa. 306, 90 Atl. 183; Alney v. Twombly, 39 R. I. 304, 97 Atl. 806; Southern Railway Co. v. Beaudrot, 63 S. C. 266, 41 S. E. 299; Rex v. Joliffe, 2 Term. Rep. 95.

59a. Stevens v. Kelley, 78 Me. 445, 57 Am. Rep. 913, 6 Atl. 868; Paine v. Woods, 108 Mass. 160; Eidemuller Ice Co. v. Guthrie, 42 Neb. 238, 28 L. R. A. 581, 60 N.

for which the right of flowage was created.^{59b} And one whose land is subject to a right of way may take profits, such as herbage or minerals, from the ground on which the way is located,⁶⁰ and may even plough the ground, it has been said, provided this does not unreasonably interfere with the exercise of the easement.⁶¹ He cannot pasture stock on the ground on which the way is located, especially if this is a source of danger to persons using the way.⁶²

The owner of the servient tenement may, it seems, at his own expense, make changes in connection with the appliances placed thereon for the purpose of exercising the easement, in so far as such changes in no way interfere with the exercise of the easement, he being entitled, except in so far as the exercise of the easement is concerned, to have his land in condition satisfactory to himself.^{62a}

The owner of land subject to a right of way may himself use the same way,⁶³ provided this does not

W. 717; *Valentino v. Schantz*, 216 N. Y. 1, L. R. A. 1916B, 1044, Ann. Cas. 1917C, 780, 109 N. E. 866; *Searle v. Gardner*, 13 Atl. 835 (Pa.)

59b. *Howe v. Andrews*, 62 Conn. 398, 26 Atl. 394; *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813, 6 Atl. 868; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902, 32 N. W. 800; *Dodge v. Berry*, 26 Hun (N. Y.) 246.

60. *Smith v. Langewald*, 140 Mass. 205, 4 N. E. 571; *Cleveland, C. C. & St. L. R. Co. v. Simpson*, 182 Ind. 693, 104 N. E. 301; *Greenmount Cemetery Co's Appeal*, 4 Atl. 528 (Pa.)

61. *Moffitt v. Lytle*, 165 Pa. 173, 30 Atl. 922.

62. *Espencheid v. Bauer*, 235 Ill. 172, 85 N. E. 230.

He cannot enclose a part of the land on which a railroad right of way is located, under claim of exclusive right. *Southern R. Co. v. Beaudrot*, 63 S. C. 266, 41 S. E. 299. But he has, it has been decided, the right to a private crossing over the right of way if this does not unreasonably interfere with the use of the right of way for railroad purposes. *Cincinnati, H. & D. Co. v. Wachter*, 70 Ohio St. 113, 70 N. E. 974.

62a. See *Olcott v. Thompson*, 59 N. H. 154, 47 Am. Rep. 184.

63. *Rice v. Ford* (Ky.), 120 S. W. 288; *Teachout v. Capital Lodge*, 128 Iowa, 380, 104 N. W. 440 (stairway); *Morgan v. Boyes*, 65 Me. 124; *Kretz v. Fireproof Storage Co.*, 127 Minn. 304, 149

unreasonably interfere with the exercise of the other's easement.⁶⁴ And he may also grant to another or others a similar right of way,⁶⁵ subject to the same proviso,⁶⁶ and provided, further, the prior grant was not intended to be exclusive.⁶⁷

The owner of a right of way in a city cannot ordinarily demand that the space over the way be absolutely free from projections above the way, such as bay windows, at such a height as not to interfere with the right of passage,⁶⁸ and the owner of the servient tenement may even place an arch over, or otherwise span, the line of the right of way, and erect a building thereon, provided the building is not so near the ground as unreasonably to interfere with the user of the way,⁶⁹ and, provided further, the language of the grant, construed with reference to the surrounding circumstances,

N. W. 648; *Campbell v. Kuhlman*, 38 Mo. App 628; *Goss v. Calhane*, 113 Mass. 423; *Smith v. Rowland*, 243 Pa. 306, 90 Atl. 183.

64. *Herman v. Roberts*, 119 N. Y. 37, 7 L. R. A. 226, 16 Am. St. Rep. 800, 23 N. E. 442, where the owner of the servient tenement injured the roadway prepared by the owner of the dominant tenement, by hauling heavy loads thereover.

65. *Morgan v. Boyes*, 65 Me. 124; *Smith v. Rowland*, 243 Pa. 306, 90 Atl. 183. See *Morton v. Thompson*, 69 Atl. 422, 38 Atl. 88.

66. *Greene v. Canny*, 137 Mass. 64; *Jarman v. Freeman*, 78 N. J. Eq. 464, 79 Atl. 1065, 83 Atl. 572.

67. *Greene v. Canny*, 137 Mass. 64; *Thompson v. Germani*

Life Ins. Co., 97 Minn. 89, 106 N. W. 102.

68. *Bittello v. Lipson*, 80 Conn. 497, 69 Atl. 21; *Burnham v. Nevins*, 144 Mass. 88, 59 Am. Rep. 61, 10 N. E. 494. But see *Schmoele v. Betz*, 212 Pa. 41, 108 Am. St. Rep. 845, 61 Atl. 525.

69. *Atkins v. Bordman*, 2 Mete. (Mass.) 457, 37 Am. Dec. 100; *Lipsky v. Heller*, 199 Mass. 310, 85 N. E. 310; *Duncan v. Goldthwait*, 216 Mass. 402, 103 N. E. 701; *Sutton v. Groll*, 42 N. J. Eq. 213, 15 L. R. A. 487; *Hollins v. Demorest*, 129 N. Y. 15 L. R. A. 487, 29 N. E. 1093; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974; *Andrews v. Cohen*, 221 N. Y. 148, 116 N. E. 862; *Duross v. Singer*, 224 Pa. 573, 73 Atl. 951; *Stevenson v. Stewart*, 7 Phil. (Pa.) 293.

does not indicate an intention that nothing shall be erected thereover.⁷⁰

— **Gates over way.** The cases are generally to the effect that, in the absence of language or circumstances calling for a different construction of the grant or reservation of a right of way, the owner of the servient tenement is entitled to maintain a fence with a gate therein, at either end of the way, that is, at the point where the servient tenement abuts upon a highway or upon another's property,⁷¹ and he may even be justified in placing, instead of a gate, remov-

70. For cases in which the terms and circumstances of the grant of the way were regarded as such as to preclude any erections over the way, at any height from the ground, see *Schwoerer v. Boylston Market Ass'n*, 99 Mass. 285; *Brooks v. Reynolds*, 106 Mass. 31; *Attorney General v. Williams*, 140 Mass. 329, 54 Am. Rep. 468; *Crocker v. Cotting*, 181 Mass. 146, 63 N. E. 402; *Frost v. Jacobs*, 204 Mass. 1, 90 N. E. 357; *Goodwin v. Bragaw*, 87 Conn. 31, 86 Atl. 668.

71. *Green v. Goff*, 153 Ill. 534, 39 N. E. 975; *Phillips v. Dressler*, 122 Ind. 414, 17 Am. St. Rep. 575, 24 N. E. 226; *Boyd v. Bloom*, 152 Ind. 152, 52 N. E. 751 (although use of way to be "free and unincumbered"); *Berg v. Neal*, 40 Ind. App. 575, 82 N. E. 802; *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409; *Ames v. Shaw*, 82 Me. 379, 19 Atl. 856; *Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506; *Short v. Devine*, 146 Mass. 119, 15 N. E. 148; *Gibbons v. Ebbing*, 70 Ohio St.

298, 101 Am. St. Rep. 900, 71 N. E. 720; *Connery v. Brooke*, 73 Pa. 80; *Watson v. Coke*, 73 S. Car. 36, 53 S. E. 537; *Utah-Idaho Sugar Co. v. Stevenson*, 34 Utah, 184, 97 Pac. 26; *Whaley v. Jarrett*, 69 Wis. 613, 2 Am. St. Rep. 764; *Collins v. Degler*, 74 W. Va. 455, 82 S. E. 265 (though grant of "free right of way"); *Mitchell v. Bowman*, 74 W. Va. 498, 82 S. E. 330.

That a gate was there at the time of the grant is obviously a circumstance tending to strengthen the presumption that it was contemplated by the parties that a gate might thereafter be maintained. *Truax v. Gregory*, 196 Ill. 83, 63 N. E. 674; *Garland v. Furber*, 47 N. H. 304. Conversely, the fact that the land had for a long time been used for purposes of passage without any gates having been erected tends to show that no right to erect gates was contemplated. See *Raisor v. Lyons*, 172 Ky. 314, 189 S. W. 234; *Welch v. Wilcox*, 101 Mass. 162, 100 Am. Dec. 113;

able bars at the termini of the way on the land.⁷² It is readily conceivable, indeed, that he might have a right to maintain a fence at the terminus of a footway, with merely steps to aid in climbing the fence. On the other hand, if the grant or reservation, construed with reference to the surrounding circumstances, shows an intention that no fence or gate shall be erected, such a showing of intention is controlling.⁷³

In the absence of any express language bearing upon the question of the right in this regard, the courts ordinarily treat it as a question of fact whether gates or bars will unreasonably interfere with the exercise of the easement of passage.⁷⁴ Even though the owner of the servient tenement would not otherwise have the right to place a gate or bars across the way, he may acquire the right by reason of his maintenance of the gate or bars for the prescriptive period.⁷⁵

The courts have but rarely considered the question of the right of the owner of the servient tenement to maintain a fence with a gate therein, not at one or both of the termini of the way, but across the way at a point well within his own land,⁷⁶ for the purpose of dividing his land into different tracts, to be utilized for

Garland v. Furber, 47 N. H. 301; Newsom v. Newsom (Tenn. Ch.), 56 S. W. 29.

72. Bakeman v. Talbot, 31 N. Y. 366, 88 Am. Dec. 275; Ball v. Allen, 216 Mass. 469, 103 N. E. 928; Goodale v. Goodale, 107 Me. 301, 78 Atl. 567; Jewell v. Clement, 69 N. H. 133, 39 Atl. 582.

73. Mineral Springs Mfg. Co. v. McCarthy, 67 Conn. 279 (way "to be unincumbered"); Devore v. Ellis, 62 Iowa, 505, 17 N. W. 740 (fences along way); Goodale v. Goodale, 107 Me. 301, 78 Atl. 567; Welch v. Wilcox, 101 Mass. 162, 100 Am. Dec. 113; Dicken-

son v. Whiting, 141 Mass. 414 (existing lane); Patton v. Western Carolina Educational Co., 101 N. C. 408, 8 S. E. 140 (reservation of "thirty three feet for a street").

74. See Baker v. Frick, 45 Md. 337, 24 Am. Rep. 506; Jewell v. Clement, 69 N. H. 133, 39 Atl. 582; Brill v. Brill, 108 N. Y. 511, 15 N. E. 538; Connery v. Brooke, 73 Pa. 80; Griffin v. Gilchrist, 29 R. I. 200, 69 Atl. 683, and other cases cited, *ante*, notes 71-73.

75. Ball v. Allen, 216 Mass. 469, 103 N. E. 928.

different purposes. Inability thus to divide his land by fences running across the line of the way might involve a very considerable hardship, and it does not seem that, in the ordinary case, the existence of a gate at a point within his own land would involve inconvenience to the person using the way to any greater extent than would a gate located at his boundary. Whether he may so erect a fence or fences across the line of the way for the purpose of dividing his land, with a gate therein at the point where the way strikes the fence, would seem properly to be determined by the same considerations as control in the case of a fence and gate at the terminus of the way, with the additional consideration, perhaps, of his *bona fides* in erecting the fence.

In the case of a way based upon prescription, the question of the right of the servient owner to maintain a gate across the way has usually been regarded as a matter to be determined by the consideration whether such a gate was maintained during the prescriptive period.⁷⁷ In other cases, however, the view has been adopted that the controlling consideration is whether the gate would involve an unreasonable interference with the exercise of the easement, having regard to the nature thereof.⁷⁸

76. In *Short v. Devine*, 146 Mass. 119, 15 N. E. 148, the court apparently regards the fact that the gate is "in the middle of" the way, and not at the terminus thereof, as a consideration adverse to the right to maintain it.

That there may be a right to maintain a fence and gate or bars for the purpose of dividing the servient tenement is apparently assumed in *Goodale v. Goodale*, 107 Me. 301, 78 Atl. 567; *Bakeman v. Talbot*, 31 N. Y. 366,

88 Am. Dec. 275, and is stated in *Bean v. Coleman*, 44 N. H. 539, and *Dyer v. Walker*, 99 Wis. 404, 75 N. W. 79 (prescriptive way).

77. *Hill v. Miller*, 144 Ga. 404, 87 S. E. 385; *Frankboner v. Corder*, 127 Ind. 164, 26 N. E. 766; *Frazier v. Myers*, 132 Ind. 71, 31 N. E. 536. *Miller v. Pettit*, 127 Ky. 419, 105 S. W. 892; *Shivers v. Shivers*, 32 N. J. Eq. 578, affirmed 35 N. J. Eq. 562; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632.

78. *Ames v. Shaw*, 82 Me. 179,

Occasionally one having a right of way over another's land has been required to erect a gate or gates at the border of the land, to prevent the escape or entrance of stock.^{78a} The imposition of such an active duty upon the owner of the dominant tenement to protect the owner of the servient appears not to be generally recognized.^{78b}

If the owner of the servient tenement has the right to have a gate across the way, the owner of the easement is under an obligation to shut the gate when he makes use of the way,⁷⁹ and a failure to do so, it appears, operates to make his user of the way wrongful, constituting a trespass on the servient tenement.⁸⁰

— **Interference by third person.** That A has an easement in land does not justify him in interfering, by the erection of structures or otherwise, with the exercise of an easement belonging to B in the same land,⁸¹ except, it seems, when such interference is necessary

19 Atl. 856; *Hartman v. Fick*, 167 Pa. 18, 31 Atl. 342, 46 Am. St. Rep. 658; *Luster v. Garner*, 128 Tenn. 160, 48 L. R. A. (N. S.) 87, Ann. Cas. 1914D, 769, 159 S. W. 604; *Mitchell v. Bowman*, 74 W. Va. 498, 82 S. E. 330; *Dyer v. Walker*, 99 Wis. 404, 75 N. W. 79. And see *Evans v. Cook*, 33 Ky. Law Rep. 788, 111 S. W. 326.

78a. *Damron v. Justice*, 162 Ky. 101, 172 S. W. 120; *Moore v. White*, 159 Mich. 460, 124 N. W. 62.

78b. That there is no such duty, see *Rowe v. Nally*, 81 Md. 267, 32 Atl. 198.

79. *Amondson v. Severson*, 37 Iowa, 602; *Truax v. Gregory*, 196 Ill. 83, 63 N. E. 674; *Brill v. Brill*, 108 N. Y. 511, 15 N. E. 538; *Damron v. Justice*, 162 Ky. 101, 172

S. W. 120.

That the owner of the easement is bound only to the exercise of reasonable care to see that the gates are kept closed. See *Rater v. Shuttlefield*, 146 Iowa, 512, 44 L. R. A. (N. S.) 101, 125 N. W. 235.

80. See *Garland v. Furber*, 47 N. H. 301.

81. *West Louisville & N. R. Co.*, 155 Ala. 506, 46 So. 469; *Goodwin v. Bragaw*, 87 Conn. 31, 86 Atl. 668; *Murphy v. Harker*, 115 Ga. 77, 41 S. E. 585; *Killion v. Kelly*, 120 Mass. 47; *Freeman v. Sayre*, 48 N. J. L. 37, 2 Atl. 650; *Ellis v. Academy of Music*, 120 Pa. 608, 6 Am. St. Rep. 739, 15 Atl. 494; *Allegheny Nat. Bank v. Reighard*, 204 Pa. 391, 54 Atl. 268.

to the exercise of A's easement, and B's easement was acquired with notice, actual or constructive, of the prior grant to A.

— **Remedy.** An action for the disturbance or obstruction of an easement should, at common law, be in case.⁸² Ejectment does not lie,⁸³ nor trespass *quare clausum fregit*.⁸⁴ There being an infringement of his right, the owner of the easement is entitled to at least nominal damages.⁸⁵

Notice to the owner of the servient tenement to remove an obstruction which he has interposed to the exercise of the easement is not necessary before bringing an action on account of such obstruction,⁸⁶ but if the defendant, the owner of the servient tenement at the time of suit, is not the original creator of the obstruction, and he has merely allowed an obstruction created by a former owner to remain, a previous re-

82. *Bale v. Todd*, 123 Ga. 99, 50 S. E. 990; *Martin v. Bliss*, 5 Blackf. (Ind.) 35, 32 Am. Dec. 52; *Shaffer v. Smith*, 7 Har. & J. (Md.) 67; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. (Mass.) 332; *Osborne v. Butcher*, 26 N. J. Law 308; *Shroder v. Brenneman*, 23 Pa. St. 348.

83. *Adams, Ejectment*, c. 2; *Canton Co. v. City of Batimore*, 106 Md. 69, 11 L. R. A. (N. S.) 129, 66 Atl. 671, 67 Atl. 274; *Taylor v. Gladwin*, 40 Mich. 232; *Brier v. State Exchange Bank*, 225 Mo. 673, 125 S. W. 469; *Roberts v. Trujillo*, 3 N. M. 87, 1 Pac. 855; *Child v. Chappell*, 9 N. Y. 246; *Parker v. West Coast Packing Co.*, 17 Ore. 510, 5 L. R. A. 61, 21 Pac. 822; *Hancock v. McAvoy*, 151 Pa. St. 460, 18 L. R. A. 781, 31 Am. St. Rep. 774, 25 Atl. 47; *Fritsche v. Fritsche*, 77 Wis.

270, 45 N. W. 1089; *LeBlond v. Town of Peshtigo*, 140 Wis. 604, 25 L. R. A. (N. S.) 511, 123 N. W. 157.

84. *Chitty, Pleading* (7th Ed.) 147, 159; *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Morgan v. Boyes*, 65 Me. 124; *Wetmore v. Robinson*, 2 Conn. 529; *Osborne v. Butcher*, 26 N. J. L. 308.

85. *Tuttle v. Walker*, 46 Me. 280; *Collins v. St. Peters*, 65 Vt. 618, 27 Atl. 425; *Dewire v. Hanley*, 79 Conn. 454, 65 Atl. 573; *Harrop v. Hirst*, L. R. 4 Exch. 43; *Goddard, Easements* (6th Ed.) 438.

86. *Collins v. St. Peters*, 65 Vt. 618, 27 Atl. 425. But the easement may itself involve a necessity of notice to the owner of the servient tenement, that is, the easement may be one to be exercised only after notice to such

quest to him to remove it is, it seems, necessary, unless, at least, he already had notice of the easement and its obstruction,⁸⁷ this according with the rules ordinarily applicable to actions on account of the maintenance of a nuisance.⁸⁸

A tenant of land holding under a lease may bring an action on account of the disturbance of an easement, he being directly affected thereby.^{88a} The reversioner may also sue if the disturbance is of such a permanent character or otherwise of such a nature that he can be regarded as suffering damage therefrom.^{88b}

In view of the incorporeal character of a pew, the remedy for interference with the pew holder's right would seem properly to be an action on the case.⁸⁹ In a number of cases in this country, however, it is held that trespass *quare clausum fregit* or ejectment will lie.⁹⁰

cwner. See *Phipps v. Johnson*, 99 Mass. 26.

87. *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253; *Elliott v. Rhett*, 5 Rich. (S. C.) 405, 57 Am. Dec. 750; *Gale, Easements* (8th Ed.) 588.

88. See note to *Leahan v. Cochran*, 86 Am. St. Rep. at p. 508, *et seq.*; 1 *Tiffany, Landlord & Ten.* p. 791.

88a. *Gale, Easements* (8th Ed.), 582; *Walker v. Clifford*, 128 Ala. 67, 86 Am. St. Rep. 74, 29 So. 588; *Hamilton v. Dennison*, 56 Conn. 359, 1 L. R. A. 287, 15 Atl. 748; *Greist v. Amryhn*, 80 Conn. 280, 68 Atl. 521; *Morrison v. Chicago & N. W. R. Co.*, 117 Iowa, 587, 91 N. W. 793; *Foley v. Wyeth*, 2 Allen (Mass.) 135; *Coleman v. Holden*, 88 Miss. 798, 41 So. 374; *Schmoele v. Betz*, 212 Pa. 32, 108 Am. St. Rep. 845, 61

Atl. 525.

88b. See 2 *Tiffany, Landlord & Ten.*, § 353a.

89. See *Stocks v. Booth*, 1 Term R. 431; *Bryan v. Whistler*, 8 Barn. & C. 294; *Perrin v. Granger*, 33 Vt. 101; *Trustees of the Third Presbyterian Congregation v. Andruss*, 21 N. J. Law, 325; *Daniel v. Wood*, 1 Pick. (Mass.) 162, 11 Am. Dec. 151.

90. *Jackson v. Rounseville*, 5 Mete. (Mass.) 127; *O'Hear v. De Goesbriand*, 33 Vt. 593, 80 Am. Dec. 653; *Howe v. Stevens*, 47 Vt. 262; *Shaw v. Beveridge*, 3 Hill (N. Y.) 26, 38 Am. Dec. 616; *First Baptist Church v. Witherell*, 3 Paige (N. Y.) 296, 24 Am. Dec. 223. These cases seem to be based on the theory that a pew is "real estate," and that these forms of action always lie for "real estate." On this theory, trespass

— **Injunction.** The question of the propriety of the issuance of an injunction to restrain an interference with an easement, especially of a right of way, has been frequently the subject of litigation. An injunction for this purpose may assume a mandatory as well as a prohibitory form, as when, in the case of the obstruction of the exercise of the easement by a structure of a permanent or *quasi* permanent character, the decree requires the removal of the structure.⁹¹

In some of the reported cases, the court recognizes the right to an injunction to restrain the obstruction of an easement without the mention of any possible limitations upon the right,⁹² and in favor of such right, when the obstruction is of a permanent or *quasi* permanent character, is the consideration that otherwise the owner of the easement would be in effect compelled to sell his right for a price equal to the amount of the damages which he may recover on account of the obstruction.⁹³ More usually, however, the courts recog-

quare clausum fregit or ejectment would lie for any easement or right of profit, since they are all "real estate," except when the interest is merely for years.

91. See *Stallard v. Cushing*, 76 Cal. 472, 18 Pac. 427; *Feitler v. Dobbins*, 263 Ill. 78, 104 N. E. 1088; *Robbins v. Archer*, 147 Iowa, 743, 126 N. W. 936; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Schaidt v. Blaul*, 66 Md. 141, 6 Atl. 669; *Green v. Richmond*, 155 Mass. 188, 29 N. E. 770; *Longton v. Stedman*, 182 Mich. 405, 148 N. W. 738; *Dulce Realty Co. v. Staed Realty Co.*, 245 Mo. 417, 151 S. W. 415; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632.

92. See *McCann v. Day*, 57 Ill. 100; *Dewire v. Hanley*, 79 Conn.

454, 65 Atl. 573; *Shedd v. American Maize Products Co.*, 60 Ind. App. 146, 108 N. E. 610; *Swisher v. Chicago & A. Rwy. Co.*, 235 Mo. 430, 138 S. W. 505; *Nash v. New England Mut. Life Ins. Co.*, 127 Mass. 91; *Vinton v. Greene*, 158 Mass. 426, 33 N. E. 607; *Agnew v. Pawnee City*, 79 Neb. 603, 113 N. W. 236; *Herman v. Roberts*, 119 N. Y. 37, 7 L. R. A. 226, 16 Am. St. Rep. 800, 23 N. E. 442. *Nicholas v. Title & Trust Co.*, 79 Ore. 226, Ann. Cas. 1917A, 1149, 154 Pac. 391; *Bowers v. Myers*, 237 Pa. St. 533, 85 Atl. 860; *Kalinowski v. Jacobowski*, 52 Wash. 359, 100 Pac. 852.

93. See *Tucker v. Howard*, 123 Mass. 361; *Manbeck v. Jones*, 190 Pa. St. 171, 42 Atl. 536. But the

nize some restrictions upon the right to an injunction for this purpose.^{93a} One such restriction is to the effect that equity will not take jurisdiction if it does not clearly appear that the easement actually exists in the applicant for the injunction, it being for a court of law rather than for one of equity to determine the existence of an easement.⁹⁴ It has in one case been asserted that, in the case of a right of way, the location of the way must clearly appear.⁹⁵ It has likewise been stated that the injury to be prevented must be irreparable, or that an injunction will issue, provided the injury is of that character,⁹⁶ and that the threatened interference with the exercise of the case-

fact that the injury can be compensated in damages has been referred to as a ground for refusing an injunction. *Green v. Richmond*, 155 Mass. 138; *Berkeley v. Smith*, 27 Gratt. (Va.) 892.

93a. See editorial note, 10 *Columbia Law Rev.* 355.

94. *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839; *Feitler v. Dobbins*, 263 Ill. 78, 104 N. E. 1088; *Bennett v. Seligman*, 32 Mich. 500; *Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl. 865; *Todd v. Staats*, 60 N. J. Eq. 507, 46 Atl. 645; *Hacke's Appeal*, 101 Pa. 245; *Seaboard Air Line R. Co. v. Olive*, 142 N. C. 257, 55 S. E. 263.

Conversely it is said that an injunction may issue if the existence of the easement is not doubtful. *Espencheid v. Bauer*, 235 Ill. 172, 85 N. E. 230; *Oberheim v. Reeside*, 116 Md. 265, 81 Atl. 590; *Imperial Realty Co. v. West Jersey & S. R. Co.*, 78 N. J. Eq. 110, 77 Atl. 1041; *Manbeck*

v. Jones, 190 Pa. 171, 42 Atl. 536; *Garvey v. Harbison-Walker Refractories Co.*, 213 Pa. 177, 62 Atl. 778.

That the determination of the existence and character of the easement involves the construction of a written instrument does not appear to be ground for refusing relief in equity. *Shreve v. Mathis*, 63 N. J. Eq. 170, 52 Atl. 234; *Oberheim v. Reeside*, 116 Md. 265, 81 Atl. 590.

95. *Fox v. Pierce*, 50 Mich. 500, 15 N. W. 880. But see *Bright v. Allan*, 203 Pa. 386, 53 Atl. 248.

96. *Murphey v. Harker*, 115 Ga. 77, 41 S. E. 585; *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839; *Feitler v. Dobbins*, 263 Ill. 78, 104 N. E. 1088; *Henry v. Koch*, 20 Ky. 391, 44 Am. Rep. 484; *Jay v. Michael*, 92 Md. 198, 48 Atl. 61; *West Arlington Land Co. of Baltimore County v. Flannery*, 115 Md. 274, 80 Atl. 965; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632.

ment must be substantial.⁹⁷ Reference is also occasionally made to the permanent or continuous character of the obstruction as a consideration in favor of granting such relief.⁹⁸ The fact that the plaintiff has not yet suffered any damage by reason of the easement does not appear to be conclusive against his right to an injunction.⁹⁹ Occasionally an injunction has been refused on the ground that it would operate oppressively, the owner of the easement being left to his remedy at law,¹ or a decree being made for the ascertainment and payment of damages. To some degree, as ordinarily in connection with an application for an injunction, the matter is within the discretion of the court, and it has been said that one will not be required to remove an obstruction of a merely partial character, if this would bear upon him with undue severity,³ especially if the owner of the easement has been guilty of laches in not earlier seeking redress.⁴

— **Abatement.** The person entitled to exercise an easement may himself remove or “abate” a structure or object which obstructs its exercise,⁵ provided, per-

97. *Hagerty v. Lee*, 45 N. J. Eq. 1, 15 Atl. 399; *Green v. Richmond*, 155 Mass. 188, 29 N. E. 770; *Bentley v. Root*, 19 R. I. 205, 32 Atl. 918; *Wilson v. Cohen*, Rice Eq. (S. Car.) 80. Compare *Schmoele v. Betz* (212 Pa. 32, 108 Am. St. Rep. 845, 61 Atl. 525.

98. *Danielson v. Sykes*, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87; *Russell v. Napier*, 80 Ga. 77, 4 S. E. 857; *Webber v. Gage*, 39 N. H. 182; *Shreve v. Mathis*, 63 N. J. Eq. 170, 52 Atl. 234; *Miller v. Lynch*, 149 Pa. 460, 24 Atl. 80.

99. *Danielson v. Sykes*, 157 Cal. 686, 28 L. R. A. (N. S.) 1024,

109 Pac. 87; *Feitler v. Dobbins*, 263 Ill. 78, 104 N. E. 1088; *Swift v. Coker*, 83 Ga. 789, 20 Am. St. Rep. 347, 10 S. E. 442; *Swisher v. Chicago, & A. Ry. Co.*, 235 Mo. 430, 138 S. W. 505.

1. *McBryde v. Sayre*, 86 Ala. 458, 3 L. R. A. 861, 5 So. 791; *Hall v. Rood*, 40 Mich. 46; *Richard's Appeal*, 57 Pa. St. 105.

2. *Berkeley v. Smith*, 27 Gratt. (Va.) 892.

3. *Green v. Richmond*, 155 Mass. 188, 29 N. E. 770; *Bentley v. Root*, 19 R. I. 205.

4. *Green v. Richmond*, 155 Mass. 188, 29 N. E. 770.

5. *Quintard v. Bishop*, 29 Conn.

haps, the circumstances are not such that the removal may cause a breach of the peace.⁶ If, however, the obstruction was created by a former owner of the land and merely allowed by the subsequent owner to remain, its abatement by the owner of the easement is justified, it seems, only after he has notified the owner of the land to abate it.⁷ And such notice appears to be necessary even as against the original creator of the obstruction, if the abatement involves a trespass upon the latter's land.⁸

IV. EXTINCTION OF EASEMENTS.

§ 372. **Cessation of purpose of easement.** It has been said that when an easement is created for a particular purpose, it comes to an end upon a cessation of that purpose,⁹ which means, apparently, that an easement which is created to endure only so long as a particular purpose is subserved by its exercise, comes to an end when it can no longer subserve such purpose.¹⁰

366; *Sargent v. Hubbard*, 102 Mass. 380; *Morgan v. Boyes*, 65 Me. 124; *Joyce v. Conlin*, 72 Wis. 607, 40 N. W. 212.

6. *Schmidt v. Brown*, 226 Ill. 590, 11 L. R. A. (N. S.) 457, 117 Am. St. Rep. 261, 80 N. E. 1071; *Keplinger v. Woolsey*, 4 Neb. (unoff) 282, 93 N. W. 1008.

But in *Davies v. Williams*, 16 Q. B. 546, the removal of a house, which was at the time inhabited, was regarded as justifiable, provided notice to remove it had been previously given.

7. *O'Shaughnessy v. O'Rourke*, 36 Miss. 518, 73 N. Y. Supp. 1070. Applying the rule which exists in the ordinary case of a nuisance, as asserted in *Penruddock's Case*, 5 Co. Rep. 101.

8. *Jones v. Williams*, 11 Mees. & W. 176; *Lemmon v. Webb* (1905), App. Cas. 1.

9. *National Guaranteed Manure Co. v. Donald*, 4 Hurlst. & N. 8; *Long v. Louisville*, 98 Ky. 67, 32 S. W. 271; *Chicago & N. W. Ry. Co. v. Sioux City Stock-Yards Co.*, 176 Iowa, 659, 158 N. W. 769; *Hahn v. Baker Lodge No. 47*, 21 Ore. 30, 13 L. R. A. 153, 28 Am. St. Rep. 723, 27 Pac. 166; *Riefler & Sons v. Wayne Storage Water Power Co.*, 232 Pa. 282, 81 Atl. 300.

That an appurtenant easement is not extinguished by an attempt to separate it from the dominant tenement, see note in 20 Harv. Law Rev. at p. 136.

10. See *Cotting v. Boston*, 201

The question then is, in each case, what is the particular purpose to be subserved by the easement, and this, in the case of an easement created by grant, is a question of intention. In the case of an easement created by prescription, on the other hand, the question as to what is the particular purpose to be subserved by the easement is presumably to be determined with reference to the apparent purpose of the user during the prescriptive period.

An easement to use a dock or waterway for vessels has been regarded as coming to an end when, owing to the construction of a street by the municipality, such use of the dock or waterway became impossible.¹¹ And an easement to be exercised for the benefit of a particular lot has been considered to cease when the lot became permanently submerged by the waters of a river,¹² or the lot was appropriated for a street.¹³ Likewise, a right of approach to an upper room or floor in a building was held to come to an end when the building was destroyed.¹⁴ So, in the case of the grant

Mass. 97, 87 N. E. 205; *Cotton States Lumber Co. v. James*, 98 Miss. 134, 53 So. 410; *Bangs v. Parker*, 71 Me. 458; *Hall v. Armstrong*, 53 Conn. 554, 4 Atl. 113; *In Johnson v. Knapp*, 150 Mass. 267, 23 N. E. 40, it was held that, even though a pipe was actually used at the time of the severance of ownership for the purpose of conducting water, still, if the supply of water was dependent on the continuance of a license to take it from other land, the easement which passed was to endure only so long as it could be rightfully taken, that is, until the license was revoked.

11. *Mussey v. Union Wharf*, 41 Me. 34; *Central Wharf & Wet Dock Corp. v. Proprietors of*

India Wharf, 123 Mass. 567.

12. *Weis v. Meyer*, 55 Ark. 18, 17 S. W. 339.

13. *Hancock v. Wentworth*, 5 Metc. (Mass.) 446. See *Brown v. Ore. Short Line R. Co.*, 36 Utah, 257, 24 L. R. A. (N. S.) 86, 102 Pac. 740.

14. *Hahn v. Baker Lodge No. 47*, 21 Ore. 30, 13 L. R. A. 158, 28 Am. St. Rep. 723, 27 Pac. 166; *Cotting v. Boston*, 201 Mass. 97, 87 N. E. 205.

In *Shirley v. Crabb*, 138 Ind. 200, 46 Am. St. Rep. 376, 37 N. E. 130, the extinguishment of such an easement appears to be based on the destruction of the servient building, not the dominant, though both were as a matter of fact destroyed. In *Douglas v.*

of a right of way for a railroad, a reservation in favor of the owner of the land of the privilege of a crossing, by which to pass to other land belonging to him, was construed as giving such crossing so long only as the two pieces of land belonged to the same person.¹⁵ In these various cases the easement, being one created by grant, came to an end, it is conceived, because it was intended, or presumed to be intended, to come to an end upon an event such as occurred, rather than as occasionally suggested, because the impossibility of the exercise of an easement, or the impossibility of its exercise for the same purpose as before, necessarily involves its extinguishment. That an easement may continue to exist even though its exercise is temporarily impossible, is not open to question, and in the cases above referred to, the impossibility of its continued exercise as before, while it threatened to be permanent, might, in the event, have proven to be temporary merely.

The destruction of a building on the dominant tenement will effect an extinguishment of the easement if the easement was intended to be exercised only in connection with that particular building,¹⁶ while it will not have that effect if it was intended to be exercised in connection with the land, independently of the existence thereon of a building, or of some particular

Coonley, 156 N. Y. 521, 51 N. E. 200.

283, the easement was held to be suspended and revived. See *post*, this section, notes 16, 17, 19-26a, 28, 29.

15. Knowlton v. New York, N. H. & H. R. Co., 72 Conn. 188, 44 Atl. 8; Marino v. Central R. Co., 69 N. J. L. 628, 56 Atl. 306; Vandalia R. Co. v. Furnas, 182 Ind. 306, 106 N. E. 401. Compare Rathbun v. New York, N. H. & H. R. Co., 20 R. I. 60, 37 Atl.

16. Day v. Walden, 46 Mich. 575, 10 N. W. 26; Blake v. Clark, 6 Me. 436. Compare Stevenson v. Wallace, 27 Gratt. (Va.) 77.

17. Hottell v. Farmers' Protective Ass'n, 25 Colo. 67, 71 Am. St. Rep. 109, 53 Pac. 327; Reynolds v. Union Savings Bank, 155 Iowa, 519, 49 L. R. A. (N. S.) 194, 136 N. W. 529; Bangs v. Parker, 71 Me. 458; Chew v. Chew, 39 N. J. Eq. 396; Hennen v. Deveny, 71

building.¹⁷ An easement of flowage for the benefit of a canal has been held to come to an end when the canal was abandoned.¹⁸

That an easement of a right of way, created by a grant thereof in express terms, was at the time of the grant necessary for the purpose of access to the dominant tenement, has not been regarded as a reason for holding the easement extinguished when the necessity ceases,^{18a} the rule thus differing from that which has been applied in connection with a right of way by necessity.^{18b}

— **Party wall.** The easement of using a wall, or a part thereof, belonging to another, as a party wall, has been regarded as ceasing upon the destruction, by fire or other accident, of the wall and of the buildings separated thereby,¹⁹ and also upon such destruction of the buildings, though the wall remains standing.²⁰ In thus asserting

W. Va. 629, L. R. A. 1917A, 524, 77 S. E. 142. Accordingly it has been decided that an easement of light may continue in existence although the building by which the light was availed of is destroyed. *Tapling v. Jones*, 11 H. L. Cas. 290; *Scott v. Pape*, 31 Ch. Div. 554; *City Nat. Bank v. Van Meter*, 59 N. J. Eq. 32, 45 Atl. 280, 61 N. J. Eq. 674, 47 Atl. 1131.

18. *Riefler v. Wayne Storage Water Power Co.*, 232 Pa. 282, 81 Atl. 300.

18a. *Johnson v. Allen*, 33 Ky. Law Rep. 621, 110 S. W. 851; *Estep v. Hammons*, 104 Ky. 144, 46 S. W. 715, (semble); *Atlanta Mills v. Mason*, 120 Mass. 244; *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474, 53 Atl. 699; *Crounse v. Wemple*, 29 N. Y. 540 (prescriptive way); *Par-*

sons v. N. Y., N. H. & H. R. Co., 216 Mass. 269, 103 N. E. 693; *Zell v. Universalist Soc.*, 119 Pa. 390, 4 Am. St. Rep. 654, 13 Atl. 447, *Ebert v. Mishler*, 234 Pa. 609, 83 Atl. 596.

18b. *Post*, this section, notes 27-29.

19. *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Antomarchi's Ex'r v. Russell*, 63 Ala. 356, 35 Am. Rep. 40; *Duncan, v. Rodecker*, 90 Wis. 1, 62 N. W. 533. See *Huck v. Flentye*, 80 Ill. 258 (destruction of wall and single building supported thereby).

20. *Moore v. Shoemaker*, 10 App. D. C. 6; *Dowling v. Hennings*, 20 Md. 179, 83 Am. Dec. 545; *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Bowhay v. Richards*, 81 Neb. 764, 19 L.

that a party wall easement ceases on the destruction of the buildings, the courts appear to consider that there is a rule of law to that effect, necessitated by the consideration of the burden involved in compelling an owner to reconstruct his wall or building in such a way as to afford his neighbor the same easement as he had before. The rule is, however, it is submitted, in the case of the grant or reservation of a party wall easement, properly a rule of construction rather than of law,²¹ since it could be excluded by an expression of intention that the easement shall continue in spite of the destruction of the buildings.²² It might, however, in the case of such an easement, when created by prescription, it seems, be regarded as a rule of law.

In one case,²³⁻²⁴ it was decided that while ordinarily the destruction of a party wall and the buildings on both sides thereof would extinguish the party wall easements, and also the easement of a right to use a staircase in one building for purposes of access to the other, this was not so when the wall and staircase were immediately rebuilt in exactly the same location as before, it being said that "this conduct of the parties operated to revive the easement that was suspended by the destruction of the property." There is, in another state, a decision to the contrary effect,²⁵ and it is

R. A. (N. S.) 883, 116 N. W. 677. *Heartt v. Kruger*, 121 N. Y. 386, 9 L. R. A. 135, 18 Am. St. Rep. 829, 24 N. E. 841; *Odd Fellows' Hall Ass'n of Portland v. Hegele*, 24 Ore. 16, 32 Pac. 679.

In *Heartt v. Kruger*, 121 N. Y. 386, 9 L. R. A. 135, 18 Am. St. Rep. 829, 24 N. E. 841 *supra*, the court emphasizes the fact that the easement was created by "implied grant" as corresponding to a preexisting *quasi*-easement, distinguishing *Brondage v. Warner*, 2 Hill (N. Y.) 145, as

being a case of express grant. It does not seem that this constitutes a substantial basis of distinction.

21. See *Moore v. Shoemaker*, 10 App. D. C. 6.

22. As in *Frisbie v. Bigham Masonic Lodge No. 256*, 133 Ky. 588, 118 S. W. 359.

23-24. *Douglas v. Coonley*, 156 N. Y. 521, 66 Am. St. Rep. 580, 51 N. E. 283.

25. *Bonney v. Greenwood*, 96 Me. 335, 52 Atl. 786.

somewhat difficult to see how, if the destruction of the buildings is otherwise sufficient to extinguish the easement, this can be avoided by the subsequent adoption of a particular plan of rebuilding. The decision might perhaps be supported on the theory that the grant was of an easement to endure so long as the land was utilized for buildings similar to the buildings originally existing thereon. The court quotes from a text book on the civil law to the effect that while "servitudes cease when the things are found in such condition that one can no longer use them," they "revive if the things are reestablished in such a manner that one can use them." But whatever the civil law doctrine in this regard may be, the existence of an easement, by the law of this country and of England, is not affected by the temporary impossibility of its exercise. In the case, for instance, of a right to conduct water over another's land, an injury to the aqueduct which makes it impossible, for the time being, to exercise the easement, in no way affects the existence of the easement. And the repair of the aqueduct consequently does not revive the easement, though it revives the possibility of its exercise.

The destruction of one of the buildings separated by a party wall has been held not to extinguish the easement in the wall in favor of the other building,²⁶ and such a view is particularly suggested when the right of support is created by implied grant by way of necessity, the necessity enduring so long as the building supported endures.^{26a}

— **Way of necessity.** A way of necessity has been regarded as coming to an end when the necessity ceases, as, for instance, when a highway is opened

26. *Lexington Lodge v. Beal*, (N. S.) 1021, 134 Pac. 614.

94 Miss. 521, 49 So. 833; *Commercial Nat. Bank of Ogden v. Eccles*, 43Utah, 91, 46 L. R. A. 26a. See editorial note, 13 Columbia Law Rev. 754.

through the dominant tenement, or the owner thereof acquires another right of way.²⁷ As the intention to create the way is inferred from the necessity of the way, the extent of the inference is limited by the same consideration. The acquisition of another right of way, however, is not sufficient to extinguish the way of necessity, unless the new right of way is reasonably sufficient for the enjoyment of the dominant tenement.^{27a}

— **Change in servient tenement.** Occasionally an easement is created in such terms, or under such circumstances, as to indicate that the easement is to endure so long only as a structure on the servient tenement, in connection with which the easement is to be exercised, endures or is capable of use.²⁸ In such case the easement comes to an end when the structure is destroyed or becomes incapable of use. A somewhat similar case is presented by a decision that when, by reason of the condemnation of part of the servient tenement for the purpose of a railroad right of way, the exercise

27. *Carey v. Rae*, 58 Cal. 159; *Cassin v. Cole*, 153 Cal. 677, 96 Pac. 277; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Russell v. Napier*, 82 Ga. 770, 9 S. E. 746; *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839. *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743; *Oliver v. Hook*, 46 Md. 301; *Haserick v. Bouliat-Gorell Co.*, 77 N. H. 121, 88 Atl. 998; *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966. But see *Conley v. Fairchild*, 142 Ky. 271, 134 S. W. 142. properly criticized, it is submitted, in 11 *Columbia Law Rev.* 478.

The English case of *Holmes v. Goring*, 2 Bing. 76, accords with the view generally adopted in this country, but it is questioned by *Parke & Alderson*, B. B., in

Proctor v. Hodgson, 10 Exch. 824.

27a. *Hart v. Deering*, 222 Mass. 407, 111 N. E. 37.

That one having a way of necessity is given a mere revocable permission to pass to his land over other land has been held not to involve a termination of the necessity, so as to extinguish the right of way. *Sweezy v. Vallette*, 37 R. I. 51, 90 Atl. 1078.

28. *Linthicum v. Ray*, 9 Wall. 241, 19 L. Ed. 657; *Shirley v. Crabb*, 138 Ind. 200, 46 Am. St. Rep. 376, 37 N. E. 130; *Ballard v. Butler*, 30 Me. 94. *Central Wharf v. India Wharf*, 123 Mass. 567; *Bartlett v. Peaselee*, 20 N. H. 547, 51 Am. Dec. 242; *Percival v. Williams*, 82 Vt. 531, 74 Atl. 321.

of a preexisting private right of way became impossible of exercise, it was extinguished.²⁹

§ 373. **Excessive user of land.** The fact that the owner of the easement makes a use of the servient tenement not justified by the character or extent of the easement does not involve the extinguishment or suspension of the easement, although in making such use he is a wrongdoer.³⁰ Equity will, in such case, ordinarily enjoin such an illegal exercise of the easement, without interfering with the proper exercise except in so far as this may be necessary to protect the landowner.

As before stated,³¹ the fact that, subsequently to the grant of the easement, there is a change in the mode in which the dominant tenement is utilized, so that there results a more constant use of the servient tenement in the exercise of the easement, has not ordinarily been regarded as involving an excessive user of the easement. That is, the grant of the easement is regarded *prima facie* as not being intended to continue in force only so long as the mode of utilizing the dominant tenement continues unchanged. It might occur, however, that by a reason of a very radical change in the dominant tenement, it becomes impossible to exercise the easement without an excessive user of the servient tenement, and the making of such change might, under some circumstances, be regarded as involving an extinction of the easement by abandonment.^{31a}

29. Cornell Andrews Smelting Co. v. Boston & P. R. Corp., 202 Mass. 585, 89 N. E. 118.

30. Mendell v. Delano, 7 Metc. (Mass.) 176; McTavish v. Carroll, 13 Md. 429. White's Bank v. Nicholls, 64 N. Y. 65; Walker v. Gerhard, 9 Phila. (Pa.) 116. Dea-

vitt v. Washington County, 75 Vt. 156, 53 Atl. 563. See McMillian v. Cronin, 75 N. Y. 474; editorial note 18 Harv. Law Rev. 608.

31. *Ante*, § 369.

31a. Goddard, Easements (6th Ed.) 547; Gale, Easements (8th Ed.) 521, 528.

§ 374. **Unity of possession or title.** An easement is ordinarily extinguished if one person acquires an estate in fee simple in possession in both the dominant and servient tenements.³² By reason of the perpetual right of possession of the tenement which was previously subject to the easement, such person and his heirs can make any use whatsoever thereof, and the inferior right of easement, its utility having thus disappeared, is swallowed up in the superior right of possession.

When one person acquires estates in possession in both the dominant and servient tenements, but they are such in character that one will or may terminate before the other, the utility of the easement, though in abeyance for the time being, is liable to revive by reason of the termination of one of such estates, and consequently there is no reason for regarding it as extinguished. So the easement is not extinguished by reason of the fact that one has an estate in fee simple in one tenement and an estate for life or for years in the other.³³ But though the estates are of unequal duration, the easement should, it would seem, be regarded as extinguished if it cannot possibly endure after the less estate comes to an end, as when an easement is created

32. *Smith v. Roath*, 238 Ill. 247, 128 Am. St. Rep. 123, 87 N. E. 414; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Capron v. Greenway*, 74 Md. 289, 22 Atl. 269; *Ritger v. Parker*, 8 Cush. (Mass.) 145, 54 Am. Dec. 744; *Atwater v. Bodfish*, 11 Gray (Mass.) 150; *Rogers v. Powers*, 204 Mass. 257, 90 N. E. 514; *Kieffer v. Imhoff*, 26 Pa. 438; *Plimpton v. Converse*, 42 Vt. 712.

In *Tuttle v. Kilroa*, 177 Mass. 146, 58 N. E. 682, there is apparently a dictum that there is no extinguishment of the ease-

ment of a right of way by reason of the acquisition, by the owner of the dominant tenement, of the fee simple in the servient tenement, if there is a like right of way outstanding in another. This is, it is submitted, most questionable.

33. *Thomas v. Thomas*, 2 Crompt. M. & R. 34; *Dority v. Dunning*, 78 Me. 381, 6 Atl. 6; *Bull, Petitioner*, 15 R. I. 534, 10 Atl. 484; *Pearce v. McClenaghan*, 5 Rich. Law (S. Car.) 178, 55 Am. Dec. 710.

in favor of a life tenant of land for his life, and subsequently he acquires a fee simple estate in the servient tenement, or the fee simple tenant of the servient tenement acquires his life estate in the dominant tenement.

It has been decided that the estates are not of equal duration for the purpose of causing an extinguishment of the easement, when one is a fee simple and the other a fee determinable.³⁴ And the same principle appears to be involved in decisions that the easement is not extinguished because the legal title to both the dominant and servient tenements is vested in one person as mortgagee, under distinct mortgages falling due at different times,³⁵ nor because an estate in fee simple in both tenements is vested in a single person, if one of these titles is wrongful, and therefore subject to defeasance.³⁶

As above indicated, the extinguishment of the easement by one's acquisition of estates in both the dominant and servient tenements appears to be by reason of the unity of possession operating to render the easement useless, and so in the earlier authorities the unity of possession is referred to as the important consideration, without any reference to the question of the necessity of unity of seisin.³⁷ It has been said, however, that unity of possession is insufficient to effect an extinguishment unless there is also unity of seisin,³⁸ without any explanation being given of why unity of seisin should be regarded as necessary. Suppose A having an estate in Whiteacre for ten years only creates in favor of B

34. *Rex v. Inhabitants of Hermitage*, Cathew. 339.

35. *Ritger v. Parker*, 8 Cush. (Mass.) 145, 54 Am. Dec. 744. See Co. Litt., 313b.

36. *Tyler v. Hammond*, 11 Pick. (Mass.) 193; Co. Litt. 313b.

37. Bro. Abr. Extinguishment, pl. 15; *Jenkins' Centuries*, p. 20, case 37; *Sury v. Pigot*, Poph.

166; *Peers v. Lucy*, 4 Mod. 364; *Rex v. Inhabitants of Hermitage*, Cathew. 239; *Whalley v. Thompson*, 1 Bos. & P. 371.

38. *Thomas v. Thomas*, 2 Crompt. M. & R., per Alderson, B.; editorial note, 21 Harv. Law Rev. at p. 359; 11 Halsbury's Laws of England, 283.

an easement in Whiteacre to the extent of his ability, that is, for the balance of the ten years, and subsequently B acquires A's estate for the balance of the ten years. B then has an estate, with the right of possession for so long as the easement can endure, and the same reason would seem to exist for regarding the easement as extinguished as if he had acquired also the estate in fee simple in Whiteacre.

Not only has it been said that unity of possession without unity of seisin is insufficient to extinguish the easement, but it has even been said that unity of seisin without unity of possession is sufficient for this purpose.³⁹ According to this view, if one who has an estate in fee simple in the dominant tenement makes a lease for years and subsequently transfers his reversion to the owner of the servient tenement, he thereby effects an extinguishment of the easement not only as against himself but also as against his lessee.^{39a} A rule which thus operates to put property rights of one person at the mercy of others is to be accepted with some hesitation, in the absence of an overwhelming weight of authority in its favor. It is difficult indeed to understand why the highly artificial conception of seisin, as distinguished from possession, should be introduced in this connection. As above indicated, the earlier authorities, to whom the conception of seisin was most familiar, refer to unity of possession as the decisive consideration without mention of unity of seisin.

In order that unity of possession may extinguish the easement, the person in whom the union occurs must

39. *Buckby v. Coles*, 5 Taunt. 311.

39a. That the owner of the dominant tenement cannot thus effect the extinguishment of the easement as against his lessee is decided in *Richardson v. Graham*, 1 K. B. (1908) 439, as regards

the easement of light. The decision appears, however, to be based on the terms of the Prescription Act in reference to the easement of light, rather than upon general principles applicable to all easements.

have an estate in severalty in each tenement.⁴⁰ If he has merely a fractional interest in the dominant tenement, his co-owners are entitled to the easement irrespective of whether his share and the servient tenement become united in ownership,⁴¹ while if he has merely a fractional interest in the servient tenement, his joint right to the possession of such tenement gives him no right to utilize any part thereof for his own exclusive benefit, and consequently the utility of the easement continues as before.⁴² Moreover, it seems, the estates which are thus united in one person must both be beneficial in character, that is, one must not be a bare legal estate and the other equitable in character.⁴³

§ 375. Application of land to public use. The question whether the establishment of a highway has the effect of extinguishing a pre-existent private right of way along the same line becomes of importance in case the highway is subsequently discontinued.⁴⁴ That the concurrent existence of a highway and of a private

40. *Cheda v. Bodkin*, 173 Cal. 7, 158 Pac. 1025; *Smith v. Roath*, 238 Ill. 247, 87 N. E. 414; *Reed v. West*, 16 Gray (Mass.) 283; *Atlanta Mills v. Mason*, 120 Mass. 244; *Dority v. Dunning*, 78 Me. 381, 6 Atl. 6 (*dictum*); *Blanchard v. Maxson*, 84 Conn. 429, 80 Atl. 206.

41. See *Tuttle v. Kilroa*, 177 Mass. 146, 58 N. E. 682.

42. But there is perhaps a partial extinguishment, that is, an extinguishment as regards his interest in the easement, precluding him, or any one claiming under him, from thereafter exercising the easement. See *Baringer v. Virginia Trust Co.*, 132 N. C. 409, 43 S. E. 910.

43. See *Ecclesiastical Com'rs for England v. Kino*, 14 Ch. Div. 213; *Pearce v. McClenaghan*, 5 Rich. Law (S. C.) 178, 55 Am. Dec. 710.

44. The question is referred to in *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351, but the cases in other states there referred to as adjudications on the question appear to be but partially applicable. In *Murphy v. Bates*, 21 R. I. 89, 41 Atl. 1011, it is said that "ordinarily a private way becomes merged in a public way," but the authorities cited (*Ross v. Thompson*, 78 Ind. 90; *Elliott, Roads & Streets*, §§ 3 & 4) do not support the statement.

way along the same line is not impossible appears to be fully recognized in the decisions, before referred to, that the grant of land as abutting on a highway gives in effect a private right of way upon the discontinuance of the highway,⁴⁵ and it is difficult to see why the establishment of a highway should in itself extinguish the private right, though it renders the assertion of such right at least temporarily unnecessary.⁴⁶

If the owner of the right of way joins with the owner of the servient tenement in dedicating the land to such public use, the dedication is obviously binding on him,⁴⁷ but it would seem that, as upon the cessation of the public use the owner of the land has the same rights as before the dedication, so the owner of the easement has such rights. If the latter does not join in the dedication he is not, in theory, affected thereby,⁴⁸ but whether the transformation of the private right of way into a public one could be regarded as an impairment of his rights capable of legal remedy would seem to be doubtful, in the absence at least of language in the grant of the right of way making it more or less exclusive.⁴⁹

In case the highway is established by legal proceedings in which the owner of the right of way appears as a petitioner, the right may well be regarded as abandoned by him.⁵⁰ In case he is not a petitioner but is a party to the proceedings, his right would seem to be extinguished to the same extent as that of the owner of the land, that is, only during the continuance of the

45. *Ante*, § 366a, note 35. And see Isaac G. Johnson & Co. v. Cox, 196 N. Y. 110, 89 N. E. 454.

46. The English cases are clearly to the effect that the establishment of a highway over the line of a private way does not, of itself, affect the existence of the latter. *Allen v. Ormond*, 8 East. 4; *Brownlow v. Tomlinson*,

1 Man. & Gr. 484; *Duncan v. Louch*, 6 Q. B. 904; *R. v. Chorley*, 12 Q. B. 515.

47. *Bailey v. Culver*, 84 Mo. 531.

48. *Sarcoxie v. Wild*, 64 Mo App. 403. See *Post*, § 481.

49. See *ante*, 367, note 78.

50. *McKinney v. Pennsylvania R. Co.*, 222 Pa. 48, 70 Atl. 946.

public user, with a revival of the right upon its discontinuance,⁵¹ unless the public acquired the fee by the condemnation proceeding.⁵² If he is not a party to the proceeding, his right of way cannot be regarded as extinguished, so as to be incapable of assertion after the discontinuance of the highway,⁵³ though he is, it appears, to be regarded as concluded by the proceeding, on the theory that he is not damnified by the establishment of the highway.⁵⁴

When the servient tenement is condemned for a railroad right of way, and the owner of the easement is made a party to the proceeding, the easement is extinguished, if the railroad acquires the fee,⁵⁵ while if the railroad acquires merely the easement of a right of way, it does not seem that the private easement is extinguished, though its exercise is for the time being rendered impossible. If the owner of the easement is not a party to the proceeding, his easement, it seems, is not affected thereby.⁵⁶

§ 376. Express release. An easement may be extinguished by an express release thereof made by the owner of the dominant tenement in favor of the owner of the servient tenement,⁵⁷ and such an express re-

51. *Post*, § 565.

52. *Post*, § 561.

53. *Clayton v. County Court*, 58 W. Va. 253, 2 L. R. A. N. S. 598, 52 S. E. 103.

54. *Allen v. City of Chicago*, 176 Ill. 113, 52 N. E. 33; *Clayton v. County Court*, 58 W. Va. 253, 2 L. R. A. N. S. 598, 52 S. E. 103.

55. *Googins v. Boston, & A. R. Co.*, 155 Mass. 505, 30 N. E. 71; *Currie v. Bangor, & A. R. Co.*, 105 Me. 529, 75 Atl. 51.

56. *Lewis, Eminent Domain*, § 531, note 21.

57. *Goddard, Easements*, 575; *Gale, Easements*, 512. *Jersey Farm Co. v. Atlanta Realty Co.*, 164 Cal. 412, 129 Pac. 593; *Richards v. Attleborough Branch R. Co.*, 153 Mass. 120, 26 N. E. 418; *Flaten v. Moorehead City*, 58 Minn. 324, 59 N. W. 1044; *McAllister v. Deoane*, 76 N. C. 57.

Somewhat analogous to the case of an express release is a case in which it was held that one who made a conveyance of land with a covenant of warranty therein was estopped, upon subsequently acquiring adjoining

lease must, at common law, like any other release, be under seal.⁵⁸ Under the doctrine of abandonment of an easement,⁵⁹ however, as recognized in the modern decisions, it seems that even an oral relinquishment of the easement might be effective.

One who has only a partial or limited interest in the dominant tenement can obviously extinguish the easement by release only as against himself.⁶⁰

§ 377. Abandonment. There are many cases to the effect that an easement is extinguished by "abandonment" thereof, by which is meant that a nonuser thereof, together with other circumstances, may, as showing an intention to make no further use of it, terminate the easement.⁶¹ The question whether there has been such an abandonment is in each case a ques-

land, to assert that there was appurtenant to this latter land an easement upon the land first conveyed. *Hodges v. Goodspeed*, 20 R. I. 537, 40 Atl. 373.

58. *Co. Litt.* 264b; *Gale, Easements*, 482; *Pue v. Pue*, 4 Md. Ch. 386. That it must be in writing, see *Erb v. Brown*, 69 Pa. 216.

59. *Post*, § 377.

60. *Dyer v. Sanford*, 9 Metc. (Mass.) 395, 43 Am. Dec. 399. *Glenn v. Davis*, 35 Md. 208, 6 Am. Rep. 389; *Welsh v. Taylor*, 134 N. Y. 450, 18 L. R. A. 535, 31 N. E. 896; *Robert v. Thompson*, 16 N. Y. Misc. 638, 40 N. Y. Supp. 754.

61. *Moore v. Rawson*, 3 Barn. & C. 332; *Stein v. Dahm*, 96 Ala. 481, 11 So. 597; *Arnold v. Roup*, 61 Colo. 316, 157 Pac. 206; *New York, N. H. & H. R. Co. v. Cella*, 88 Conn. 515, 91 Atl. 972; *Louis-*

ville & N. R. Co. v. Covington, 2 Bush (Ky.) 526; *Fitzpatrick v. Boston, & M. R. R.*, 84 Me. 33, 24 Atl. 432; *Stewart v. May*, 119 Md. 10, 85 Atl. 957; *Canny v. Andrews*, 123 Mass. 155; *King v. Murphy*, 140 Mass. 254, 4 N. E. 566. *Jones v. Van Bochove*, 103 Mich. 98, 61 N. E. 342; *Snell v. Levitt*, 110 N. Y. 595, 1 L. R. A. 414, 18 N. E. 370; *Welsh v. Taylor*, 134 N. Y. 450, 18 L. R. A. 535, 31 N. E. 896; *Wiley v. Norfolk Southern R. Co.*, 96 N. C. 408; *Faulkner v. Rocket*, 33 R. I. 152, 80 Atl. 380; *Taylor v. Hampton*, 4 McCord (S. C.) 96, 17 Am. Dec. 710; *Monaghan v. Memphis Fair & Exposition Co.*, 95 Tenn. 108, 31 S. W. 497. *Brown v. Oregon Short Line R. Co.*, 36 Utah, 257, 24 L. R. A. (N. S.) 86, 102 Pac. 740; *Philips v. Coumbe*, 90 Wash. 543, 156 Pac. 535; *Stenz v. Mahoney*, 114 Wis. 117, 89 N. W. 819.

tion of fact.⁶² And it must be established, it has been said, by "evidence clear and unequivocal of acts decisive and conclusive."⁶³ Even the fact that the owner of the dominant tenement erects or alters a structure in such a way as to render the exercise of the easement for the time difficult or impossible does not necessarily involve an abandonment of the easement.⁶⁴

It has been stated, with more or less explicitness, that the underlying theory of the abandonment of an easement is that of the inference or implication, from the circumstances of the case, of an express release of the easement,⁶⁵ but such a theory does not

62. *Smith v. Worn*, 93 Cal. 206, 28 Pac. 944; *Holmes v. Jones*, 80 Ga. 659, 7 S. E. 168; *Vogler v. Geiss*, 51 Md. 407; *King v. Murphy*, 140 Mass. 254, 4 N. E. 566. *Willets v. Langhaar*, 212 Mass. 573, 99 N. E. 466; *Leach v. Philadelphia, H. & P. R. Co.*, 258 Pa. 522, 102 Atl. 175; *Polson v. Ingraham*, 22 S. C. 541; *Southern Ry.-Carolina Division, v. Howell*, 89 S. C. 391, Ann. Cas. 1913A, 1070, 71 S. E. 972; *Cook v. Bath Corporation*, L. R. 6 Eq. 177.

63. *Adams v. Hodgkins*, 109 Me. 361, 42 L. R. A. (N. S.) 741, 84 Atl. 530. And for statements of a more or less similar character, see *Dyer v. Sanford*, 9 Metc. (Mass.) 395, 43 Am. Dec. 306; *Eddy v. Chace*, 140 Mass. 471, 5 N. E. 306; *Lagorio v. Lewenberg*, 226 Mass. 464, 115 N. E. 979; *Hennessy v. Murdock*, 137 N. Y. 317, 33 N. E. 330; *Vogler v. Geiss*, 51 Md. 407; *Raritan Water Power v. Veghte*, 21 N. J. Eq. 463.; *Daniel v. Doughty*, 120 Va. 853, 92 S. E. 848.

64. *Brunthaver v. Talty*, 31 App. Dist. Col. 134; *Hayward v.*

Spokesfield, 100 Mass. 491. *Vinton v. Greene*, 158 Mass. 426, 33 N. E. 607; *Faulkner v. Duff*, 14 Ky. L. Rep. 227, 20 S. W. 227; *McKee v. Perchment*, 69 Pa. 342. *Compare Taylor v. Hampton*, 4 McCord (S. Car.) 96, 17 Am. Dec. 710; *Tuttle v. Sowadzki*, 41 Utah, 501, 126 Pac. 959.

As to the question of the abandonment of an easement of light, see *Salem City Nat. Bank v. Van Meter*, 59 N. J. Eq. 32, 45 Atl. 280, 61 N. J. Eq. 674, 47 Atl. 1131; *Johnson v. Hahne*, 61 N. J. Eq. 438, 49 Atl. 5; *Fowler v. Wick*, 74 N. J. Eq. 603, 70 Atl. 682, and the many English cases cited in *Gale, Easements*, and *Goddard, Easements*.

65. See *Norbury v. Meade*, 3 Bligh. 242; *Lovell v. Smith*, 3 C. B. N. S. 120, 127; *Doe d. Putland v. Hilder*, 2 Barn. & Ald. 782; *Winham v. McGuire*, 51 Ga. 578; *Adams v. Hodgkins*, 109 Me. 361, 42 L. R. A. (N. S.) 741, 84 Atl. 530; *Brown v. Trustees of Methodist Episcopal Church*, 37 Md. 108; *Suydam v. Dunton*, 84 Hun (N. Y.) 506, 32 N. Y. Supp.

appear to have had any practical result on the course of decision. Occasionally, it has been stated that an indication of intention to abandon the easement is not effective to extinguish the easement unless the owner of the servient tenement is induced thereby to make expenditures or otherwise to alter his position, thus in effect making the question of abandonment a question of estoppel.⁶⁶ But this is evidently not in accord with the great weight of authority. The fact, however, that the person asserting the abandonment was induced, by the course of action of the owner of the easement, to assume that there was an intention to abandon the easement, and to make improvements on the strength of this assumption, would presumably operate in favor of a finding of abandonment, or as it might otherwise be expressed, the owner of the easement might, in such case, be regarded as estopped to assert the easement.^{66a}

Nonuser in itself does not terminate an easement acquired by grant,⁶⁷ and, as above stated, it is at most merely one of the facts from which an abandonment may be inferred. The fact that the nonuser continues

333; 3 Kent, Comm. 448; Goddard, Easements, 555. The whole theory of extinguishment of easements by abandonment is severely criticized in 11 Columbia Law Rev. at p. 777.

66. See *Smith v. Worn*, 93 Cal. 206, 28 Pac. 944; *Vance v. Adams* (Ky.) 112 S. W. 927; *Day v. Walden*, 46 Mich. 575, 10 N. W. 26; *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 742.

66a. See *Trimble v. King*, 131 Ky. 1, 22 L. R. A. (N. S.) 880, 114 S. W. 317; *Patterson v. Chambers' Power Co.*, 81 Ore. 328, 159 Pac. 568; *Andrews v. Cohen*, 221 N.

Y. 148, 116 N. E. 862. And *post*, § 378.

67. *Moore v. Rawson*, 3 Barn. & C. 332; *Smith v. Worn*, 93 Cal. 206, 28 Pac. 994; *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690; *Dewire v. Hanley*, 79 Conn. 454, 65 Atl. 573; *Ford v. Harris*, 95 Ga. 97, 22 S. E. 144; *Hoffthen v. Mede*, 226 Ill. 320, 80 N. E. 893; *Edgerton v. McMullan*, 55 Kan. 90, 39 Pac. 1021; *Adams v. Hodgkins*, 109 Me. 361, 42 L. R. A. (N. S.) 741, 84 Atl. 530; *Dana v. Valentine*, 2 Allen (Mass.) 128; *Hayford v. Spokesfield*, 100 Mass. 491; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128; *Murphy*

for the prescriptive period is immaterial,⁶⁸ in the absence of any adverse acts on the part of the owner of the land.⁶⁹

There are *dicta* to the effect that an easement acquired by prescription, as distinguished from one acquired by express grant, may be extinguished by non-user alone,⁶⁹ though in but one case, apparently,⁷⁰ is there a direct decision to this effect, and such a distinction has been doubted, apparently with good reason.⁷¹

Chair Co. v. American Radiator Co., 172 Mich. 14, 137 N. W. 791; Dulce Realty Co. v. Staed Realty Co., 254 Mo. 417, 151 S. W. 415; Dill v. Board of Education of City of Camden, 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739; Welsh v. Taylor, 134 N. Y. 450, 18 L. R. A. 535, 31 N. E. 896; Willey v. Norfolk S. R. Co., 96 N. C. 408, 1 S. E. 446; Hoffman v. Dorris, 83 Ore. 625, 163 Pac. 972; Bombaugh v. Miller, 82 Pa. St. 203; Sweezy v. Vallette, 37 R. I. 51, 90 Atl. 1078; Boyd v. Hunt, 102 Tenn. 495, 52 S. W. 131; Scott v. Moore, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 342; McCue v. Bellingham Bay Water Co., 5 Wash. 156, 31 Pac. 461.

68. Ward v. Ward, 7 Exch. 838; Nichols v. Peck, 70 Conn. 439, 40 L. R. A. 81, 66 Am. St. Rep. 122, 39 Atl. 803; Ford v. Harris, 95 Ga. 97, 22 S. E. 144; Edgerton v. McMullan, 55 Kan. 90, 39 Pac. 1021; Pratt v. Sweetser, 68 Me. 344; King v. Murphy, 140 Mass. 254, 4 N. E. 566; Butterfield v. Reed, 160 Mass. 361, 35 N. E. 1128; Day v. Walden, 46 Mich. 575, 10 N. W. 26; Wheeler v. Wilder, 61 N. H. 2; Welsh v.

Taylor, 134 N. Y. 450, 18 L. R. A. 535, 31 N. E. 896; Lindeman v. Lindsey, 69 Pa. St. 93, 8 Am. Rep. 219; Mason v. Horton, 67 Vt. 266, 48 Am. St. Rep. 817, 31 Atl. 291.

But non user for the prescriptive period has occasionally been regarded as creating a rebuttable presumption of intention to abandon. Pratt v. Sweetser, 68 Me. 344; Dyer v. Dupui, 5 Whart. (Pa.) 584; Hunter v. West, 172 N. C. 160, 90 S. E. 130. See Reg v. Chorley, 12 Q. B. 515; 11 Halsbury's Laws of England, 278; Goddard, Easements (6th Ed.), 560.

69. Kuecken v. Voltz, 110 Ill. 264; Adams v. Hodgkins, 109 Me. 361, 84 Atl. 530; Wooster v. Fiske, 115 Me. 161, 98 Atl. 378. Browne v. Baltimore M. E. Church, 37 Md. 108; Arnold v. Stevens, 24 Pick. (Mass.) 106, 35 Am. Dec. 305; Hayford v. Spokesfield, 100 Mass. 491; Smyles v. Hastings, 22 N. Y. 217; Pope v. O'Hara, 48 N. Y. 446; Nitzell v. Paschall, 3 Rawle (Pa.) 76. See Curran v. City of Louisville, 83 Ky. 628; Willey v. Norfolk R. Co., 96 N. C. 408, 1 S. E. 446.

In a few states this asserted distinction has been in effect embodied in a statutory provision that a servitude acquired by enjoyment may be extinguished by disuse thereof for the period prescribed for acquiring title by enjoyment.⁷²

According to a few decisions, an easement cannot be extinguished by abandonment, unless there has been a failure to use the easement for a period equal to that necessary for the creation of an easement by prescription,⁷³ but this view has not been generally adopted.⁷⁴

§ 378. Executed license. It has been decided that if one who has an easement in another's land gives a license to the owner of the servient tenement to do something thereon, the effect of which is to obstruct the exercise of the easement, and the licensee, on the faith of the license, makes expenditures for improvements obstructive of the easement, the easement is extinguished.⁷⁵ Accordingly, if one entitled to an ease-

70. *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631.

71. See *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142. *Pratt v. Sweetser*, 68 Me. 344; *Angell, Water Courses* (7th Ed.) § 252, note; 3 Kent, Comm. 450, note by Mr. Justice Holmes. The distinction is not recognized in England. See *Gale, Easements*, 527. In *Hale v. Oldroyd*, 14 Mees. & W. 789; *Ward v. Ward*, 7 Exch. 838; *Lovell v. Smith*, 3 C. B. (N. S.) 120,—all cases of prescriptive easements,—nonuser for the statutory period was not regarded as in itself extinguishing the right, no reference being made to any such distinction as that referred to above.

72. California Civ. Code, §

811; Montana Codes 1907, § 4517; North Dakota, Comp. Laws 1913, § 5340. Oklahoma Rev. Laws 1910, § 6633; South Dakota Civ. Code, § 277.

73. *Cox v. Forrest*, 60 Md. 74; *Wilder v. City of St. Paul*, 12 Minn. 192; *Corning v. Gould*, 16 Wend. (N. Y.) 531.

74. See *Reg v. Chorley*, 12 Q. B. 515; *Moore v. Rawson*, 3 Barn. & C. 332; *Louisville, & N. R. Co., v. Covington*, 2 Bush (Ky.) 526; *Fitzpatrick v. Boston, & M. R. R.*, 84 Me. 33, 24 Atl. 432. *Canny v. Andrews*, 123 Mass 155; *Steere v. Tiffany*, 13 R. I. 568.

75. *Winter v. Brockwell*, 8 East, 308, as explained in *Hewlins v. Shippam*, 5 Barn. & C. 221; *Liggins v. Inge*, 7 Bing. 682;

ment of light over another's land gives a license to the owner of the servient tenement to erect a building thereon which will prevent the passage of light, and the building is erected accordingly, the easement of light is extinguished;⁷⁶ and, if one entitled to flow another's land gives such other a license to erect an embankment preventing such flow, and the embankment is erected, the easement of flowage is extinguished.⁷⁷ These decisions have been referred to in some jurisdictions as representing an exception to the general rule that a license is revocable even though followed by improvements on the faith thereof,⁷⁸ but they may more satisfactorily, it is conceived, be regarded as applications of the doctrine of estoppel. Just as one who undertakes orally to grant an easement is, after the intended grantee makes improvements on the strength thereof, estopped to deny the validity of the grant,⁷⁹ so one who undertakes orally to release an easement by authorizing the construction of improvements which will prevent its

Boston, & P. R. Corp. v Doherty, 154 Mass. 314, 28 N. E. 277; *Cartwright v. Maplesden*, 53 N. Y. 622; *Addison v. Hack*, 2 Gill (Md.) 221, 41 Am. Dec. 421; *Vogler v. Geiss*, 51 Md. 407. *Davidson v. Kretz*, 127 Minn. 313, 149 N. W. 652. See *Stein v. Dahm*, 96 Ala. 481, 11 So. 597.

76. *Winter v. Brockwell*, 8 East, 308. The doctrine has been held to be applicable to the so-called easements of light, air, and access in the owner of land abutting on a highway. *White v. Manhattan Ry. Co.*, 139 N. Y. 19, 34 N. E. 887. See *post*, § 417.

77. *Morse v. Copeland*, 2 Gray (Mass.) 302.

78. "The authorities * * * show that the rule, sometimes

laid down in the books, that a license executed cannot be countermanded, is not applicable to licenses which, if given by deed, would create an easement, but to licenses which, if given by deed, would extinguish or modify an easement. They also show that the distinction, sometimes taken in the books, between a license to do acts on the licensee's own land, and a license to do acts on the licensor's land, is the same distinction that is made between licenses which, if held valid, would create, and licenses which extinguish or modify, an easement." *Metcalfe, J.*, in *Morse v. Copeland*, 2 Gray (Mass.) 302.

79. *Ante*, § 349(d) notes 44-49.

exercise, is thereafter estopped to deny the validity of the release. If he evidently does not intend to release the easement, as when he gives permission to construct merely a temporary obstruction, the fact that such obstruction is erected would apparently not preclude him from afterwards asserting the easement.⁸⁰

Attention has,^{80a} in this connection, been called to the consideration that, after the obstruction has been erected on the servient tenement under license from the owner of the dominant tenement, the latter is powerless to remove it or to compel its removal, and that this in itself precludes him from again exercising the easement until the owner of the servient tenement voluntarily removes the obstruction, or it is removed by natural causes.

In the case of a license to obstruct a way at a particular point only, the fact of the construction of the obstruction in accordance therewith, while it may properly be regarded as extinguishing the way at that point, and, by reason of the physical conditions of the way, such partial extinguishment may necessarily involve a total disuse of the way,⁸¹ it may occur that a right of passage by or around the obstruction is substituted by agreement,⁸² with the result that the way still exists over the servient tenement except at the point at which the obstruction occurs.⁸³ The fact that, without having given any express license to obstruct the way, the owner of the dominant tenement makes no objection to the erection of a structure which has that effect, does not necessarily, it seems, preclude him from

80. See *Vogler v. Geiss*, 51 Md. 407.

80a. See editorial note, 11 Columbia Law Rev. at p. 78.

81. See *Vogler v. Geiss*, 51 Md. 407; *Cartwright v. Maplesden*, 53 N. Y. 622; *Aldrich v. Billings*, 14 R. I. 233; *Boston & P.*

R. Corp. v. Doherty, 154 Mass. 314, 28 N. E. 277; *Davidson v. Kretz*, 127 Minn. 313, 149 N. W. 652.

82. *Ante*, § 367, notes 12-17.

83. See *Peck v. Lloyd*, 38 Conn. 566; *Hall v. Hall*, 106 Me. 389, 76 Atl. 705.

afterwards asserting his right of passage if the owner of the servient tenement knew, or had reason to know, of the easement.⁸⁴ But the physical conditions of the way and the other circumstances may be such as to justify an inference that another place of passage has been substituted by mutual assent.⁸⁵

§ 379. **Adverse user of land.** An easement may be extinguished by the user of the servient tenement in a manner adverse to the exercise of the easement, for the period required to give title to land by adverse possession,⁸⁶ a subject hereafter discussed.⁸⁷ The mere fact, however, that the servient owner uses the land without reference to the existence of the easement, does not render his user adverse, since he may do this merely as a consequence of the failure to exercise the easement. He must in some way actively interfere with the exercise of the easement, to such an extent as to give a right of action against him for disturbance of the easement.⁸⁸ Consequently, the maintenance of a

84. *Welsh v. Taylor*, 134 N. Y. 450, 18 L. R. A. 535, 31 N. E. 896; *Oberheim v. Reeside*, 116 Md. 265, 81 Atl. 590. But see *Arnold v. Cornman*, 50 Pa. 361.

85. *Fitzpatrick v. Boston & M. R. R.*, 84 Me. 33, 24 Atl. 432; *ante*, § 367, notes 12-17.

86. *Wall v. United States Mining Co.*, 239 Fed. 90, 152 C. C. A. 140; *Jesse French Piano & Organ Co. v. Forbes*, 129 Ala. 471, 87 Am. St. Rep. 71, 29 So. 683; *Louisville & N. R. Co. v. Quinn*, 94 Ky. 310, 22 S. W. 221; *Baltimore, City of, v. Canton Co. of Baltimore*, 124 Md. 620, 93 Atl. 144; *Smith v. Langewald*, 140 Mass. 205, 4 N. E. 571; *Burnham v. Mahoney*, 222 Mass. 524, 111

N. E. 396; *Dill v. Board of Education of City of Camden*, 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 729; *Woodruff v. Paddock*, 130 N. Y. 618, 29 N. E. 1021; *State v. Suttle*, 115 N. C. 784, 20 S. E. 725; *Hoffman v. Dorris*, 83 Ore. 625, 163 Pac. 972; *Spackman v. Steidel*, 88 Pa. St. 453; *Jessop v. Borough of Kittaning*, 225 Pa. St. 589, 74 Atl. 554; *Bentley v. Root*, 19 R. I. 205, 32 Atl. 918; *Bowen v. Team*, 6 Rich. Law (S. C.) 298, 60 Am. Dec. 127; *City of Galveston v. Williams*, 69 Tex. 449, 6 S. W. 860.

87. *Post*, §§ 500-513.

88. *Edgerton v. McMullan*, 55 Kan. 90, 39 Pac. 1021; *Smith v. Langewald*, 140 Mass. 205, 4 N.

gate across a way would not usually involve an adverse user of the land, it not being such as to give a right of action.⁸⁹ A mere notice by the owner of the land to the person having the easement, demanding that the latter cease to make use of the land, and in effect denying the existence of the easement, does not constitute an actionable obstruction thereof,^{89a} and consequently the continuance of such denial for the statutory period, if unattended by any actual interference with the exercise of the easement, will not affect the existence of of the easement.

The adverse user may be, not only by the owner of the servient tenement, but also by another person,⁹⁰ and such other person may be one who has also an easement in the same land.⁹¹ That is, if there is adverse possession sufficient to divest a fee simple title to land, it will also operate to extinguish an easement in such land, without reference to whether the adverse possessor previously had himself an estate or an easement in the land.

§ 380. In favor of innocent purchaser. An easement is, in effect, as a general rule, extinguished as to a purchaser for value of the servient tenement, if

E. 571; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128; *Day v. Walden*, 46 Mich. 575, 10 N. W. 26; *Dill v. Board of Education of City of Camden*, 47 N. J. Eq. 421, 10 L. R. A. 276, 20 Atl. 739; *Andrus v. National Sugar Refining Co.*, 183 N. Y. 580, 76 N. E. 1088; *State v. Suttle*, 115 N. C. 784, 20 S. E. 725; *Lindsey v. Lindeman*, 69 Pa. St. 93, 8 Am. Rep. 219; *James v. Stevenson* (1893), App. Cas. 162. But see *Baugh v. Arnold*, 123 Md. 6, 91 Atl. 151; *Hunter v. West*, 172 N.

C. 160, 90 S. E. 130.

89. *Welsh v. Taylor*, 134 N. Y. 450, 18 L. R. A. 535, 31 N. E. 896; *State v. Pettis*, 7 Rich. (S. Car.) 390; *Boyd v. Hunt*, 102 Tenn. 495, 52 S. W. 131.

89a. *Dana v. Smith*, 114 Me. 262, 95 Atl. 1034; Compare, *post*, § 528.

90. *San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542.

91. *Goodwin v. Bragaw*, 87 Conn. 31, 86 Atl. 668.

he purchases without notice, either actual or constructive,^{91a} of the easement,⁹² while he takes subject to the easement if he has notice thereof.⁹³

In the case of an easement created by express grant, the right of the innocent purchaser for value of the servient tenement to hold the land free from the burden of the easement is obviously by reason of the recording laws, which invalidate an unrecorded conveyance as against a purchaser without notice,⁹⁴ and the same is true of an easement created by "implied grant" so called,⁹⁵ which is properly, as before explained, an express grant extended by construction to include an easement appurtenant to the land conveyed. In the case of a prescriptive easement, however, the recording acts, as ordinarily phrased, cannot well apply to protect an innocent purchaser, since they have to do with priorities as between instruments affecting land, while if the easement is prescriptive the question is one of priority as between a claim under an instru-

91a. *Post*, § 511.

92. *Mesmer v. Uharriet*, 174 Cal. 110, 162 Pac. 104; *Rives v. Hickey*, 1 MacArthur (D. C.) 83; *Rome Gaslight Co. v. Meyerhardt*, 61 Ga. 287; *Armor v. Pye*, 25 Kan. 731; *Jobling v. Tuttle*, 75 Kan. 351, 9 L. R. A. (N. S.) 960, 89 Pac. 699; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Taylor v. Millard*, 118 N. Y. 244, 6 L. R. A. 667, 23 N. E. 376, affirming 42 Hun, 363; *Tise v. Whitaker Harvey Co.*, 144 N. C. 507; *Ricks v. Scott*, 117 Va. 370, 84 S. E. 676; *Roe v. Walsh*, 76 Wash. 148, 135 Pac. 1031, 136 Pac. 1146; *Pentland v. Keep*, 41 Wis. 490; *Taggart v. Warner*, 83 Wis. 1, 53 N. W. 33. See *McCann v. Day*, 57 Ill. 101; *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421,

27 N. E. 344; *Wissler v. Hershey*, 23 Pt. St. 333.

93. *Pollard v. Rebman*, 162 Cal. 633, 124 Pac. 235; *Ashelford v. Willis*, 194 Ill. 492, 62 N. E. 817; *Downey v. Hood*, 203 Mass. 4, 89 N. E. 24; *Dinneen v. Corporation, etc.*, 114 Md. 589, 79 Atl. 1021; *Murphy Chair Co. v. American Radiator Co.*, 172 Mich. 14, 137 N. W. 791; *Litchfield v. Boogher*, 238 Mo. 472, 142 S. W. 302; *Reid v. King*, 158 N. C. 85, 73 S. E. 168; *Shields v. Titus*, 46 Ohio St. 528; *Patterson v. Chambers' Power Co.*, 81 Ore. 328, 159 Pac. 568; *Little v. Gibb*, 57 Wash. 92, 106 Pac. 491; *Proudfoot v. Saffle*, 62 W. Va. 51, 57 S. E. 256; *Forde v. Libby*, 22 Wyo. 464, 143 Pac. 1190.

ment and a claim not under an instrument. In one state there are decisions to this effect, that a purchaser of land takes it subject to a prescriptive easement thereon, even though he has no notice, actual or constructive.⁹⁶ There are on the other hand occasional decisions that the purchaser in such case takes free from the easement, the courts ignoring the consideration that the doctrine of notice, as regards legal rights, is based upon the recording acts and has no existence apart therefrom.⁹⁷

94. *Post*, § 567.

95. *Quinlan v. Noble*, 75 Cal. 250, 17 Pac. 69; *Ingals v. Plamondon*, 75 Ill. 118; *Shepardson v. Perkins*, 58 N. H. 354; *Muir v. Cox*, 110 Ky. 560, 62 S. W. 723; *Havens v. Klein*, 51 How. Pr. (N. Y.) 82; *Rollo v. Nelson*, 34 Utah, 116, 26 L. R. A. (N. S.) 315, 96 Pac. 315; *Hair v. Downing*, 96 N. Car. 172, 2 S. E. 520; *Eliason v. Grove*, 85 Md. 215, 36 Atl. 844; *Muse v. Gish*, 114 Va. 90, 75 S. E. 764. See also citations, *ante*,

§ 363c, note 80.

96. *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134; *Shaughnessy v. Leary*, 162 Mass. 108, 38 N. E. 197. See cases cited, *post*, § 531.

97. *Schmidt v. Brown*, 226 Ill. 590, 80 N. E. 1071; *Jobling v. Tuttle*, 75 Kan. 351, 9 L. R. A. N. S. 960, 89 Pac. 699; *Sparks v. Rogers*, 29 Ky. Law Rep. 1170, 97 S. W. 11; *Van De Vanter v. Flaherty*, 37 Wash. 218, 79 Pac. 794.

CHAPTER XIII.

PROFITS A PRENDRE.

- § 381. General considerations.
- 382. Rights in gross and appurtenant.
- 383. Rights of common.
- 384. Rights of pasture.
- 385. Mineral rights.
- 386. The creation of rights.
- 387. Apportionment and extinction.

§ 381. **General considerations.** A *profit à prendre* involves primarily a power to acquire, by severance or removal from another's land, some thing or things previously constituting a part of the land, or appertaining thereto, the holder of the *profit à prendre* having, as an integral part thereof, rights against the members of the community generally that they shall not interfere with the exercise or enjoyment of the power.¹ As instances of *profits à prendre* may be mentioned rights to take from another's land, and so acquire as one's own, wood,² herbage,³ or coal or other minerals,⁴ this latter being at the present day the most important class of such rights. Likewise, one may have the right to kill and take as his own game on another's land,⁵ fish in waters thereon,⁶ seaweed cast thereon,⁷

1. For a justifiable criticism of a former definition by the present writer, see Professor Hohfield's article in 27 Yale Law Journ. at p. 70.

2. Reg v. Chamberlains, 9 Adol. & E. 444; Clark v. Way, 11 Rich. (S. C.) 621.

3. Co. Litt. 4b, 122a; Johnson v. Barnes, L. R. 8 C. P. 527.

4. Post, § 385.

5. Wickham v. Hawker, 7 Mees. & W. 63; Webber v. Lee, 9 Q. B. D. 315; Bingham v. Salene, 15 Ore. 208, 3 Am. St. Rep. 152, 14 Pac. 523.

6. Fitzgerald v. Firbank, [1897] 2 Ch. 96; Turner v. Hebron, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951.

7. Hill v. Lord, 48 Me. 83; Sale v. Pratt, 19 Pick. (Mass.) 191.

or soil, sand and gravel therein.⁸ A right to take ice has been regarded as a *profit à prendre*.^{8a}

A *profit à prendre* may be exclusive of any right in the land owner or in other persons to take that particular profit, or it may not be so exclusive.⁹ In the case of an exclusive right of profit the one entitled thereto, having begun the exercise thereof, has been regarded to that extent as in possession of the land, so as to be entitled to maintain an action of trespass *quare clausum fregit* against a person interfering therewith.¹⁰

A *profit à prendre*, like an easement, may be created to endure in perpetuity, that is, for the duration of an estate in fee simple, or for a less period, such as a term of years,¹¹ or it may even be terminable at the will of either the land owner or the owner of the profit.^{11a}

A *profit à prendre* involves a right to do such things on the land in which the right exists as are reasonably necessary for the exercise of the right. Thus, one to whom is given the right to take timber from land may enter on the land to do so,¹² and one given a right to mine may cut through the soil for that purpose, and erect necessary mining machinery.^{12a}

8. Maxwell v. Martin, 6 Bing. 522; Blewett v. Tregonning, 3 Ad. & El. 554; Constable v. Nicholson, 14 C. B. N. C. 230; Merwin v. Wheeler, 41 Conn. 25; Wenger v. Clay Tp. 61 of St. Joseph County, 61 Ind. App. 640, 112 N. E. 402; Perley v. Langley, 7 N. H. 233; Hopper v. Herring, 75 N. J. L. 212, 67 Atl. 714; Texas & P. Ry. Co. v. Durrett, 57 Tex. 48.

8a. Mitchell v. D'Olier, 62 N. J. L. 375, 59 L. R. A. 949, 53 Atl. 467. Huntington v. Asher, 96 N. Y. 604.

9. Post, § 383.

10. Burt v. Moore, 5 Term 2 R. P.—13

Rep. 329; Harker v. Birkbeck, 3 Burr. 1556; Wilson v. Mackreth, 3 Burr. 1824; Crosby v. Wadsworth, 6 East. 602; Holford v. Bailey, 13 Q. B. 426; Fitzgerald v. Firbank [1897] 2 Ch. 96.

11. Hooper v. Clark, L. R. 2 Q. B. 200; Fitzgerald v. Firbank (1897) 2 Ch. 96. Davis v. Miller-Brent Lumber Co., 151 Ala. 580, 44 So. 639.

11a. Christian v. Stilth Coal Co., 189 Ala. 500, 66 So. 641.

12. Liford's Case, 11 Coke. 52a; Leake, Prop. in Land, 349.

12a. Cardigan v. Armitage, 2 Barn. & C. 197; Dand v. Kings-

That one has the exclusive right of hunting wild fowl on another's land has been held not to affect the right of the latter to drain or otherwise change the land, provided he does this in good faith to improve the land, though this detracts from the value of the hunting privilege.^{12b}

— **Right to take water.** The right to take water upon another's land from such a natural source of supply as a pond or spring, has been regarded as an easement and not a *profit à prendre*, on the theory that the water does not belong to the owner of the land on or by which it flows, and consequently the grant of the right to take it, while valid in so far as it gives an easement to pass over the land to reach the water, is a nullity as regards the water.¹³ And likewise, as the owner of land abutting on a natural watercourse has no ownership of the water therein,^{13a} a grant by him of the right to take water from the stream would seem to involve merely the creation of an easement.^{13b} In so far as water on one's land can be regarded as not *publici juris*, but as belonging

cote, 6 Mees. & W. 174; Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368, 4 So. 350; Marvin v. Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322; Wardell v. Watson, 93 Mo. 107, 5 S. W. 605.

12b. Isherwood v. Salene, 61 Ore. 572, 40 L. R. A. (N. S.) 299, Ann. Cas. 1914B, 542, 123 Pac. 49.

13. Race v. Ward, 4 El. & Bl. 702; Manning v. Wasdale, 5 Adol. & E. 758; Hill v. Lord, 48 Me. 83. Goodrich v. Burbank, 12 Allen (Mass.) 459, 90 Am. Dec. 161. See Legg v. Horn, 45 Conn. 409.

But that water issuing from a spring is private property, see Metcalf v. Nelson, 8 S. D. 87,

65 N. W. 911.

In Turner v. Hebron, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951, it was held that one person could own the water in a large pond, with the incidental right of fishing therein, while another owned the bed of the pond.

The view that a right to take water is an easement rather than a *profit à prendre* is perhaps not entirely in accord with the cases regarding a right to take ice as a *profit à prendre*. Mitchell v. D'Olier, 68 N. J. L. 375, 59 L. R. A. 949, 53 Atl. 467; Huntington v. Asher, 96 N. Y. 604.

13a. *Ante*, § 339(a).

13b. *Ante*, § 352.

to him personally, as when it is accumulated by him in a cistern or aqueduct,^{13c} since the water is not a part of the land, the grant of such water would be, not the grant of a right of profit, but rather the grant of a chattel, with an incidental right to come on the land for the purpose of taking it, that is, using the terminology of the older books, there is in such case a license coupled with an interest.^{13d} But in those states in which water from natural streams is regularly distributed by means of aqueducts and ditches controlled by irrigation companies, contracts with such companies are regarded as having "for their subject matter the usufruct in the stream (and not the water itself) through the intermediate agency of the ditch, affecting the water right in the stream from which the ditch heads. So far as the water in the canal is personally, it is personally of the consumers as well as of the company, the company being chiefly the agent of the consumers to make the diversion and carry the water."^{13e}

— **License privilege distinguished.** One having a *profit à prendre* has a right, as against the members of the community generally, including the owner of the land, that they shall not interfere with the exercise or enjoyment of the profit.¹⁴ It is in this respect that a license to sever particular things from the land is to be distinguished from a *profit à prendre*, the licensee having no right to freedom from interference by third persons or by the landowner himself. the distinction between a license and a *profit à prendre* being in a general way similar to that between a license and an easement.¹⁵ It is as a result, it seems,

13c. *Ante*, § 339(a).

13d. *Ante*, § 349(d).

13e. Samuel C. Wiel, Esq.,
article 22 Harv. Law Rev. at p.

213. See editorial notes, 13 Col-

umbia Law Rev. 251, 30 Harv.
Law Rev. 297.

14. See cases cited *ante*, this
section, note 11.

15. *Ante*, § 349(a).

of the absence of any duty on the part of the landowner to refrain from interference with the exercise of the license privilege that the license is revocable at the pleasure of the licensor.

Not infrequently a landowner licenses another to sever from the land some particular subject of profit, with the intention that the license, on effecting such severance, shall become the owner of the thing severed, as for instance, when the landowner orally licenses another to cut timber or remove minerals. In such a case there is both a license to sever the wood or minerals and an oral gift or sale of them, the gift or sale taking effect, for the purpose of transferring the ownership to the licensee, so soon as they become chattels by reason of their severance.¹⁶

§ 382. Rights in gross and appurtenant. Rights to take profits from another's land may exist in gross,—that is, they may be held by one independently of his ownership of other land, the rule in this respect differing in England from that usually regarded as applying to easements, unattended with a right of profit.¹⁷ They may, however, be appurtenant to other land, the land to which the right appertains being then the “dominant tenement,” and the land from which the profits are taken being the “servient tenement.”¹⁸

16. *Ante*, § 261.

17. *Welcome v. Upton*, 6 Mees. & W. 536; *Shuttleworth v. Le Fleming*, 19 C. B. (N. S.) 687; *Pierce v. Keator*, 70 N. Y. 419, 26 Am. Rep. 612; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 100 Am. Dec. 597; *Youghiogheny River Coal Co. v. Pierce*, 153 Pa. St. 74, 25 Atl. 1026; *Cadwalader v. Bailey*, 17 R. I. 495, 14 L. R. A. 300, 23 Atl. 20. *Williams, Rights of Common*, 184, 195, 203, 207.

18. *Phillips v. Rhodes*, 7 Metc. (Mass.) 322; *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 90 Am. Dec. 161; *Huntington v. Asher*, 96 N. Y. 604; *Bingham v. Salene*, 15 Ore. 208, 14 Pac. 523, 3 Am. St. Rep. 152; *Grubb v. Grubb*, 74 Pa. St. 25; *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715; *Chase v. Cram*, 39 R. I. 83, 97 Atl. 481, 802. And see cases in notes following.

A *profit à prendre* in gross is ordinarily regarded as freely transferable and inheritable.¹⁹ A *profit à prendre* appurtenant passes *prima facie* upon a transfer of the dominant tenement.^{19a}

A right of profit, in order that it may be appurtenant to other land, and pass therewith, must be in some way connected with the enjoyment of the right of property in the dominant tenement, and must be limited by the needs of the latter.^{19b} Consequently one cannot claim as appurtenant to land owned by him a right to take all the wood which may grow on other land, and dispose of it as he pleases,²⁰ or a right to take turf or seaweed from other land, without regard to the requirements of his own tenement.²¹

Since a right of profit appurtenant is limited and admeasured by the uses of the dominant tenement, it follows that such profit cannot be separated from the latter by a grant thereof to a third person without the tenement.²²

19. *Welcome v. Upton*, 6 Mees. & W. 536; *Muskett v. Hill*, 5 Eng. N. C. 694; *Grubb v. Bayard*, 2 Wall. Jr. 81; *Gaston v. Plum*, 14 Conn. 344; *New Haven v. Hotchkiss*, 77 Conn. 168, 58 Atl. 753; *Baker v. Kenney*, 145 Iowa, 638, 139 Am. St. Rep. 456, 124 N. W. 901; *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105; *Negaunee Iron Co. v. Iron Cliffs Co.*, 134 Mich. 264, 96 N. W. 468; *Boatman v. Lasley*, 23 Ohio St. 614; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 100 Am. Dec. 597; *Cadwalader v. Bailey*, 17 R. I. 498, 14 L. R. A. 300, 23 Atl. 20.

19a. *Warrick v. Queen's College*, 6 Ch. App. 716; *Hopper v. Herring*, 75 N. J. L. 212, 67 Atl. 714; *Huff v. McCauley*, 53 Pa. St.

209, 21 Am. Dec. 203; *Grubb v. Grubb*, 74 Pa. St. 25.

19b. *Chesterfield v. Harris* (1908), 2 Ch. 397; *Hopper v. Herring*, 75 N. J. L. 212, 67 Atl. 714; *Pierce v. Keator*, 70 N. Y. 419, 26 Am. Rep. 612.

20. *Bailey v. Stephens*, 12 C. B. N. S. 91.

21. *Valentine v. Penny*, Noy, 145; *Hall v. Lawrence*, 2 R. I. 218. In *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652, it was held that a right to cut ice on land, and to store it in an ice house on other land, might be appurtenant to the land on which the ice house was situated.

22. *Drury v. Kent*, Cro. Jac. 14; *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715; *Baker v. Ken-*

§ 383. **Rights of common.** The term "common" is frequently applied in England, especially by the older writers, to a right of profit, as when they speak of common of pasture, of estovers, of turbary, of piscary (fishing), or of digging for coals, minerals, and the like.²³ The word "common," applied in this connection, refers to the fact that the interest in the profits is "common," as between the person entitled to take profits and either the owner of the land, or other owners of like rights of profit in the same land.²⁴ Consequently, the word is properly applied to any *profit à prendre* which is not exclusive of like rights in either the owner of the land or in a third person. A right of profit, on the other hand, which is exclusive of any rights in either the landowner or in a third person to take similar profits from that particular land, is usually referred to in the English books as a "several" right, as in the case of a several right of fishery or of pasture.²⁵

Common of turbary involves the right in common with others, of digging turf on another's land, and common of piscary the right of fishing on the land of another, or, rather, in water on his land.²⁶ Common of estovers involves the right of taking necessary wood from another's land for use as firewood, or in repairs on a house or farm.²⁷

§ 384. **Rights of pasture.** The most important *profit à prendre*, historically considered, is that of pasturing cattle on another's land, usually referred to as "common of pasture." Under the feudal system, the

ney, 145 Iowa, 638, 139 Am. St. Rep. 456, 124 N. W. 901.

23. Co. Litt. 122a; 2 Blackst. Comm. 32, 34; Williams, Rights of Common, *passim*.

24. Co. Litt. 122a; 2 Pollock & Maitland, Hist. Eng. Law, 144;

Leake, Prop. in Land, 332.

25. Co. Litt. 122a; Williams, Rights of Common, 12, 18-30, 259-65.

26. Co. Litt. 122a; 2 Bl. Comm. 34; Smith v. Kemp. 2 Salk. 637.

27. 2 Bl. Comm. 35; Van Rens-

right existed in favor of the tenants of the manor as regards the waste land of the manor,—that is, the land not allotted to tenants or reserved by the lord as demesne land.²⁸

Common of pasture involves the placing of the cattle on the land to eat the herbage, in this differing from a right to take herbage from another's land by cutting and transporting it.²⁹

Common of pasture might, at common law, be “appendant,” “appurtenant,” “in gross,” or “because of vicinage.” Common appendant existed, as before suggested, in favor of each holder of arable land in a manor, as appertaining to such land, and involved the right to pasture, on the waste land of the manor, his “commonable” cattle. It could not be created after the statute of *Quia Emptores*, since a grant by the lord of the manor thereafter took the land granted out of the manor as regards tenure,³⁰ and cannot, of course, exist

selaer v. Radcliff, 10 Wend. (N. Y.) 639. The right to take estovers from another's land must be distinguished from the exclusive right of a tenant for life or years to take them from his own land, which has been previously considered. See, *ante*, § 283, and 2 Blackst. Comm. 35, Chitty's note.

28. This right in the tenants of the manor to take profits from the waste land probably existed, before the introduction of feudalism into England, as a right in the inhabitants of the town or “vill” to utilize the lands which belonged to the community as a whole. After the introduction of feudalism and of the manorial idea, these community lands came to be regarded as belonging to the lord, and consequently the right to take profits therefrom

was regarded as a right to *profits à prendre* in another's land. The community lands of the town or vill were themselves a survival of the “mark” system, which existed in all Aryan communities. Digby, Hist. Real Prop. (5th Ed.) 192; Williams, Rights of Common, 37 *et seq.*; Maine, Village Communities, *passim*; 4 Kent, Comm. 441, note by Hon. O. W. Holmes. In this country, traces of the mark system are to be found in the system of “commons” or “common lands” which existed in New England and also in the Spanish and French settlements. See *post*, § 418.

29. *De la Warr v. Miles*, 17 Ch. Div. 535; *Potter v. North*, 1 Saund. 353a, note; Williams, Rights of Common, 21.

30. Leake, Prop. in Land, 337, citing 2 Co. Inst. 85.

in this country. Common "because of vicinage" was a local custom of intercommoning,—that is, for cattle to stray from one common to another adjacent common, without creating any liability for trespass.³¹ It was based on custom, and has never existed in this country.³² Common of pasture "appurtenant" and "in gross" are rights of pasture annexed to a dominant tenement, or belonging to a person and his heirs, the terms being applied as in other cases of *profits à prendre*,³³ and these may exist in this country.

§ 385. **Mineral rights.** A person may have a right to take minerals from another's land in the nature of a *profit à prendre*.³⁴ Such right to take minerals from another's land must be carefully distinguished from an estate in the minerals themselves which, as previously stated, may be separated, for purposes of ownership, from the surface of the ground.³⁵ A grant of the right to take minerals from another's land is not

31. Co. Litt. 122a; 2 Blackst. Comm. 33.

32. A right of common, sometimes, perhaps, termed "common of vicinage," has been occasionally asserted in jurisdictions where the owner of cattle is not bound to prevent them from trespassing on unfenced land belonging to others (see *Davis v. Gurley*, 44 Ga. 532), but the right to allow one's cattle to roam over unfenced lands belongs, in those jurisdictions, to everybody, and, as clearly decided, constitutes in no sense a right of common of pasture (*Harrell v. Hannum*, 56 Ga. 508). See *Smith v. Floyd*, 18 Barb. (N. Y.) 522; *Thomas v. Marshfield*, 13 Pick. (Mass.) 240.

33. Co. Litt. 122a; 2 Blackst.

Comm. 33.

34. *Doe d. Hanley v. Wood*, 2 Barn. & Ald. 738; *Muskett v. Hill*, 5 Bing. N. C. 694; *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339, 19 L. Ed. 955; *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 380; *Baker v. Hart*, 123 N. Y. 470, 12 L. R. A. 60, 25 N. E. 948; *Clement v. Youngman*, 40 Pa. St. 341; *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286, 18 L. R. A. 702, 34 Am. St. Rep. 645, 25 Atl. 597.

35. *Wilkinson v. Proud*, 11 Mees. & W. 33; *Caldwell v. Fulton*, 31 Pa. St. 475; *Baker v. Hart*, 123 N. Y. 470, 12 L. R. A. 60, 25 N. E. 948; *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 380. See *ante*, § 253.

exclusive of the right of the owner of the land also to take them, unless it is so expressed.³⁶ A right to take oil or gas from land in which the person so entitled has no right of ownership is likewise, though not always expressly so stated, a right of *profit à prendre*.³⁷ Frequently what is properly a *profit à prendre* as regards minerals in land, that is, a power of a more or less permanent character to take as one's own minerals in the land, is referred to as a mining license,³⁸ the important distinction, before referred to, between a *profit à prendre* and a license,³⁹ being thus ignored.

§ 386. **The creation of rights.** A *profit à prendre* may, like an easement, be acquired by either grant or prescription. Since the grant of such a right involves a transfer of an interest in land, it must be created by writing, and a seal is necessary to the validity of the grant at common law.⁴⁰ An attempted grant of a *profit à prendre*, if invalid as being merely oral, or, it would seem, as wanting a seal, creates a license merely, which may be revoked at any time,⁴¹ but by reason of

36. Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Massot v. Moses, 3 Rich. (S. C.) 168; Harlow v. Lake Superior Iron Co., 36 Mich. 105; Silsby v. Trotter, 29 N. J. Eq. 228; Grubb v. Bayard, 2 Wall. Jr. 81, Fed. Cas. No. 5,849; Funk v. Halde-
man, 53 Pa. St. 229; Mountjoy's Case, Co. Litt. 164b.

37. See Brown v. Spilman, 155 U. S. 665, 39 L. Ed. 304; Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. St. 173; Duffield v. Rosenzweig, 144 Pa. St. 520, 23 Atl. 4.

38. See Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290, 322; Kamphouse v. Gaffner, 73 Ill. 453; Neumoyer v. Andreas,

57 Pa. St. 446; Boone v. Stover, 66 Mo. 430; Silsby v. Trotter, 29 N. J. Eq. 228; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Painbridge, Mines (5th Ed.) 280 *et seq.*; MacSwinney, Mines, c. 12. and authorities cited, *ante*, § 254.

39. *Ante*, § 381, notes 14-16.

40. Hopkins v. Robinson, 2 Lev. 2; Somerset v. Fogwell, 5 Barn. & C. 875; Holford v. Bailey, 13 Q. B. 426; Taylor v. Millard, 118 N. Y. 244, 6 L. R. A. 667, 23 N. E. 367; Kamphouse v. Gaffner, 73 Ill. 453; Boone v. Stover, 66 Mo. 430; McBee v. Loftis, 1 Strob. Eq. (S. C.) 90.

41. Williams v. Morrison (C. C.) 32 Fed. 177; Wheeler v. West, 71 Cal. 126, 11 Pac. 871; Kamp-

the making of improvements by the intended grantee on the faith thereof the intending grantor may be estopped to deny the validity of the grant,⁴² as in the case of an invalid grant of an easement.⁴³

A *profit a prendre* may also, like an easement, be created by words of exception or reservation.^{43a}

A right of profit may be acquired by prescription, provided the taking during the prescriptive period was limited to the requirements of a particular dominant tenement.⁴⁴ But there can be no prescriptive right of profit in the public.⁴⁵

§ 387. Apportionment and extinction. A *profit à prendre* in gross cannot be assigned in portions to different persons, so that each of the assignees may exercise it separately, but all the assignees must exercise it in common; this being on the theory that otherwise the land would be injured as a result of the taking of profits therefrom by numerous persons.⁴⁶ Some rights of common appurtenant, such as those of estovers, are not apportionable on the severance of the dominant tenement by the conveyance of a part thereof, since this would increase the amount of profits to be

house v. Gaffner, 73 Ill. 453; Desloge v. Pearce, 38 Md. 588; Huff v. McCauley, 53 Pa. St. 206.

42. Kamphouse v. Gaffner, 73 Ill. 453; Huff v. McCauley, 53 Pa. St. 206.

43. *Ante*, § 349(d), notes 44-49.

43a. Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Wardell v. Watson, 93 Md. 107, 5 S. W. 605; Alden's Appeal, 93 Pa. St. 182; Pierce v. Keator, 70 N. Y. 419.

That a reservation is ineffectual to create a *profit a prendre* in favor of a third person, see Beardslee v. New Berlin, L. &

P. Co., 207 N. Y. 34, 100 N. E. 434; Tuscorara Club of Milbrook v. Brown, 215 N. Y. 543, 109 N. E. 597.

44. Dowglas v. Kendall, Cro. Jac. 256; Cowlan v. Slack, 15 East, 108; Ackroyd v. Smith, 10 C. B. 164; Bailey v. Stephens, 12 C. B. N. S. 91; Harris v. Chesterfield (1911), App. Cas. 623; Hill v. Lord, 48 Me. 83; Morse v. Marshall, 97 Mass. 519; Perley v. Langley, 7 N. H. 233.

45. *Post*, § 419.

46. Mountjoy's Case, Co. Litt. 164b; Chetham v. Williamson, 4 East, 469; Funk v. Haldeman, 53 Pa. St. 229, 244; Harlow v. Lake

taken, and, consequently, as neither of the persons between whom the land is divided is entitled to the profits, the right thereto is entirely extinguished by such a conveyance.⁴⁷ But where a right of common is admeasurable according to the area of the dominant tenement, the common may be apportioned to the several parts of the dominant tenement upon its severance, the burden on the servient tenement not being increased thereby. Such is the case where there is a right to pasture such cattle as may be kept on the dominant tenement, or to take such herbage as may be used thereon, and the alienee of a part of the dominant tenement is entitled to a right of common proportioned to the extent of his grant.⁴⁸

A *profit à prendre* is extinguished by a release thereof to the owner of the servient tenement.⁴⁹ If the titles to the dominant and servient tenements become united in one person, he having an equal estate in both, the right of common or profit is extinguished, since a man cannot have a right of profit in his own land.⁵⁰ And the same result no doubt follows if the owner of a right of profit in gross acquires a fee-simple estate in the servient tenement.

Even though a right of profit or common is apportionable, if separate parts of the land subject thereto are held by different tenants, the right is extinguished in case the owner of the dominant tenement releases a

Superior Iron Co., 36 Mich. 105, 121.

47. Van Rensselaer v. Radcliffe, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; Livingston v. Ketchum, 1 Barb. (N. Y.) 592; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715; Bell v. Ohio & P. R. Co., 25 Pa. St. 161, 64 Am. Dec. 687.

48. Co. Litt. 122a; Tyrringham's Cas, 4 Coke, 37a; Wild's Case, 8 Coke, 78b; Hall v. Law-

rence, 2 R. I. 218, 57 Am. Dec. 715; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639.

49. Litt. § 480; Co. Litt. 280a; 2 Leake, 355.

50. Tyrringham's Case, 4 Coke, 38a; Bradshaw v. Eyre, Cro. Eliz. 570; Rex v. Inhabitants of Hermitage, Carth. 239; Saundeys v. Oliff, Moore, 467; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

part of such land from the burden of the profit,⁵¹ or if the dominant tenement and a part of the servient land become the property of one man,⁵² since, otherwise, the burden upon the other parts would be increased.

51. *Rotherham v. Green*, Cro. Leon. 43; *Livingston v. Ten*
Eliz. 593; *Hall v. Lawrence*, 2 Broeck, 16 Johns. (N. Y.) 14, 8
R. I. 218, 57 Am. Dec. 715; *John-* Am. Dec. 287; *Hall v. Lawrence*,
son v. Barnes, L. R. 7 C. P. 592, 2 R. I. 218, 57 Am. Dec. 715; *Bell*
600. v. Ohio & P. R. Co., 25 Pa. St.
52. *Kimpton v. Bellamy*, 1 161, 64 Am. Dec. 687.

CHAPTER XIV.

COVENANTS RUNNING WITH THE LAND.

- § 388. General considerations.
- 389. The running of benefits.
- 390. The runnings of burdens.
- 391. Privity of estate.
- 392. The nature of the covenant.
- 393. Party wall agreements.

§ 388. **General considerations.** Covenants with the owner of land, which are calculated to render its enjoyment more beneficial, may in some, if not all, cases, be enforced by a subsequent owner of the land; and, on the other hand, covenants made by the owner of land, restricting in some mode the freedom of its enjoyment, may, by some authorities, be enforced against a subsequent owner of the land. Covenants the benefit or burden of which may thus pass to subsequent owners of the land are said to "run with the land." Rights created by such covenants in favor of or against transferees of the land are strictly *in personam*, and not *in rem*; but as incidents of the land, following it into the hands of subsequent owners, they are somewhat similar in effect to proprietary rights in another's land such as have been previously discussed, and accordingly call for consideration in this connection.

That covenants in connection with leases run in favor of or against the owner of an estate for life or for years created by the lease, or of the reversion expectant on such estate, is determined, or at least confirmed, by the provisions of the statute of 32 Hen. VIII. c. 34. The terms and effect of this statute having been already considered,¹ the running of covenants made by or with the owner of land in fee simple not in connection with a lease, will alone be here discussed.

These questions of the assignment of contractual benefits and liabilities by the transfer of the land in connection with which the contract was made have usually been considered in connection with "covenants," strictly so called, that is, contracts under seal. In England, owing to the general practice of sealing formal legal instruments affecting land, the question of the running of a contract not under seal appears not to have been the subject of judicial determination, so far as appears; and the fact that the running of covenants in leases was, by the statute of 32 Hen. 8, expressly confined to covenants in indentures of lease may well have tended to confirm the view that in no case can an agreement not under seal run with the land. In this country there are one or two decisions that a contract not under seal will not run with the land² and at least one case indicative of a contrary view.³ In any state in which private seals have been abolished or their efficacy destroyed, the fact that a contract is or is not under seal is obviously immaterial upon the question whether it runs with the land.

In the case of a deed poll,—that is, an instrument sealed by one only of the parties thereto,—a stipulation therein on the part of the person not sealing it is, by the weight of authority, regarded as the covenant of such person by reason of his acceptance of the conveyance,⁴ though there are well-considered opinions

1. *Ante*, § 56(a).

2. *Martin v. Drinan*, 128 Mass. 515; *Kennedy v. Owen*, 136 Mass. 199; *Poage v. Wabash, St. L. & P. Ry. Co.*, 24 Mo. App. 199.

3. *Burbank v. Pillsbury*, 48 N. H. 475. That an oral contract will not run, see *St. Louis, A. & T. H. R. Co., v. Todd*, 36 Ill. 409; *Guilfoos v. N. Y. Cent. R. Co.*, 69 Hun (N. Y.) 593, 23 N. Y. Supp. 925; *Bartlett v. State*, — Ind. —,

114 N. E. 692.

4. *Co. Litt.* 230b, *Butler's* note; *Sheppard's Touchstone*, 177; *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492; *Sanitary District of Chicago v. Chicago Title & Trust Co.*, 278 Ill. 529, 116 N. E. 161; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A. 694, 21 Am. St. Rep. 189, 24 N. E. 758; *Sexauer v. Wilson*, 136 Iowa, 357, 14 L. R. A. (N. S.) 185, 15 A. & E.

to the contrary.⁵ In order to create a covenant, neither the word "covenant," nor any other particular word, is necessary,⁶ and words of condition are frequently, as before stated, construed as words of covenant.⁷ Moreover, words of covenant have been sometimes construed as creating, not a covenant, but an easement,⁸ or a charge on the land in the nature of a lien.⁹

§ 389. The running of benefits. That the right to sue upon a covenant relating to land may pass to a subsequent owner of the land, claiming under the covenantee, by reason merely of the conveyance of the land, is generally conceded.¹⁰ Such a covenant is usually

Ann. Cas. 54, 113 N. W. 941; Kentucky Cent. R. Co. v. Kenney, 82 Ky. 154 (*semble*); Poage v. Wabash, St. L. & P. Ry. Co., 24 Mo. App. 199; Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633; Finley v. Simpson, 22 N. J. L. 311, 53 Am. Dec. 252; Hagerty v. Lee, 54 N. J. L. 580, 20 L. R. A. 631, 25 Atl. 319; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Bowen v. Beck, 94 N. Y. 86, 46 Am. Rep. 124; Maynard v. Moore, 76 N. C. 158 (*semble*); Ring v. Mayberry, 168 N. C. 563, 84 S. E. 846; Hickey v. Lake Shore & M. S. Ry. Co., 51 Ohio St. 40, 23 L. R. A. 396, 46 Am. St. Rep. 543, 36 N. E. 72; Doty v. Chattanooga Union Ry. Co., 103 Tenn. 564, 53 S. W. 944, 48 L. R. A. 160, 6 L. R. A. (N. S.) 436.

5. Platt, Covenants, 10; Hinsdale v. Humphrey, 15 Conn. 431; Stabler v. Cowman, 7 Gill & J. (Md.) 284; Western Md. R. Co. v. Orendorff, 37 Md. 335; Newell

v. Hill, 2 Metc. (Mass.) 180; Martin v. Drinan, 128 Mass. 515; Kennedy v. Owen, 136 Mass. 199; Maule v. Weaver, 7 Pa. St. 329; First Congregational Meeting House Soc. v. Town of Rochester, 66 Vt. 501, 29 Atl. 810.

6. Platt, Covenants, 28; Hartung v. Witte, 59 Wis. 285, 18 N. W. 175; Midgett v. Brooks, 34 N. C. 145, 55 Am. Dec. 405; Taylor v. Preston, 79 Pa. St. 436; Trull v. Eastman, 3 Metc. (Mass.) 121; Electric City Land & Improvement Co. v. West Ridge Coal Co., 187 Pa. St. 500, 41 Atl. 458.

7. *Ante*, § 79.

8. *Ante*, § 361.

9. Fresno Canal & Irrigation Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; Howard Mfg. Co. v. Water Lot Co., 53 Ga. 689; Martin v. Martin, 44 Kan. 295, 24 Pac. 418; Goudy v. Goudy, Wright (Ohio), 410.

10. Pollock, Contracts (Williston's Ed.), 300; Sims, Covenants Running with Land, 136; Fergu-

made by the grantor or grantee of land as an incident of the conveyance, that is, by one who has some relation to the title. The question has, however, occasionally arisen whether one who is neither a grantor nor grantee of the land may make a covenant with the owner thereof, the benefit of which will pass to a subsequent owner of the land, that is, whether the benefit of a covenant may run, though there is lacking what is ordinarily referred to as "privity of estate" between the covenantor and covenantee. The authorities are about equally divided upon the question.¹¹ Apart, however, from any question of covenants running with the land, the transfer of the land might be construed as intended to pass the right of action for subsequent breaches of the covenant, that

son v. Omaha & S. W. R. Co., 227 Fed. 513, 142 C. C. A. 145; St. Louis. I. M. & S. Ry. Co. v. O'Baugh, 49 Ark. 418, 5 S. W. 711; Sterling Hydraulic Co. v. Williams, 66 Ill. 393; Peden v. Chicago, R. I. & P. Ry. Co., 73 Iowa, 328, 5 Am. St. Rep. 680, 35 N. W. 424; Gaines' Adm'x v. Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; Leader v. La Flamme, 111 Me. 242, 88 Atl. 859; Maryland Coal Co. v. Cumberland & Pennsylvania R. Co., 41 Md. 343; National Union Bank at Dover v. Segur, 39 N. J. L. 173; Ventnor Investment Co. v. Record Devel. Co. (N. J. Ch.), 80 Atl. 952; Raby v. Reeves, 112 N. C. 688, 16 S. E. 760; Ford v. Oregon Electric R. Co., 60 Ore. 278, 36 L. R. A. (N. S.) 358, Ann. Cas. 1914A, 280, 117 Pac. 809.

11. That the benefit will pass with the land in such case, see

Pollock, Contracts (7th Ed.) 237, note; Holmes, The Common Law, 405; 1 Smith's Leading Cases (8th Am. Ed.) at p. 176; Shaber v. St. Paul Water Co., 30 Minn. 179, 14 N. W. 874; Dickinson v. Hoomes' Adm'r, 8 Grat. (Va.) 353 (dictum); Gaines' Adm'x v. Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; Rawle, Covenants, § 203, note. The contrary view is taken in Sims, Covenants Running with the Land, 196; Sugden, Vendors (14th Ed.) 584 *et seq.*; Mygatt v. Coe, 124 N. Y. 212, 11 L. R. A. 646, 26 N. E. 611, 147 N. Y. 456, 42 N. E. 17; Lyon v. Parker, 45 Me. 474; Hurd v. Curtis, 19 Pick. (Mass.) 459 (*dictum*) Packenham's Case, Y. B. 42 Edw. III. 3, pl. 14 (translated in Rawle, Covenants, § 203, note), is cited on both sides of the discussion,—a not unnatural result of the obscurity of the report.

is, as involving an assignment of a chose in action, within the modern statutes and rules in that regard.^{11a}

§ 390. **The running of burdens.** In England it is apparently the law that the burden of a covenant by the owner of land in fee simple, made with one other than his lessee, will not run so as to be enforceable against a transferee of the land.¹² In this country, on the other hand, there are a number of decisions to the effect that covenants by the owner of land will bind transferees of the land,¹³ though in a few

11a. See 1 Tiffany, Landlord & Ten. p. 885. That transfer of the land after breach does not transfer the right of action for such breach, see Gulf Coast & Coke Co. v. Musgrove, 195 Ala. 219, 70 So. 179.

12. Pollock, Contracts (7th Ed.) 237; 1 Smith, Lead. Cas. (10th Ed.) 75-85. See Brewster v. Kidgill, 12 Mod. 166; Brewster v. Kitchin, 1 Ld. Raym. 317; Keppel v. Bailey, 2 Mylne & K. 517; Austerberry v. Corporation of Oldham, 29 Ch. Div. 750.

13. Robbins v. Webb, 68 Ala. 393; Gilmer v. Mobile, & M. R. Co., 79 Ala. 569; Albersen v. Cutting, 163 Cal. 503, 126 Pac. 157 (*semble*); Hottell v. Farmers' Protective Ass'n, 25 Colo. 67, 71 Am. St. Rep. 109, 53 Pac. 327; Georgia Southern R. Co. v. Reeves, 64 Ga. 492; Dorsey v. St. Louis A., & T. H. R. Co., 58 Ill. 65; Fitch v. Johnson, 104 Ill. 111; Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254; Conduitt v. Ross, 102 Ind. 166, 26 N. E. 198; Sexauer v. Wilson, 136 Iowa, 357, 14 L. R. A. (N. S.) 185, 15 A. 2 R. P.—14

& E. Ann. Cas. 54, 113 N. W. 941; Ranney v. Childs, 96 Kan. 483, 152 Pac. 621; Sutton v. Head, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; Chesapeake & Ohio Ry. Co. v. May, 157 Ky. 708, 163 S. W. 1112; De Logny's Heirs v. Mercer, 43 La. Ann. 205 (*semble*); Leader v. La Flamme, 111 Me. 242, 88 Atl. 859; Phoenix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400 (*dictum*); Dexter v. Beard, 130 N. Y. 549, 29 N. E. 983; Denman v. Prince, 40 Barb. (N. Y.) 213; Dey v. Prentice, 90 Hun (N. Y.) 27, 35 N. Y. Supp. 563; Easter v. Little Miami R. Co., 14 Ohio St. 48 (*dictum*); Huston v. Cincinnati, & Z. R. Co., 21 Ohio St. 236; Pittsburg, C. & St. L. Ry. Co. v. Bosworth, 46 Ohio St. 81, 2 L. R. A. 199, 18 N. E. 533 (*dictum*); Hickey v. Lake Shore, & M. S. Ry. Co., 51 Ohio St. 40, 23 L. R. A. 396, 46 Am. St. Rep. 545, 36 N. E. 672 (*dictum*) St. Andrews' Church Appeals, 67 Pa. St. 512; Landell v. Hamilton, 175 Pa. St. 327, 34 L. R. A. 227, 34 Atl. 663; Electric City Land & Improvement Co. v. West Ridge Coal

states the English view appears to have been adopted.¹⁴ Occasionally a covenant of an affirmative character appears to have been regarded as enforceable in equity, on the same theory on which negative or restrictive

Co., 187 Pa. St. 500, 41 Atl. 458; Wooliscroft v. Norton, 15 Wis. 198. Crawford v. Witherbee, 77 Wis. 419, 9 L. R. A. 561, 46 N. W. 545.

14. West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; Brewer v. Marshall, 18 N. J. Eq. 337, 19 N. J. Eq. 537 (*dictum*); Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676; Costigan v. Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810; Lynn v. Mount Savage Iron Co., 34 Md. 603 (*semble*).

It has been said quite recently, by the New York Court of Appeals, that the burden of a covenant will not ordinarily run with the land, two or three covenants being however referred to as exceptions to this rule. Miller v. Clary, 210 N. Y. 127, 103 N. E. 1115. Compare Morehouse v. Woodruff, 218 N. Y. 494, 113 N. E. 512.

In Massachusetts, apart from the cases of landlord and tenant, the burden of a covenant will not run with the land, as a general rule, it has been said, unless "the covenant either creates a servitude or a restriction in the nature of a servitude in favor of a neighboring parcel, or else is in some way incident to and inseparable from such a servitude; or, if attached to the dominant estate, appears to be the *quid pro quo* for the easement

enjoyed." Holmes, S. J., in Lincoln v. Burrage, 177 Mass. 378, 52 L. R. A. 110, 59 N. E. 67; Compare Norcross v. James, 140 Mass. 188, 2 N. E. 946. Morse v. Aldrich, 19 Pick. (Mass.) 449, and Bronson v. Coffin, 108 Mass. 175, 118 Mass. 156, 11 Am. Rep. 335, which seem to favor the running of the burden. The later decisions in this state upon this subject, especially those in which the opinion of the court was delivered by Holmes, C. J., are in accord with the views expounded by him in his work "The Common Law," pp. 392-406.

14. Gilmer v. Mobile, & M. Ry. Co., 79 Ala. 569, 58 Am. Rep. 623; Bartlett v. State, — Ind. —, 114 N. E. 692; Louisville H. & St. L. Rwy Co. v. Baskett, — (Ky.) —, 121 S. W. 957; Kneale v. Price, 29 Mo. App. 227; Burbank v. Pillsbury, 48 N. H. 475; Pittsburg C., & St. L. Ry. Co. v. Bosworth, 46 Ohio St. 81, 2 L. R. A. 199, 18 N. E. 533.

In Carnegie Realty Co. v. Carolina C., & O. Ry. Co., 136 Tenn. 300, 189 S. W. 371, it was held that a transfer did not impose the burden of the covenant on the transferee if the latter did not make any claim under the transfer and did not take possession. This does not accord with the view ordinarily asserted in connection with the running of covenants in leases. See 1 Tiffany, Landlord & Ten., p. 975.

covenants are so regarded, as against a purchaser with notice of the covenant.^{14a}

The fact that the burden of a covenant passes to the transferee is not, it would seem, sufficient in itself to relieve the original covenantor from liability thereon, the same principle being applicable as in the case of landlord and tenant.¹⁵ In several cases, however, the covenantor has been regarded as immune from liability for violations occurring after he has parted with title, on a construction of the language to this effect, as being in accord with the presumable intention of the parties to the covenant.¹⁶

While ordinarily the cases do not assert any requirement that the transferee of land have notice of a covenant made by a previous owner, in order that he may be bound thereby, they occasionally do so;^{16a} and the courts, it is conceived, would be reluctant to impose liability upon one under a covenant of which he had neither actual or constructive notice. Usually the transferee of land would be chargeable with notice of the covenant by reason of the fact that it occurs in a conveyance in the chain of title, or in a conveyance of adjoining land made by a previous owner whose name appears in the chain of title.

§ 391. Privity of estate. In order that the burden of a covenant run with the land, there must be, it is generally stated, a "privity of estate" between the covenantor and covenantee.¹⁷ This expression, as used

14a. *Post*, § 395, note 17.

15. See *ante*, § 54(d).

16. *Carr v. Lowry's Adm'x*, 27 Pa. St. 257; *Hickey v. Lake Shore & M. S. Ry. Co.*, 51 Ohio St. 40, 23 L. R. A. 396, 46 Am. St. Rep. 545, 36 N. E. 672; *Sexauer v. Wilson*, 136 Iowa, 357, 14 L. R. A. (N. S.) 185, 15 A. & E. Ann. Cas. 54, 113 N. W. 941; *Clark v. Devoe*,

124 N. Y. 120, 21 Am. St. Rep. 652, 26 N. E. 275; *Bolles v. Pecos Irrig. Co.*, — N. Mex. —, 167 Pac. 280.

16a. See cases cited *post*, § 393, note 76.

17. *Spence v. Mobile, & M. Ry. Co.*, 79 Ala. 576; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Lyon v. Parker*, 45 Me. 474;

in connection with covenants, other than in leases, running with estates in fee simple, refers apparently to the relation between the grantor and grantee of such an estate at the time of the conveyance. In other words, in order that there be such privity of estate that the burden of a covenant may run, the covenant must be entered into at the time of the making of a conveyance by the covenantee to the covenantor, or *vice versa*.¹⁸ Accordingly, except perhaps in two or three states,¹⁹ the requisite privity exists in the case of a covenant by a grantor to do or not to do something on land retained by him, adjoining that conveyed, so that one to whom the former is subsequently conveyed by him may be bound by the covenant;²⁰ and it also exists

Hurd v. Curtis, 19 Pick. (Mass.) 459; Morse v. Aldrich, 19 Pick. (Mass.) 449; Bronson v. Coffin, 108 Mass. 175, 118 Mass. 156, 11 Am. Rep. 254; Sharp v. Cheatham, 88 Mo. 498; Wheeler v. Schad, 7 Nev. 204; Cole v. Hughes, 54 N. Y. 444; Nye v. Hoyle, 120 N. Y. 195, 24 N. E. 1; Easter v. Little Miami R. Co., 14 Ohio St. 48. Town of Middletown v. Newport Hospital, 16 R. I. 319, 15 Atl. 800; Hurxthal v. St. Lawrence etc., Co., 53 W. Va. 87, 97 Am. St. Rep. 954, 44 S. E. 520.

18. Gilmer v. Mobile, & M. R. Co., 79 Ala. 569; Fresno Canal & Irrigation Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; Conduitt v. Ross, 102 Ind. 166, 26 N. E. 198; Indianapolis Water Co. v. Nulte, 126 Ind. 373, 26 N. E. 72; Louisville, H. & St. L. Ry. Co. v. Baskett, — Ky. —, 121 S. W. 957; Smith v. Kelley, 56 Me. 64; Burbank v. Pillsbury, 48 N. H. 475; Harsha v. Reid, 45 N. Y. 415; Lawrence v. Whitney,

115 N. Y. 410, 5 L. R. A. 417, 22 N. E. 174; Louisville & N. R Co v Webster, 106 Tenn. 586, 61 S. W. 1018.

19. *Post*, this section, note 28.

20. Fitch v. Johnson, 104 Ill. 111; Scott v. Burton, 2 Ashm. (Pa.) 324; Crawford v. Witherbee, 77 Wis. 419, 9 L. R. A. 561, 46 N. W. 545; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254; Easter v. Little Miami R. Co., 14 Ohio St. 48,—the last three cases, however, involving covenants by the grantor to fence, which might be regarded as involving the grant of an easement. See *ante*, § 357.

It is to be observed that the burden of the covenant does not necessarily pass with the land in connection with which the privity arises; that is, in the case referred to in the text, the privity arises in connection with the land first conveyed, while the burden of the covenant runs with that

in the more ordinary case of a covenant by the grantee of land as to something to be done or not to be done by him on the land conveyed, so that his subsequent transferee may be bound thereby. On the other hand, an agreement by various mill owners as to the use of water will not bind their assigns, since there is no privity between them.²¹ And a covenant made after a conveyance, though between the parties thereto, has been held not to be supported by such privity of estate that the burden will run.²²

The exact basis of this requirement that the parties to the covenant stand in the relation of grantor and grantee in order that the covenant may run, does not clearly appear.^{22a} As before indicated, by some authorities, such a requirement exists in order that even the benefit of a covenant may run.²³ In the case of a covenant in a lease, the running of the covenant is ordinarily, as we have before seen, closely associated with the existence of a privity of estate between the interested parties,²⁴ and this may have

last conveyed. See *Brewer v. Marshall*, 18 N. J. Eq. 337, 19 N. J. Eq. 537; *Waterbury v. Head*, 12 N. Y. St. Rep. 361; *Clark v. Devoe*, 124 N. Y. 120, 21 Am. St. Rep. 652, 26 N. E. 275, as explained in *Dexter v. Beard*, 130 N. Y. 549, 29 N. E. 983.

21. *Hurd v. Curtis*, 19 Pick. (Mass.) 459; *Lawrence v. Whitney*, 115 N. Y. 410, 5 L. R. A. 417, 22 N. E. 174. In Pennsylvania it is held that the requirement of privity is subject to exceptions, and that, without any such privity, covenants by owners of separate tracts of riparian land as to the use of the water power will bind their assignees. *Horn v. Miller*, 136 Pa. 640, 9 L. R. A. 810, 20 Atl. 706. To the same effect, see *Weill v. Baldwin*, 64

Cal. 476, with which, however, *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53, does not appear to be in accord.

22. *Inhabitants of Plymouth v. Carver*, 16 Pick. (Mass.) 183; *Smith v. Kelley*, 56 Me. 64. *Wheeler v. Schad*, 7 Nev. 204. But if the covenant and conveyance are parts of the same transaction, the fact that they are in separate instruments is immaterial. *Sims Covenants*, 198; *Hills v. Miller*, 3 Paige (N. Y.) 254; *Robbins v. Webb*, 68 Ala. 393 (*semble*.)

22a. See a suggestive editorial note in 15 *Columbia Law Rev.* at p. 55.

23 See *ante*, § 389, note 11.

24. *Ante*, § 56.

operated to suggest that in no case can the burden of a covenant run in the absence of such privity.²⁵ Privity of estate, however, as between a grantor and grantee in fee simple has a meaning different from that which it has as between lessor and lessee, and their successors in interest. In the latter case, privity of estate means the simultaneous ownership by both parties of estates in the land, while in the former case it can mean merely succession in ownership. It was occasionally used in the latter sense by Coke,²⁶ and perhaps other early authorities,²⁷ particularly in connection with the law of warranty, and conceding the necessity of privity of estate in order that the burden of a covenant, not contained in a lease, may run with the land, it was reasonable to regard this requirement as satisfied by the succession in ownership which was included under this designation by the earlier writers.

In at least two states the conveyance of an estate in the land, as distinguished from the grant of an easement therein,²⁸ has been held not to furnish the privity of estate necessary to the creation of a covenant which will run with the land,²⁹ the theory being, apparently, that a mere succession in interest is not sufficient for

25. In *Hurd v. Curtis*, 19 Pick. 459, in which the necessity of such privity is asserted in reference to a covenant by a fee simple owner, not in a lease, the court refers to *Webb v. Russell*, 3 Term. Rep. 402, which involved a covenant in a lease.

26. Co. Litt. 271a, 272b, 273, 352a, 385a. In *Whittingham's Case*, 8 Co. Rep. 84, it is said "there are three manner of privities, *scil*, privity in blood, privity in estate, and privity in law. * * * Privities in estate are, as joint tenants, husband and wife, donor and donee, lessor and lessee."

27. See the opinion of Holmes, C. J., in *Norcross v. James*, 140 Mass. 188, 2 N. E. 946, and Holmes, "The Common Law," 395-400.

28. *Post*, this section, note 30.

29. *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 Pac. 308; *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 117 Pac. 677; *Norcross v. James*, 140 Mass. 188, 2 N. E. 946. In the latter case it is said by Holmes, J., in delivering the opinion of the court, that the statement that there must be "privity of estate between the covenantor and the covenantee, only means that the 'covenant

this purpose, but that the simultaneous existence of two distinct interests in the land, in the covenantor and covenantee respectively, is necessary.^{29a}

— **Grant of easement.** The requirement of privity of estate is satisfied if the covenant accompanies a grant by the owner of land of a mere easement therein, he retaining the land.³⁰ Accordingly, it has been held that the burden of a covenant made upon the grant of a water privilege,³¹ or upon the grant of a railroad

must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or *quasi* easement, or must be in aid of such a grant." This statement accords with the view of the subject elsewhere presented by this learned jurist, (see "The Common Law," at p. 388 et seq.), but does not accord with the ordinary judicial view. With this statement may be compared a statement emanating from the same court at a much earlier period. "The stipulations in the indenture cannot be construed as grants and covenants at the same time. If they were grants, then an action of covenant is not the proper remedy for the violation of them; and if covenants, the assignee is not bound for want of privity of estate between the parties." Per Wilde, J., in *Hurd v. Curtis*, 19 Pick. (Mass.) 459.

29a. In *Morse v. Aldrich*, 19 Pick. (Mass.) 449, above cited, in which the running of a covenant created in connection with the grant of an easement, was apparently first recognized, the decision appears to be based on the analogy of a lease, it being

said that "privity exists between the grantor and grantee, where a grant is made of any subordinate interest in land; the reversion or residue of the estate being reserved by the grantor, all covenants in support of the grant or in relation to the beneficial enjoyment of it, are real covenants and will bind the assignee."

30. *Gilmer v. Mobile & M. Ry. Co.* 79 Ala. 569; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Fitch v. Johnson*, 104 Ill. 111; *Bronson v. Coffin*, 108 Mass. 156, 11 Am. Rep. 335; *Lincoln v. Burrage*, 177 Mass. 378, 52 L. R. A. 110, 59 N. E. 67; *Crawford v. Witherbee*, 77 Wis. 419, 9 L. R. A. 561, 46 N. W. 545. A covenant created in connection with an easement was held to run, even though not entered into till after the grant of the easement. *Morse v. Aldrich*, 19 Pick. (Mass.) 449. *Contra*, *Smith v. Kelley*, 56 Me. 64; *Wheeler v. Schad*, 7 Nev. 204, 204.

31. *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 40 Colo. 467, 92 Pac. 290 (*semble*); *Fitch v. Johnson*, 104 Ill. 111. *Nye v.*

right of way,³² will bind a subsequent transferee of the land or of the easement.³³ And the grant of an easement as regards the construction and utilization of a party wall will support the running of a covenant as to compensation for the use of the wall.³⁴

§ 392. **The nature of the covenant.** We have, in connection with the discussion of covenants in leases which run with the land,³⁵ referred to the difficulty, if not impossibility, of framing a rule for the determination of whether a covenant is such as to touch and concern the land so as to run therewith. Ordinarily, however, a covenant is regarded as touching and concerning the land if it is of value to the covenantee by

Hoyle, 120 N. Y. 195, 24 N. E. 1; Morehouse v. Woodruff, 218 N. Y. 494, 113 N. E. 512; Norfleet v. Cromwell, 64 N. C. 1; Noonan v. Orton, 4 Wis. 335; Wooliscroft v. Norton, 15 Wis. 198. But see Miller v. Clary, 210 N. Y. 127, 103 N. E. 1114; Barringer v. Virginia Trust Co., 132 N. C. 409, 43 S. E. 910.

So a covenant which was made in connection with a gas and oil lease, a grant apparently of a *profit a prendre*, was held to run. Indiana, etc., Oil Co. v. Hinton, 159 Ind. 398, 64 N. E. 224; Harbert v. Hope Natural Gas Co., 76 W. Va. 207, 84 S. E. 770. And see Munro v. Syracuse, L. & N. R. Co., 200 N. Y. 224, 93 N. E. 516, and comment thereon in 11 Columbia Law Rev. at p. 384.

32. St. Louis, I. M. & S. Ry. Co. v. O'Baugh, 49 Ark. 418, 5 S. W. 711; Dorsey v. St. Louis, A. & T. H. R. Co., 58 Ill. 65; Midland Ry. Co. v. Fisher, 125 Ind.

19, 8 L. R. A. 604, 21 Am. St. Rep. 189, 24 N. E. 756; Peden v. Chicago, R. I. & P. Ry. Co., 73 Iowa. 328, 5 Am. St. Rep. 680, 35 N. W. 424; Kentucky Cent. R. Co. v. Kenney, 82 Ky. 154; Ford v. Oregon Elec. R. Co., 60 Ore. 278, 36 L. R. A. (N. S.) 358, Ann. Cas. 1914A, 243, 117 Pac. 809; Lydick v. Baltimore & O. R. Co., 17 W. Va. 427.

33. Dorsey v. St. Louis, A. & T. H. R. Co., 58 Ill. 65; Fitch v. Johnson, 104 Ill. 111; Midland Ry. Co. v. Fisher, 125 Ind. 19, 8 L. R. A. 604, 21 Am. St. Rep. 189, 24 N. E. 756; Kentucky Cent. R. Co. v. Kenney, 82 Ky. 154; Lydick v. Baltimore & O. R. Co., 17 W. Va. 427. So the benefit may pass with a subsequent grant of the water power. Sterling Hydraulic Co. v. Williams, 66 Ill. 393.

34. *Post*, § 393.

35. See *ante*, § 56(b).

reason of his occupation of the land or by reason of an easement which he has in the land, or if it is a burden on the covenantor by reason of his occupation of the land. It has been held that a covenant to give free transportation to the covenantee,³⁶ or to pay an incumbrance on the land,³⁷ is of such a personal nature as not to run. And the same view has been taken by some courts as to a covenant the purpose of which is to prevent competition in trade.³⁸

Among the covenants which have been most frequently considered as passing with the grant of a

36. *Morse v. Garner*, 1 Strob. (S. C.) 514, 47 Am. Dec. 565; *Dickey v. Kansas City & I. R. T. Ry. Co.*, 122 Mo. 223, 26 S. W. 685; *Ruddick v. St. Louis, K. & N. W. Ry. Co.*, 116 Mo. 25, 22 S. W. 499, 38 Am. St. Rep. 570; *Eddy v. Hinnant*, 82 Tex. 354, 18 S. W. 562. So, in the case of a covenant by the grantee of an easement to give its transportation business to the grantor, a ferry company, it was held that the covenant would not run, since it did not affect the enjoyment of the easement, or of the land in which the easement was granted, but was purely for the benefit of the owner of the ferry. *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 94 Ill. 83. Compare *Munro v. Syracuse, L. S. & N. R. Co.*, 200 N. Y. 224, 93 N. E. 516.

37. *Glenn v. Canby*, 24 Md. 127; *Scholten v. Barber*, 217 Ill.

148, 75 N. E. 460; *Graber v. Duncan*, 79 Ind. 565. The same view was taken of a covenant to pay to the covenantee a percentage of the net earnings of mining property, against the transferee of which it was sought to assert the covenant. *Consolidated Arizona Smelting Co. v. Hinchman*, 212 Fed. 803, 129 C. C. A. 267.

38. *Taylor v. Owen*, 2 Blackf. (Ind.) 301; *Kettle River R. Co. v. Eastern Ry. Co. of Minnesota*, 41 Minn. 461, 6 L. R. A. 111, 43 N. W. 469; *Sjoblom v. Mark*, 103 Minn. 193, 114 N. W. 746; *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676; *Thomas v. Hayward*, L. R. 4 Exch. 311. *Contra*, *Robbins v. Webb*, 68 Ala. 393; *National Union Bank at Dover v. Segur*, 39 N. J. Law 173; *Norman v. Wells*, 17 Wend. (N. Y.) 136.

fee-simple estate are those to repair a dam or canal,³⁹ and to fence or to repair a fence.⁴⁰ A covenant to maintain a station⁴¹ or to stop trains⁴² at a particular point has been held to run, as has a covenant to supply water⁴³ or gas⁴⁴ and to pay taxes.⁴⁵

As previously stated,⁴⁶ a covenant, contained in an instrument of lease, as to a thing not *in esse*, has been

39. Howard Mfg. Co. v. Water Lot Co., 53 Ga. 689; Sterling Hydraulic Co. v. Williams, 66 Ill. 393; Batavia Mfg Co. v. Newton Wagon Co., 91 Ill. 230; Maxon v. Lane, 102 Ind. 364, 1 N. E. 796; Fowler v. Kent, 71 N. H. 388, 52 Atl. 554; Nye v. Hoyle, 120 N. Y. 195, 24 N. E. 1; Denman v. Prince, 40 Barb. (N. Y.) 213; Norfleet v. Cromwell, 64 N. C. 1; Carr v. Lowry's Adm'x, 27 Pa. St. 257; Wooliscroft v. Norton, 15 Wis. 198.

40. Dorsey v. St. Louis, A. & T. H. R. Co., 58 Ill. 65; Midland Ry. Co. v. Fisher, 125 Ind. 19, 8 L. R. A. 604, 21 Am. St. Rep. 189, 24 N. E. 756; Lake Erie & W. Ry. Co. v. Priest, 131 Ind. 413, 31 N. E. 77; Sexauer v. Wilson, 136 Iowa, 357, 14 L. R. A. (N. S.) 185, 15 A. & E. Ann. Cas. 54, 113 N. W. 357; Kentucky Cent. R. Co. v. Kenney, 82 Ky. 154; Chicago, M. & G. R. Co. v. Dodds & Johnson, 167 Ky. 224, 181 S. W. 666; Bronson v. Coffin, 188 Mass. 175, 11 Am. Rep. 335, 118 Mass. 156; Countryman v. Deck, 13 Abb. N. C. (N. Y.) 110; Dey v. Prentice, 90 Hun (N. Y.) 27, 35 N. Y. Supp. 563; Huston v. Cincinnati & Z. R. Co., 21 Ohio St. 236; Hickey v. Lake Shore & M. S. Ry. Co., 51 Ohio St 40, 23 L.

R. A. 396, 46 Am. St. Rep. 545, 36 N. E. 672; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550.

41. Georgia Southern Railroad v. Reeves, 64 Ga. 492; Reidsville, & S. E. R. Co. v. Baxter, 13 Ga. App. 357, 79 S. E. 187; Louisville, H. & St. L. Ry. Co. v. Baskett, — (Ky.) —, 121 S. W. 957; Parrott v. Atlantic, & N. C. R. R., 165 N. C. 295, Ann. Cas. 1915D, 165, 81 S. E. 348; Carnegie Realty Co. v. Carolina, Clinchfield, & Ohio Ry. Co., 136 Tenn. 300, 189 S. W. 371.

42. Gilmer v. R. Co., 79 Ala. 569; Ford v. Oregon Elec. R. Co., 60 Ore. 278, 36 L. R. A. (N. S.) 358, Ann. Cas. 1914A, 280, 117 Pac. 809.

43. Atlanta, K. & N. Ry. Co. v. McKinney, 124 Ga. 929, 6 L. R. A. (N. S.) 436, 110 Am. St. Rep. 215, 53 S. E. 701; Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 Pac. 290.

44. Indiana Natural Gas Co. v. Hinton, 159 Ind. 398, 64 N. E. 224.

45. Barron v. Whiteside, 89 Md. 448, 43 Atl. 825; West Virginia, C. & P. R. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 696.

46. *Ante*, § 56(b). See 1 Tiffany, Landlord & Ten., p. 892;

frequently considered not to run unless "assigns" are mentioned. Occasionally the same rule has been asserted in connection with such a covenant not contained in an instrument of lease.⁴⁷

The intention of the parties to the covenant that it shall run with the land is occasionally referred to as a consideration of importance in determining whether it does run,⁴⁸ but in the great majority of cases no reference is made to this matter, the question whether the covenant runs being regarded as one to be determined by the consideration whether it touches and concerns the land. The correct rule appears to be that the parties to the covenant may, by indicating an intention to that effect, prevent the covenant from running, although it is such that otherwise it would run,⁴⁹ while if the covenant is one which does not touch and concern the land, the parties cannot make it run by indicating an intention or desire that it shall run.⁵⁰ Looked at from this point of view, the rule of Spencer's case, that a covenant in reference to a thing not *in esse* does not run unless assigns are mentioned, in so far

editorial note, 15 Mich. Law Rev. * thing not *in esse*, did not run, at p. 79. in the absence of the word "assigns."

47. Md. & Pa. R. Co., v. Silver, 110 Md. 510, 73 Atl. 297; Whalen v. Baltimore, & O. R. Co., 108 Md. 11, 17 L. R. A. (N. S.) 130, 129 Am. St. Rep. 423, 69 Atl. 390; Duester v. Alvin, 74 Ore. 544, 145 Pac. 660; Carnegie Realty Co. v. Carolina, C. & O. Ry. Co., 136 Tenn. 300, 189 S. W. 371. But see Sexauer v. Wilson, 136 Iowa, 357, 14 L. R. A. (N. S.) 185, 15 A. & E. Ann. Cas. 54, 13 N. W. 941. Purvis v. Shuman, 273 Ill. 286, 112 N. E. 679. So in Hartung v. Witte, 59 Wis. 285, and Gulf, C. & S. F. Ry. Co. v. Smith, 72 Tex. 122; Brown v. Southern Pac. Co., 36 Ore. 128, 47 L. R. A. 409, 78 Am. St. Rep. 761, 58 Pac. 1104, it was held that a covenant to build a fence, as concerning a

48. Milliken v. Hunter, 180 Ind. 149, 100 N. E. 1041; Sexauer v. Wilson, 136 Iowa, 357, 14 L. R. A. (N. S.) 185, 15 Ann. Cas. 54, 113 N. W. 357; Brown v. Southern Pac. Co., 36 Ore. 128, 47 L. R. A. 409, 78 Am. St. Rep. 761, 58 Pac. 1104.

49. Maryland Coal Co. v. Cumberland, etc. R. Co., 41 Md. 343; Masury v. Southworth, 9 Ohio St. 348; Wilmurt v. McGrane, 16 App. Div. 412, 45 N. Y. Supp. 32.

50. Ackroyd v. Smith, 10 Com. B. 164; Fresno Canal & Irr. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275. Gibson v. Holden, 115 Ill. 199, 56 Am. Rep. 149, 3 N. E. 282; Kettle River R. Co. v. Eastern R. Co. of Minnesota, 41 Minn.

as it is adopted in any state,⁵¹ may be regarded as involving merely a rule of construction that a covenant of that character is to be regarded as intended to be personal, unless a contrary intention is shown by the mention of assigns.

§ 393. Party wall agreements. Whether the stipulation, in a party wall agreement,⁵² that one of the two adjoining owners, parties thereto, upon using a wall built by the other upon the division line, shall pay to the latter part of the cost of the wall, is a covenant which runs with the land, has been the subject of frequent discussion and adjudication.⁵³

As before stated, the grant of an easement at the time of the making of a covenant is regarded as furnishing the "privity of estate" necessary to enable a covenant to run with the land, and such a grant of an easement appears to occur in the case of a party wall agreement. If the wall is regarded as belonging to both the land owners immediately upon its construction, the agreement in effect involves a grant, to take effect upon the construction of the wall, by the non builder to the builder, of an easement to use the former's half of the wall for purposes of support, and also a grant, to take effect subsequently, by the builder to the non builder, of an easement to use the former's half of the wall for purposes of support; in other words, it involves the grant of cross easements of support.⁵⁴ If the wall is regarded as belonging to

461, 6 L. R. A. 111, 43 N. W. 469; Glenn v. Canby, 24 Md. 127; Brewer v. Marshall, 18 N. J. Eq. 337, 19 N. J. Eq. 537, 97 Am. Dec. 679; Wilmurt v. McGrane, 16 N. Y. App. Div. 45 N. Y. S. 32; Masury v. Southworth, 9 Ohio St. 348; Louisville & N. R. Co. v. Webster, 106 Tenn. 586, 61 S. W. 1018.

51. *Ante*, this section, notes 46, 47.

52. *Ante*, § 356.

53. The authorities on the subject, previous to 1903, are conveniently grouped in a note in 66 L. R. A. at p. 673. The subject is discussed, in a most discriminating manner, with references to the cases by Professor Ralph W. Aigler, in 10 Mich. Law Rev. at p. 186.

54. Roche v. Ullman, 104 Ill. 1; King v. Wight, 155 Mass. 444, 29 N. E. 644; Kimm v. Griffin, 67

the landowner who builds it, until the other pays to him part of the cost thereof, there is a grant of cross easements of support, to take effect when such payment is made, and title to part of the wall accordingly vests in the non builder, and there is also a grant, by the non builder to the builder, of an easement to maintain the wall in part on the former's land.⁵⁵

— **Running of benefit.** The right to compensation under the agreement for the use of the wall is by some cases considered to appertain to the land, and to pass to a transferee of the proprietor who built the wall,⁵⁶ while by others it is regarded as personal to such proprietor, so as not to pass to his transferee.⁵⁷

Minn. 25, 64 Am. St. Rep. 385, 69 N. W. 634.

55. *Conduitt v. Ross*, 102 Ind. 166; *King v. Wight*, 155 Mass. 444, 29 N. E. 644.

56. *Rugg v. Lemley*, 78 Ark. 65, 115 Am. St. Rep. 17, 93 S. W. 570; *Eberly v. Behrend*, 20 D. C. 215; *Ferguson v. Worrall*, 31 Ky. Law Rep. 219, 9 L. R. A. (N. S.) 1261, 101 S. W. 966; *Savage v. Mason*, 3 Cush. (Mass.) 500; *King v. Wight*, 155 Mass. 444, 29 N. E. 644; *Kimm v. Griffin*, 67 Minn. 25, 64 Am. St. Rep. 385, 69 N. W. 634; *Platt v. Eggleston*, 20 Ohio St. 414. See the remarks by Holmes, C. J., in *Lincoln v. Burrage*, 177 Mass. 378., 52 L. R. A. 110, 59 N. E. 67, adverse to the view that, while the burden of such a covenant runs with the land, the benefit thereof can be regarded as "in gross" or personal to the covenantee.

In order that the transferee of the builder be able to recover upon the contract to pay part of the cost of the wall upon using it,

the party wall agreement must, it has been held in Massachusetts, be under the seal of the other party, as otherwise the builder acquires, not an easement, but a mere license to build on the other land, and no privity exists to support the running of the covenant. *Joy v. Boston Penny Sav. Bank*, 115 Mass. 60. Even if the agreement is not under seal, the transferee of one tract, by accepting a conveyance binding him to pay a part of the cost of the wall, becomes liable accordingly. *Maine v. Cumston*, 98 Mass. 317.

57. *Kenny v. Mackenzie*, 12 Ont. App. 346; *Crater v. McCormick*, 4 Colo. 197; *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198; *Mayer v. Martin*, 83 Miss. 322, 35 So. 218 (dictum); *Cole v. Hughes*, 54 N. Y. 444; *Lea's Appeal*, 9 Pa. St. 504; *Todd v. Stokes*, 10 Pa. St. 155; *Parsons v. Baltimore Building & Loan Ass'n*, 44 W. Va. 335, 67 Am. St. Rep. 769, 29 S. E. 999.

The right to compensation has occasionally been considered to be personal to the builder, not passing with the land, if the ownership of half the wall, by the express terms of the agreement, vests immediately on its construction, contrary to the general rule, in the owner of the other land, though he cannot use it till he pays his share,⁵⁸ the theory being that, in such case, the promise of the non builder is merely to reimburse the builder in part for his expenditure, the performance of which promise has no effect on the land. In at least one case, in which the title to no part of the wall was regarded as vesting in the non builder until payment was made by him, the right of the transferee of the builder to receive the payment was based on the theory, not that the benefit of the covenant ran with the land, but rather that he was the vendor of part of the wall.⁵⁹

The fact that an intention appears in the agreement that the covenant shall run with the land, as when it is so stated,⁶⁰ or even when the agreement is in terms made binding on assigns,⁶¹ has occasionally been

In New York, it seems, however, that the right to compensation passes with the land if the covenant is general in terms, referring to the possible construction of the wall by either party. *Mott v. Oppenheimer*, 135 N. Y. 312, 17 L. R. A. 409, 31 N. E. 1097; *Sebald v. Mulholland*, 155 N. Y. 455, 50 N. E. 260; *Crawford v. Krollpfeiffer*, 195 N. Y. 185, 133 Am. St. Rep. 783, 88 N. E. 29.

58. *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 133, 3 N. E. 272; *McChesney v. Davis*, 86 Ill. App. 380; *Bloch v. Isham*, 28 Ind. 37. See *Mickel v. York*, 175 Ill. 62, 51 N. E. 848; *Tomblin v. Fish*,

18 Ill. App. 439. *Pillsbury v. Morris*, 54 Minn. 492, 56 N. W. 170. And Professor Aigler's discussion, 10 Mich. Law Rev. at p. 195.

59. *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 133, 3 N. E. 272. See *Rugg v. Lemley*, 78 Ark. 65, 115 Am. St. Rep. 17, 93 S. W. 570; *Platt v. Eggleston*, 20 Ohio St. 414.

60. *Jebeles etc. Confectionery Co. v. Brown*, 147 Ala. 593, 11 Ann. Cas. 525, 41 So. 626; *Adams v. Noble*, 120 Mich. 545, 79 N. W. 810; *Loyal Mystic Legion v. Jones*, 73 Neb. 342, 102 N. W. 621.

61. *Southworth v. Perring*, 71 Kan. 755, 2 L. R. A. (N. S.) 87, 114 Am. St. Rep. 527, 81 Pac.

referred to in support of a decision that in the particular case the benefit passed, while conversely the absence of any such showing of intention has been referred to in support of a contrary decision.⁶²

Even though the benefit of the covenant would otherwise pass, the party building the wall may, it has been held, upon the grant of his parcel, reserve the right to compensation on account of the use which may be subsequently made of the wall by the adjoining proprietor.⁶³

Occasionally the benefit of the stipulation for payment of part of the cost of the wall has been regarded as passing to a grantee of the builder of the wall, not on the theory that it is a covenant running with the land, but because the instrument by which the land was conveyed also transferred in terms the benefit of the stipulation,⁶⁴ or on the theory, apparently, that a transfer in terms of the land is to be construed as also intended to transfer the benefit of the stipulation, as if it were so stated.⁶⁵

In one or two cases the grantee of the builder appears to be regarded as entitled to recover part of the cost of the wall on the theory, not of contract, but rather of *quasi* contract, that is, that the person making use of another's wall is under an implied

481, 82 Pac. 785; *King v. Wight*, 155 Mass. 444, 29 N. E. 644; *Hoffman v. Dickson*, 47 Wash. 431, 125 Am. St. Rep. 907, 15 Ann. Cas. 173, 92 Pac. 272, 93 Pac. 523. *Sandberg v. Rowland*, 51 Wash. 7, 97 Pac. 1087. See *Loyal Mystic Legion v. Jones*, 73 Neb. 342, 102 N. W. 621; *Weyman v. Ringold*, 1 Bradf. (N. Y. Surr.) 40.

62. *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198; *Behrens v. Hoxie*, 26 Ill. App. 417. See *Mott v. Oppenhiemer*, 135 N. Y. 312, 17 L. R. A. 409, 31 N. E. 1097.

63. *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198; *Pillsbury v. Morris*, 54 Minn. 432, 56 N. W. 170.

64. *Keating v. Korfhage*, 88 Mo. 524; *Parsons v. Baltimore Bldg. & L. Ass'n*, 44 W. Va. 335, 29 S. E. 999, 67 Am. St. Rep. 769; *Ellinsburg Lodge No. 20 v. Collins*, 68 Wash. 94, 122 Pac. 602.

65. See *Roche v. Ullman*, 104 Ill. 11; *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433. *Mott v. Oppenheimer*, 135 N. Y. 312, 17 L. R. A. 409, 31 N. E. 1097.

assumpsit to make compensation to the owner of the wall.⁶⁶

The statutes in regard to party walls⁶⁷ have ordinarily been construed as entitling the grantee of the builder of the wall to enforce the statutory liability for a portion of the cost of the wall.⁶⁸ But the user of the wall by the adjoining lot owner matures the obligation, so that the right to compensation does not pass by a subsequent conveyance of the land.⁶⁹

— **Running of the burden.** Agreements between owners of adjoining pieces of land that, in case of the erection by either of them of a party wall upon the division line, a part on each tract, the other will, if he subsequently uses such wall, pay his share of the cost, have usually been held to bind a subsequent transferee of either owner for a part of the cost upon his user of such wall previously erected by the owner of the other property,⁷⁰ though there are states in which such liability on the part of the transferee is denied.⁷¹ The fact that the party wall agreement

66. *Post*, § 393, note 77.

67. *Ante*, § 365.

68. *Pfrommer v. Taylor*, 27 Del. 113, 86 Atl. 212; *Halpine v. Barr*, 21 Dist. Col. 331; *Thomson v. Curtis*, 28 Iowa, 229; *Irwin v. Peterson*, 25 La. Ann. 300; *Hunt v. Ambruster*, 17 N. J. Eq. 208; *Knight v. Beenken*, 30 Pa. 372; *Vollmer's Appeal*, 61 Pa. 118; *Contra* under an earlier Pennsylvania statute, *Dannaker v. Riley*, 14 Pa. 435.

69. *Eberly v. Behrend*, 9 Mackey (20 D. C.) 215; *Lea v. Jones*, 23 Pa. Super. Ct. 587, 209 Pa. 22, 57 Atl. 1113.

70. *Roche v. Ullman*, 104 Ill. 11; *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448; *Tomblin v. Fish*, 18 Ill. App. 439; *Gibson v. Holden*,

115 Ill. 199, 56 Am. Rep. 146, 3 N. E. 282; *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198; *Ferguson v. Worrall*, 31 Ky. L. Rep. 219, 9 L. R. A. (N. S.) 1261, 101 S. W. 966; *Savage v. Mason*, 3 Cush. (Mass.) 500; *Standish v. Lawrence*, 111 Mass. 111; *Richardson v. Tobey*, 121 Mass. 457; *King v. Wight*, 155 Mass. 444, 29 N. E. 644; *National Life Ins. Co. of Montpelier v. Lee*, 75 Minn. 157, 77 N. W. 794; *Burr v. Lamaster*, 30 Neb. 688, 9 L. R. A. 637, 27 Am. St. Rep. 428, 46 N. W. 1015; *Garmire v. Willy*, 36 Neb. 340, 54 N. W. 562; *Hall v. Geyer*, 14 Ohio Cir. Ct. R. 229, 7 Ohio Dec. 436.

71. *Sharp v. Cheatham*, 88 Mo. 498; *Nalle v. Paggi*, — (Tex.) —, 9 S. W. 205. In *Nalle v. Paggi*,

is in terms binding on the assigns of the parties has been referred to as making the burden of the covenant run with the land⁷² and a statement that the covenant is to run with the land would no doubt have quite as great an effect.⁷³

Such an agreement is, it seems, *prima facie* construed as providing for reimbursement by the person alone who uses the wall for the construction of a building; and consequently the original covenantor, if he does not use the wall, is not liable on his covenant,⁷⁴ nor is one to whom the land is transferred after it has been built on by his grantor ordinarily so liable.⁷⁵

81 Tex. 201, 1 L. R. A. 33, 16 S. W. 932, it was held that the non builder, party to the agreement, having contracted to pay half the value of the wall when he used it, became personally liable for half the value immediately on transferring his land to another, and thus becoming incapable of using the wall.

In New York it is held that the covenant to pay part of the cost runs with the land, if the agreement is general in terms, contemplating the possible construction of the wall by either party in the future, without reference to any present intention of building a wall, while it does not run when it involves a specific agreement that, if the party named build the wall, the other party shall pay part of the cost thereof upon using it. *Sebald v. Mulholland*, 155 N. Y. 455, 50 N. E. 260; *Crawford v. Krollpfeiffer*, 195 N. Y. 185, 88 N. E. 29.

72. *Roche v. Ulman*, 104 Ill. 11; *Southworth v. Perring*, 71 Kan. 755, 81 Pac. 481, 2 L. R. A. (N. S.) 87, 114 Am. St. Rep. 527, 82 Pac. 785; *King v. Wright*, 155

Mass. 444, 29 N. E. 644; *Kimm v. Griffin*, 67 Minn. 25, 64 Am. St. Rep. 385, 69 N. W. 634; *Hoffman v. Dickson*, 47 Wash. 431, 125 Am. St. Rep. 907, 15 Ann. Cas. 173, 92 Pac. 272, 93 Pac. 523.

73. *Jebeles & Colias Confectionery Co. v. Brown*, 147 Ala. 593, 11 Ann. Cas. 525, 41 So. 626; *Roche v. Ulman*, 104 Ill. 11; *Reinhardt v. Holmes*, 143 Mo. App. 212, 127 S. W. 611; *Adams v. Noble*, 120 Mich. 545, 79 N. W. 810.

There is one decision to the effect that although the covenant was not previously one the burden of which would run with the land, its character in this regard is changed if a subsequent conveyance by the covenant is in terms subject to the party wall agreement. *Ellinsburg Lodge No. 20, I. O. F. C. v. Collins*, 68 Wash. 94, 122 Pac. 602.

74. *Standish v. Lawrence*, 111 Mass. 111; *Jordan v. Kraft*, 33 Neb. 844; *Percival v. Colonial Inv., Co.*, 140 Iowa, 275, 24 L. R. A. (N. S.) 293, 115 N. W. 941.

75. *Pfeiffer v. Matthews*, 161 Mass. 487, 42 Am. St. Rep. 435, 37

Occasionally reference is made in the decisions to the existence in the particular case of notice of the party wall agreement on the part of the person sought to be charged, as if lack of notice might prevent the running of the covenant as against him.⁷⁶ And it may be assumed that the courts would hesitate to impose such liability on one who purchased the land without notice, actual or constructive, of the agreement.

Occasionally the court, without reference to the doctrine of covenants running with the land, appears to have implied an *assumpsit*, on the part of a subsequent grantee, taking with notice of his grantor's agreement that part of the cost of the wall shall be paid upon its user, to make payment accordingly, such *assumpsit* being implied in favor of the person, whether the original builder or his grantee, who owns the wall at the time of its user by the owner of the other property.⁷⁷ This implied *assumpsit* involves a liability,

N. E. 571; First Nat. Bank v. Security Bank, 61 Minn. 25, 63 N. W. 264. But in Iowa a grantee who purchases with notice that his grantor, who used the wall, has not paid for it as agreed is perhaps liable. Pew v. Buchanan, 72 Iowa, 637, 34 N. W. 453. Percival v. Colonial Inv. Co., 140 Iowa, 275, 24 L. R. A. (N. S.) 293, 115 N. W. 941.

76. Lorenzi v. Starmarket, 19 Idaho, 614, 115 Pac. 490. See Roche v. Ullman, 104 Ill. 11; Harris v. Dozier, 72 Ill. App. 542; McChesney v. Davis, 86 Ill. App. 380; Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283; Garmire v. Willy, 36 Neb. 340, 54 N. W. 562.

In Scottish American Mortgage Co. v. Russell, 20 S. Dak. 310,

104 N. W. 607, it was held that the grantee was not affected with notice of the agreement by reason of the presence of the wall on his land. This was however a proceeding for an injunction, and the decision in favor of defendant may presumably be regarded as based on the theory that the agreement created an equitable charge (*post*, note 80) which was effective as against purchasers with notice only.

77. Standish v. Lawrence, 111 Mass. 111; Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283; Brown v. Pentz, 1 Abb. App. Dec. 227, per McCoun, J., Burlock v. Peck, 2 Duer 90; and see Platt v. Eggleston, 20 Ohio St. 414; National Life Ins. Co. v. Lee, 75 Minn. 157, 77 N. W. 794.

not in contract, but in quasi contract. But ordinarily, as before stated,⁷⁸ no liability is imposed upon one using a wall placed in part on his land by another, in the absence of an agreement on his part, or on the part of his predecessor in title, to make compensation in the case of its use by him. The theory of implied *assumpsit*, above referred to, appears to be that adopted in England, in order to impose liability on a subsequent grantee of the covenantor.⁷⁹

In a few cases it has been said that an agreement of the character referred to has the effect of creating an equitable charge,⁸⁰ or lien,⁸¹ so that a grantee claiming under the non builder, if he takes with notice, express or implied, of the agreement to pay for the use of the wall, takes subject thereto. And occasionally such an agreement has apparently been regarded as creating an equitable easement as regards the payment of part of the cost of the wall.⁸²

The view that by such an agreement an equitable lien or charge is created involves the proposition merely that, in case the wall built by the owner of one tract is used by the owner of the other, the liability for the stipulated portion of the cost of the wall may

78. *Ante*, § 356

79. *Christie v. Mitchison*, 36 Law Times N. S. 621; *Irving v. Turnbull* (1900), 2 Q. B. 129. The latter case is criticized in editorial notes, 14 Harv. Law Rev. at p. 297, and 1 Columbia Law Rev. at p. 257.

80. *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433; *Keating v. Korfhage*, 88 Mo. 254; *Stehr v. Raben*, 33 Neb. 437, 50 N. W. 327.

81. *Nelson v. McEwen*, 35 Ill. App. 100; *First Nat. Bank v. Security Bank*, 61 Minn. 25, 63 N. W. 264. *Arnold v. Chamberlain*, 14 Tex. Civ. App. 634 (express agree-

ment for lien); *Parsons v. Baltimore Building & L. Ass'n*, 44 W. Va. 335, 67 Am. St. Rep. 769, 29 N. E. 999.

In one state a grantee has been regarded, by force of the statute as to party walls, as taking the land subject to a lien for a portion of the cost of the wall, if it was used by his grantor. *Pew v. Buchanan*, 72 Iowa, 637, 34 N. W. 453.

82. *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433; *Keating v. Korfhage*, 88 Mo. 254; *Stehr v. Raben*, 33 Neb. 437, 50 N. W. 327.

be enforced against the land by foreclosure sale. But whether such a lien should be recognized in the absence of any language showing an intention to create it may well be questioned. And the theory of equitable charge or lien furnishes no ground for imposing a personal liability upon a subsequent grantee of the land,⁸³ though it is not, it seems, inconsistent with the existence of such liability.⁸⁴ That is, a grantee may in some jurisdictions be personally liable as upon a covenant running with the land, and the covenantee at the same time have an equitable lien upon his land for part of the cost of the wall. The view that by such an agreement an equitable easement is created appears to involve the proposition that as one who takes with notice of an agreement by his predecessor in title that the land shall not be used in a certain way may be restrained from making such use,^{84a} so one who takes with notice of an agreement that the land shall not be used without the making of a certain payment, may be restrained from making such use without making the payment.⁸⁵ In so far as the theory of equitable easement, however, may involve the assumption that the right to use the wall is conditional upon payment of part of the cost thereof, it does not accord with the construction sometimes, perhaps usually, placed upon a party wall agreement, that the right to use the wall is not dependent upon payment of the stipulated part of the cost.⁸⁶

83. See *Keating v. Korfhage*, 88 Mo. 524; *Parsons v. Baltimore Bldg. & L. Ass'n*, 44 W. Va. 335, 57 Am. St. Rep. 769, 29 N. E. 999.

84. *First Nat. Bank v. Security Bank*, 61 Minn. 25, 63 N. W. 624; *Roche v. Ullman*, 104 Ill. 11; *Harris v. Dozier*, 72 Ill. App. 542.

Garmire v. Willy, 36 Neb. 340, 54 N. W. 562.

84a. *Post*, § 394.

85. See *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146, 3 N. E. 282.

86. *Ante*, § 361, note 39.

CHAPTER XV.

RESTRICTIONS ENFORCEABLE IN EQUITY.

- § 394. General considerations.
- 394. Character of agreement.
- 396. Theory of enforcement.
- 397. Persons subject to restriction.
- 398. Notice.
- 399. Persons entitled to enforce restriction.
- 400. Existence of general plan.
- 401. Defenses to enforcement.

§ 394. **General considerations.** Even in jurisdictions where, as in England, the burden of a covenant does not run with the land, an agreement as to the use of land may, under certain circumstances, affect a subsequent purchaser of the land who takes with notice of the agreement, equity in such case enjoining a use of the land in violation of such agreement.¹ As stated in the leading case on the subject,^{1a} "the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land

1. See, on the subject of this chapter, an excellent article by Professor George L. Clark, in 16 Mich. Law Rev. at p. 90.

1a. *Tulk v. Moxhay*, 2 Phillips, 774. See, to the same effect, *De Mattos v. Gibson*, 4 De G. & J. 276; *Luker v. Dennis*, 7 Ch. Div. 227; *McMahon v. Williams*, 79 Ala. 288; *Bryant v. Grosse*, 155 Cal. 132, 99 Pac. 99; *Frye v. Partridge*, 82 Ill. 267; *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L. R. A. 391, 34 N. E. 556; *Wiegman v. Kusel*, 270 Ill. 520, 110 N. E. 886; *Newbold v. Peabody*

Heights Co. of Baltimore, 70 Md. 493, 3 L. R. A. 579, 17 Atl. 372; *Feabody Heights Co. of Baltimore City v. Willson*, 82 Md. 186, 36 L. R. A. 393, 32 Atl. 386, 1077; *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715; *Watrous v. Allen*, 57 Mich. 362, 58 Am. St. Rep. 363, 24 N. W. 104; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 266; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190; *Hayes v. Waverly & P. Ry. Co.*, 51 N. J. Eq. 345; *Cotton v. Cresse*, 80 N.

in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." The person thus affected by the agreement as to the use of the land may be a purchaser, a lessee,² or a mere occupant of the land under license.³ Such an agreement may occur in connection with a conveyance of land, restricting the grantor, or the subsequent transferees of the grantor, as regards the use of land retained by him,⁴ or restricting the grantee as regards the use of the land conveyed.⁵ Or it may be independent of any conveyance of land, being merely an agreement between adjoining owners as regards the use of their land.⁶

J. Eq. 540, 85 Atl. 600; Wootton v. Seltzer, 84 N. J. Eq. 207, 93 Atl. 1087; Tallmadge v. East River Bank, 26 N. Y. 105; Trustees of Columbia College v. Lynch, 70 N. Y. 440; Hodge v. Sloan, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; Hills v. Miller, 3 Paige (N. Y.) 254, 24 Am. Dec. 218; Brown v. Huber, 80 Ohio St. 183, 88 N. E. 322; St. Andrew's Lutheran Church's Appeal, 67 Pa. St. 512; Town of Middletown v. Newport Hospital, 16 R. I. 319, 15 Atl. 800; Ball v. Milliken, 31 R. I. 36, 37 L. R. A. (N. S.) 623, Ann. Cas. 1912A, 1334, 76 Atl. 789.

2. Wilson v. Hart, 1 Ch. App. 463; Spicer v. Martin, 14 App. Cas. 12; Parker v. Nightingale, 6 Allen (Mass.) 341, 83 Am. Dec. 632.

3. Mander v. Falcke [1891] 2 Ch. 554.

4. See *e. g.*, Halle v. Newbold, 69 Md. 265; Bridgewater v. Ocean City R. Co., 63 N. J. Eq. 798, 52 Atl. 1130; Brown v. Huber, 80 Ohio St. 183, 88 N. E. 322; Water-

town v. Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80; Nicoll v. Fenning, L. R. 19 Ch. Div. 258.

5. See *e. g.*, Weil v. Hill, 193 Ala. 407, 69 So. 438; Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 310; Judd v. Robinson, 41 Colo. 222, 124 Am. St. Rep. 128, 14 A. & E. Ann. Cas. 1018, 92 Pac. 724; Hays v. St. Paul M. E. Church, 196 Ill. 633, 63 N. E. 1040; Peck v. Conway, 119 Mass. 546; Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; Coughlin v. Barker, 46 Mo. App. 54; Conder v. Sayre, 46 N. J. Eq. 386, 10 Atl. 190; Phoenix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400; Smith v. Graham, 217 N. Y. 655, 112 N. E. 1076; Clark v. Martin, 49 Pa. 289.

6. Bryan v. Grosse, 155 Cal. 132, 99 Pac. 499; Codman v. Bradley, 201 Mass. 361, 87 N. E. 591; Erickson v. Tapert, 172 Mich. 457, 138 N. W. 330; Supplee v. Cohen, 81 N. J. Eq. 500, 86 Atl. 366; Cotton v. Cresse, 80 N. J. Eq. 540,

That the grantor of land is expressly given a right of forfeiture in case of the breach by the grantee of a provision restrictive of the use to be made of the land does not of itself preclude the enforcement of such a provision by injunction.⁷

The courts do not favor restrictions upon the utilization of land, and that a particular mode of utilization is excluded by agreement must clearly appear.^{7a} If this does appear, the fact that the person seeking relief cannot show that such user of the land will cause him actual damage is usually immaterial,^{7b} though it may happen that the particular violation of the agreement sought to be restrained is so unimportant that equity will not intervene.^{7c} The court will give relief when necessary by a mandatory as well as by a prohibitory injunction.^{7b}

49 L. R. A. (N. S.) 357, 85 Atl. 600; Trustees of Columbia College v. Lynch, 70 N. Y. 440; Lewis v. Gollner, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81.

7. Weil v. Hill, 193 Ala. 407, 69 So. 438; Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; Hopkins v. Smith, 162 Mass. 444, 38 N. E. 1122; Wilson v. Massachusetts Institute of Technology, 188 Mass. 565, 75 N. E. 128; Hayes v. Waverly & P. R. Co., 51 N. J. Eq. 345, 27 Atl. 648; Ball v. Milliken, 31 R. I. 36, 37 L. R. A. (N. S.) 623, 76 Atl. 789; Clark v. Martin, 49 Pa. 289; Duester v. Alvin, 74 Ore. 544, 145 Pac. 660.

7a. Gerling v. Lain, 269 Ill. 337, 109 N. E. 972; Brandenburg v. Lager, 272 Ill. 622, 112 N. E. 321; Van Duyn v. H. S. Chase & Co., 149 Iowa, 222, 128 N. W. 300; Melson v. Ormsby, 169 Iowa, 522, 151 N. W. 817; Casterton v. Plotkin, 188 Mich. 333, 154 N. W. 151; Godley v. Weisman, 133

Minn. 1, L. R. A. 1917A, 333, 157 N. W. 711, 158 N. W. 333; Scharer v. Pantler, 127 Mo. App. 433, 105 S. W. 668; Fortesque v. Carroll, 76 N. J. Eq. 583, 75 Atl. 923; Goater v. Ely, 80 N. J. Eq. 40, 82 Atl. 611; Hunt v. Held, — Ohio —, 107 N. E. 765; McCloskey v. Kirk, 243 Pa. 319, 90 Atl. 73.

7b. Hartman v. Wells, 257 Ill. 167, 100 N. E. 500; Morrow v. Hasselman, 69 N. J. Eq. 612, 61 Atl. 369; Supplee v. Cohen, 80 N. J. Eq. 83, 83 Atl. 373; Spilling v. Hutcheson, 111 Va. 179, 68 S. E. 250. See Doherty v. Allman, 3 App. Cas. at p. 720, per Lord Cairns.

7c. Barton v. Slifer, 72 N. J. Eq. 812, 66 Atl. 899; Smith v. Spencer, 81 N. J. Eq. 389, 87 Atl. 158; Forsee v. Jackson, 192 Mo. App. 408, 182 S. W. 783.

7d. Hartman v. Wells, 257 Ill. 167, 100 N. E. 500; Codman v. Bradley, 201 Mass. 361, 87 N. E. 591; Stewart v. Finkelstone, 206 Mass. 28, 28 L. R. A. (N. S.) 634,

It has been decided in one state that a covenant restrictive of the use of land constitutes a property right in the land restricted, so as to entitle the beneficiaries under the covenant to compensation if such land is devoted to a public use which involves a violation of the covenant,⁸ and in another state the interest of one entitled to enforce such a covenant has been regarded as a right of which he cannot be deprived by legislation without compensation.⁹ Elsewhere, however, such a covenant has been regarded as a nullity as against the state or a state agency seeking to utilize the land for a public or *quasi* public purpose, with the result that a neighboring property owner cannot assert any claim for damages in such case, though the public use is of a character which is in terms excluded by the covenant.^{9a}

§ 395. Character of agreement. In England, an agreement will thus be enforced in equity against a subsequent purchaser or occupant only when it is restrictive of the use of the land, and not when it calls for the performance of some positive act by the occupant thereof.¹⁰ And in the great majority of the

138 Am. St. Rep. 370, 92 N. E. 37; Allen v. Barrett, 213 Mass. 36, 99 N. E. 575; Compton Hill Imp. Co. v. Strauch, 162 Mo. App. 76, 141 S. W. 1159; Maine v. Mulliken, 176 Mich. 443, 142 N. W. 782; Spilling v. Hutcheson, 111 Va. 179, 68 S. E. 250.

8. Flynn v. New York, W. & B. R. Co., 218 N. Y. 140, 112 N. E. 913.

9. Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244.

9a. Doan v. Cleveland Short Line Ry. Co., 92 Ohio St. 461, 112 N. E. 505; Ward v. Cleveland Ry.

Co., 92 Ohio St. 471, 112 N. E. 507; U. S. v. Certain Lands, 112 Fed. 622; Wharton v. United States, 153 Fed. 876.

10. Haywood v. Brunswick Permanent Benefit Building Soc., 8 J. B. Div. 403; Austerberry v. Corporation of Oldham, 29 Ch. Div. 750; London & S. W. Ry. Co. v. Gomm, 20 Ch. Div. 562. See De Gray v. Monmouth Beach Club House Co., 50 N. J. Eq. 329. That only a restrictive agreement will thus be enforced, see also Miller v. Clary, 210 N. Y. 127, 103 N. E. 1114 (*semble*).

cases in this country the agreement enforced has been restrictive. Thus, agreements not to use specified land for building,¹¹ or for a particular business,¹² or for other than residence purposes,¹³ have been thus enforced, as have agreements not to build within a certain distance of the street,¹⁴ or to erect no building of less than a certain cost,¹⁵ or of a style of construction other than that named.¹⁶ In some cases,¹⁷ however, an affirmative agreement in connection with the land has been regarded as within the doctrine, with the effect that a purchaser from the promisor with notice of such an agreement, though he may not be personally liable for its non performance, takes the land subject to the possibility that a court of equity will enforce its performance, or reparation for its non performance, by a decree in reference to the land. So an agreement by which, if one uses a wall constructed by his adjoining owner, he is to pay a

11. *Tulk v. Moxhay*, 2 Phillips, 774; *Wood v. Cooper* (1894) 3 Ch. 671; *Herrick v. Marshall*, 66 Me. 435; *Peck v. Conway*, 119 Mass. 546; *Ladd v. City of Boston*, 151 Mass. 585, 21 Am. St. Rep. 481, 24 N. E. 858; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Hennen v. Deveny*, 71 W. Va. 629, L. R. A. 1917A, 524, 77 S. E. 142.

12. *McMahon v. Williams*, 79 Ala. 288; *Collins Mfg. Co. v. Marcy*, 25 Conn. 242; *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; *Post v. Weil*, 115 N. Y. 361; 5 L. R. A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; *Stines v. Dorman*, 25 Ohio St. 580.

13. *German v. Chapman*, 7 Ch. Div. 271; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632. *Trustees of Columbia College v. Lynch*, 70 N. Y. 440.

14. *Manners v. Johnson*, 1 Ch. Div. 673; *Coles v. Sims*, 5 De Gex. M. & G. 1; *Linzee v. Mixer*, 101 Mass. 512; *Sanborn v. Rice*, 129 Mass. 387; *Ogontz Land & Improvement Co. v. Johnson*, 168 Pa. St. 178, 31 Atl. 1008; *Brandenburg v. Lager*, 272 Ill. 622, 112 N. E. 321.

15. *Bowes v. Law*, L. R. 9 Eq. 836. *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11; *Blakemore v. Stanley*, 159 Mass. 6, 33 N. E. 689.

16. *Keening v. Ayling*, 126 Mass. 404; *Landell v. Hamilton*, 177 Pa. St. 23, 35 Atl. 242; *Clark v. Martin*, 49 Pa. St. 289.

17. *Flege v. Covington & C. Elevated R. & Transfer & Bridge Co.*, 122 Ky. 348, 121 Am. St. Rep. 463, 91 S. W. 738; *Bailey v. Agawam Nat Bank*, 190 Mass. 20, 3 L. R. A. (N. S.) 98, 112 Am. St. Rep. 296, 5 A. & E. Ann. Cas.

certain amount named, has occasionally been regarded as enforceable against the land in the hands of a purchaser with notice as an equitable rather than a legal claim.¹⁸ The adoption of this view, that even an affirmative agreement may be enforced as against a purchaser with notice, involves merely a necessity of regarding such an agreement, if for the payment of money by the promisor to the promisee, as creating an equitable lien or charge on the lands,¹⁹ and if for the doing of another character of act, as justifying a decree for the specific performance of the agreement. If the agreement neither calls for the payment of money nor is of such a character that specific performance would otherwise be decreed, it would appear to be enforceable in equity as against such a subsequent purchaser to no greater extent than it is enforceable at law. Subject to such considerations, there would appear to be no objection to the application of the doctrine which we are now discussing to the case of an affirmative agreement, except as the particular court may regard it as impolitic thus to increase the burdens capable of imposition on land.²⁰

According to a few decisions, the agreement, even though restrictive, in order to be thus enforced in equity against a subsequent purchaser, must "touch and concern" land belonging to the person in favor of whom the agreement is made, by tending to the physical advantage of such land, it being insufficient that

553, 76 N. E. 449; *Childs v. Boston & M. R.*, 213 Mass. 91, 99 N. E. 957. *Carson v. Percy*, 57 Miss. 97; *Burbank v. Pillsbury*, 48 N. H. 475; *Gould v. Partridge*, 52 N. Y. App. Div. 40, 64 N. Y. Supp. 870 (*semble*); *Hinchman v. Consol. Arizona Smelting Co.*, 198 Fed. 407 (*semble*). As adverse to the enforcement of such an affirmative covenant, see *Miller v. Clary*, 210 N. Y. 127, 103 N. E. 1114.

18. *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433; *Burr v. Lamaster*, 30 Neb. 688, 9 L. R. A. 637, 27 Am. St. Rep. 428, 46 N. W. 1015. See *ante*, § 393, notes 82-85.

19. *Post*, § 661.

20. See article by Charles I. Giddings, Esq., in 5 Harv. Law Rev. at p. 279; editorial note in 18 Harv. Law Rev. at p. 214; 3 Pomeroy, Eq. Jur. § 1295.

it increases its value indirectly by preventing the use of the adjoining property for a competing business.²¹ That such an agreement preventive of competition may be enforced against a subsequent purchaser with notice is however recognized or assumed in a number of cases.²² And admitting that the agreement is valid between the original parties thereto, the fact that its chief operation is to restrain competition appears to be hardly a sufficient reason for permitting a subsequent purchaser with notice of the agreement to use the land in contravention thereof.²³

— **Statute of Frauds.** The right thus to enforce an agreement in equity against a subsequent purchaser is, at least in some jurisdictions, independent of the mode or incidents of its execution. It need not be a covenant, that is, an agreement under seal, and it has usually been regarded as sufficient although oral merely, or merely inferred from the acceptance of a conveyance containing such a stipulation, or from representations made upon the sale of land.²⁴ It is to

21. *Taylor v. Owen*, 2 Blackf. (Ind.) 301 (*semble*); *Norcross v. James*, 140 Mass. 188, 2 N. E. 946; *Brewer v. Marshall*, 18 N. J. Eq. 337, 19 N. J. Eq. 557; *Kettle River R. Co. v. Eastern Ry. Co. of Minnesota*, 41 Minn. 461, 6 L. R. A. 111, 43 N. W. 469; *Tardy v. Creasy*, 81 Va. 553 (two judges dissenting); *West Virginia Rwy. v. Ohio River Pipe Line Co.*, 22 W. Va. 600. See *Burdell v. Grandi*, 152 Cal. 376, 14 L. R. A. (N. S.) 909, 125 Am. St. Rep. 61, 92 Pac. 1022.

22. *Catt v. Tourle*, 4 Ch. App. 654; *Holloway v. Hill* (1902), 2 Ch. 612; *Robinson v. Webb*, 68 Ala. 397, 77 Ala. 176; *McMahon v. Williams*, 79 Ala. 288; *Frye v. Part-*

ridge, 82 Ill. 267; *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335 (two judges dissenting); *Stines v. Dorman*, 25 Ohio St. 580; *Middletown, Town of, v. Newport Hospital*, 16 R. I. 319, 333, 1 L. R. A. 191, 15 Atl. 800 (*semble*). See *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410.

23. See 17 Harv. Law Rev. at p 183. article by Prof J. B. Ames.

24. *Spicer v. Martin*, 14 App. Cas. 12; *Renals v. Colishaw*, 9 Ch. Div. 125, 11 Ch. Div. 866; *MacKenzie v. Childers*, 43 Ch. Div. 265; *Nottingham Patent Brick & Tile Co. v. Butler*, 15 Q. B. Div.

be regretted that the judicial expressions to this effect have not been accompanied by any explanation of why the agreement is not within the operation of the Statute of Frauds, a question as to which there appears to be considerable room for discussion.

In two or three states the view has been asserted that an agreement such as we are now considering involves the creation of an interest in land, within the local equivalent of the first section of the English statute.²⁵ But in view of the fact that that statute contains a separate provision in reference to proof of the creation of an express trust, it might perhaps be questioned whether the first section was intended to apply to the creation of any equitable interest, and a like view might perhaps be taken of similar language occurring in a state statute. There is one explicit decision that an agreement restrictive of the use of land is not an agreement for the sale of an interest in land within the fourth section of the statute,²⁶ and this seems a rational view, but a contrary view is asserted in another state.²⁷ There are two decisions denying that an agreement that land shall not be utilized in a particular way is one not to be performed within one year from the making thereof

261, 16 Q. B. Div. 778; *Whitney v. Union Railway Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715; *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319; *Allen v. City of Detroit*, 167 Mich. 464, 36 L. R. A. (N. S.) 890, 133 N. W. 317; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Lewis v. Gollner*, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81; *Equitable Life Ass'n Soc. of United States v. Brennan*, 148 N. Y. 661, 43 N. 5. 173; *Lennig v. Ocean City Ass'n*, 41 N. J. Eq. 606, 56 Am. Rep. 16, 7 Atl. 491.

25. *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Rice v. Roberts*, 24 Wis. 461; *McCusker v. Goode*, 185 Mass. 607, 71 N. E. 76; *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622. And see *Tibbetts v. Tibbetts*, 66 N. H. 360, 20 Atl. 979.

26. *Hall v. Solomon*, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876.

27. *Sprague v. Kimball*, 213 Mass. 380, 4 L. R. A. 962, 100 N. E. 622; *Clanton v. Scruggs*, 95 Ala. 279, 10 So. 757.

within the statute, one decision being based on the theory that it may be performed within a year,²⁸ and the other upon the theory that the provision does not apply to a negative contract.²⁹ It is, however, difficult to see how such a contract not limited in time, is capable of performance in a year, nor is it clearly apparent that a negative contract does not call for performance to the same extent as a positive contract, for the purpose of this provision. In those jurisdictions, however, in which this provision as to agreements not to be performed within a year has been held not to apply to a contract based on an executed consideration, or to one which is to be entirely performed by one party within the year, an agreement incidental to the sale or conveyance of land would ordinarily not fall within its operation.³⁰

Conceding that otherwise the agreement in reference to the land would be within the Statute of Frauds, it has been suggested that a restrictive agreement, although oral, might on occasion be enforced on the theory of part performance,³¹ on that of fraud³² or on that of estoppel.³³ It would seem, however, somewhat difficult to bring every case of an oral restrictive agreement within the operation of either one of these doctrines. In case, for instance, one conveying land to another orally agrees, at the time of executing the conveyance, not to make a particular use of land retained by him, there would appear to be no room for the application of the doctrine of part performance, nor any sufficient basis for a finding of either estoppel

28. *Hall v. Solomon*, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876.

29. *Leinaw v. Smart*, 11 Humph. (Tenn.) 308.

30. That a verbal agreement not to use land for a certain purpose is within this provision, see *Long v. Cramer Meat & Pack-*

ing Co., 155 Cal. 402, 101 Pac. 297.

31. *Williams, Vendor & Purchaser* (2nd Ed.) 494.

32. *Hubbell v. Warren*, 8 Allen (Mass.) 173.

33. *Lennig v. Ocean City Ass'n*, 41 N. J. Eq. 606, 56 Am. Rep. 16, 7 Atl. 491; *Woods v. Lowrance*,

or fraud.³⁴ The fact that one purchasing land mistakenly supposes that an incidental stipulation entered into by the vendor is legally enforceable, should hardly operate to estop the vendor from asserting the contrary, even though it appears that the former would not have made the purchase had he been correctly informed.³⁵

§ 396. Theory of enforcement. While the right to enforce in equity an agreement or covenant of a restrictive character as against a subsequent purchaser with notice thereof is generally recognized, the judicial expressions as to the principle underlying such enforcement are singularly inharmonious. In some cases, the doctrine appears to be regarded as merely an equitable application of a legal rule that the burden as well as the benefit of a covenant which touches and concerns the land will run with the land, a view which is necessarily restricted to such states as have adopted the rule that the burden of a covenant runs with the land at law.³⁶ In a considerable number of cases the right of enforcement appears to be based on the theory that, in the view of a court of equity, an easement in the land is created by an agreement of this character.³⁷

49 Tex. Civ. App. 542, 109 S. W. 418.

34. See *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622.

35. See *Clanton v. Scruggs*, 95 Ala. 279, 10 So. 757.

36. *Ante*, § 390.

37. *McMahon v. Williams*, 79 Ala. 288; *Weil v. Hill*, 193 Ala. 407, 69 So. 438; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503; *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L. R. A. 391, 34 N. E. 556; *Clark v. McGee*, 159 Ill. 518, 42 N. E. 965; *Herrick v. Marshall*, 66 Me. 435; *Leader v. La Flamme*, 111

Me. 242, 88 Atl. 859; *Dawson v. Western M. R. Co.*, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678, 68 Atl. 301; *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253; *Ladd v. City of Boston*, 151 Mass. 585, 21 Am. St. Rep. 481, 24 N. E. 858; *Chase v. Walker*, 167 Mass. 293, 45 N. E. 916; *Brown v. O'Brien*, 168 Mass. 484, 47 N. E. 195; *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N. E. 244; *Allen v. City of Detroit*, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890; *Bowen v.*

This latter theory has been adopted by the later English cases,³⁸ and has been there applied to the extent of holding that, as a legal easement requires a dominant as well as a servient tenement,³⁹ so an "equitable easement," requires a dominant tenement, that is, such an easement can be created by a restrictive covenant only if the covenantee has an interest in the land sought to be benefitted, with the result that if the covenantee has not such an interest, a purchaser from the covenantor, although taking with notice of the covenant, is not affected thereby.⁴⁰

The theory referred to, that a restrictive agreement operates to create an easement for the purposes of a court of equity, though favored by the later English cases, and frequently referred to with approval by most respectable American courts, is by no means entirely satisfactory.^{40a} If what is in form a

Smith, 76 N. J. Eq. 456, 74 Atl. 675; Trustees of Columbia College v. Lynch, 70 N. Y. 440; Muzzarelli v. Hulshizer, 163 Pa. St. 643, 30 Atl. 291; Green v. Creighton, 7 R. I. 9.

38. The adoption of this view by the English courts dates from the *dictum*, entirely uncalled for, of Jessel, M. R., in *London & Southwestern Ry. Co. v. Gomm*, 20 Ch. D. 562, that "the doctrine of *Tulk v. Moxhay*, 2 Phil. 774, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's case* to another line of cases, or else an extension in equity of the doctrine of negative easements." See, in support of this view, editorial notes in 28 Harv. Law Rev. at p. 201, 31 Id. at p. 376.

39. *Ante*, § 348.

40. *Formby v. Barker* (1903),

2 Ch. 539; *Millbourn v. Lyons* (1914), 1 Ch. 34; *London County Council v. Allen* (1914), 3 K. B. 642. In the latter case two of the three judges indicate dissatisfaction with the theory which compelled such a decision.

Likewise, on the analogy of easements, it has, in *Massachusetts*, been decided that the benefit of a restrictive agreement by the grantee of land would not pass on a subsequent conveyance of neighboring land in which the promisee had merely an undivided interest, since a contrary view would involve in effect a reservation of an easement in favor of a person not of a party to the conveyance, that is, the owner of the other undivided interest. *Hazen v. Mathews*, 184 Mass. 388, 68 N. E. 838.

40a. The covenants thus enforced against an assignee of the

contract not to use the land in a particular manner creates an easement as to the use of the land, it should, one would suppose, create it for the purposes of a court of law as well as of a court of equity. It is difficult to understand how language which, when under consideration in a court of equity, is regarded as creating an easement can, when under consideration in a court of law, be regarded as creating a contract only.⁴¹ It is no doubt true that an easement can be created by what are in form words of covenant,⁴² but that is by reason of the construction placed upon these words as being in effect words of grant, for the purpose of a court of law as well as of equity. It is somewhat noticeable that even courts which emphasize the theory of "equitable easement" for the purpose of making effective a restrictive covenant as against a subsequent purchaser of the land, ordinarily regard words of covenant restrictive of the use of land as creating, for other purposes, merely a covenant.⁴³ That is, the courts ignore the possible operation of such words as creating an equitable easement rather than a covenant, except when it is convenient to regard them as creating such an easement for the purpose of making them effective against a subsequent purchaser.

The more satisfactory theory, it is conceived, in regard to the enforceability in equity of restrictive

covenantor are, as hereafter stated, usually restrictions upon the character or location of the building to be erected, or business to be maintained, on the land, and such covenants are, in some of the cases last cited, said to create easements of light, air, and prospect. They are, however enforced even when their violation could not involve any interference with light, air, or prospect, as in the

case of a deviation of a few inches from a building line, or a restriction as to the use to be made of the land, or the cost of the building thereon.

41. See the remarks of Wilde, J., in *Hurd v. Curtis*, 19 Pick. (Mass.) 459, quoted *ante*, § 391, note 29.

42. *Ante*, § 361.

43. See 1 Tiffany, *Landlord & Tenant*, § 123.

agreements against purchasers with notice is that equity regards such an agreement as vesting in the promisee a right to specific enforcement by means of an injunction or otherwise, not only as against the original promisor, but also as against a subsequent holder of the property, if not a purchaser for value without notice.⁴⁴ If the right to equitable relief could not thus be asserted as against a subsequent holder of the property, the result would be that the promisee could be deprived of such right, in practically every case, by a collusive transfer on the part of the promisor. The doctrine, properly regarded, appears to be closely analagous to that by which the equitable right to specific performance of a contract is enforced as against a subsequent holder of the property, not a *bona fide* purchaser for value, by a decree requiring him to make a conveyance in conformity to the contract, as well as to the doctrine that a trust may be enforced as against a purchaser from the trustee under like circumstances. Such a right as to the use of land, created by contract and capable of enforcement as against a subsequent holder of the land, resembles likewise an equitable lien created by a contract subjecting the land to a pecuniary claim by way of security for the claim.

It has in England been decided that one who acquires the land by adverse possession takes it subject to a restrictive agreement to which it was subject in the hands of the rightful owner.⁴⁵ This decision appears,

44. See the discussion in Sugden, *Vendors & Purchasers* (14th Ed.) 802 *et seq.* Maitland, *Equity* 165; articles by Prof. J. B. Ames in 17 *Harv. Law Rev.* at p. 174, *Lectures on Legal History*, 381; by T. Cyprian Williams, Esq., in 51 *Solicitors' Journal* 141; by Professor Harlan F. Stone, in 18 *Columbia Law Rev.* at p. 291; editorial notes in 4 *Law Quart. Rev.*

at p. 119, 17 *Harv. Law Rev.* at p. 415, 21 *Id.* 139; *De Gray v. Monmouth Beach Club House Co.*, 50 *N. J. Eq.* 329, 24 *Atl.* 388; *Cotton v. Cresse*, 80 *N. J. Eq.* 540, 85 *Atl.* 600, 49 *L. R. A. (N. S.)* 357.

45. *Re Nisbet & Potts' Contract* (1905), 1 *Ch.* 391, (1906) 1 *Ch.* 386.

to some extent at least, to be based on the theory, referred to in the preceding paragraph, that the right created by such an agreement is in the nature of an easement. Attention has been called by an able writer⁴⁶ to the difficulty of harmonizing this decision, which in effect regards an equitable claimant as unaffected by the fact that the holder of the legal title is barred under the statute of limitation, with the rule⁴⁷ that a *cestui que trust* is barred when the holder of the legal title is barred, and suggestions have been made that in view of this decision, the rule that a *cestui que trust* is barred when the holder of the legal title is barred must be regarded as having been superseded as a result of the language used in the Statute of Limitations now in force in that country.⁴⁸

§ 397. **Persons subject to restriction.** So far as the agreement which is sought to be enforced against a subsequent holder of the land concerns, as is almost invariably the case, the use to be made of the land, it is a question of primary importance whether the agreement concerns the use to be made thereof by the promisor only, or the use to be made thereof by others as well. A use by a subsequent purchase cannot well be restrained if the agreement was intended to prevent the promisor only from making such use.⁴⁹ What the intention was in this regard is a question of construction, but since it is ordinarily immaterial to the promisee who may make any particular use of the property, the presumption would seem to be, in the absence of a clear showing to the contrary, that such a use by any person whomsoever is intended,⁵⁰ and

46. T. Cyprian Williams, Esq., in 51 Solicitors' Journal at pp. 141, 155.

47. *Ante*, § 103, note 4.

48. Lightwood, Time Limits of Actions, 80; article by Charles Sweet, 19 Juridicial Review, 67.

49. *Kemp v. Bird*, 5 Ch. Div. 974; *Re Fawcett v. Holmes*, 42 Ch. Div. 150; *Brigg v. Thornton* (1904), 1 Ch. 386; *Pythian Castle Ass'n of Sacramento v. Daroux*, 172 Cal. 510, 157 Pac. 594.

50. See *Hodge v. Sloan*, 107 N.

an intention to this effect would appear to be clearly indicated by the fact that the agreement in terms binds the promisor's assigns,⁵¹ or that the agreement is in an impersonal form, that the land shall not be used in a particular way.

§ 398. **Notice.** As above stated, a restrictive agreement is enforced in equity against a subsequent purchaser only when he takes with notice thereof.⁵² Such notice may be either actual or constructive,⁵³ and the purchaser is, in accordance with the general rule as to notice,⁵⁴ charged with notice of anything showing or imposing such a restriction which may be contained in a conveyance in the chain of title under which he claims,⁵⁵ and whether such a conveyance is recorded is necessarily immaterial in this regard.⁵⁶

Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; Fuller v. Arms, 45 Vt. 400.

51. Holloway Brothers v. Hill (1902), 2 Ch. 618. See Hartz v. Kales Realty Co., 178 Mich. 560, 146 N. W. 160; Pavkovich v. Southern Pac. R. Co., 150 Cal. 39, 87 Pac. 1097.

In Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308, it appears to be considered that if the restriction does not in terms purport to bind assigns or grantees, it cannot be enforced against them. And see Pythian Castle Ass'n of Sacramento v. Daroux, 172 Cal. 510, 157 Pac. 594; Wood v. Stehrer, 119 Md. 143, 86 Atl. 128.

52. Carter v. Williams, L. R. 9 Eq. 678; Nottingham Co. v. Butler, 16 Q. B. Div. 778, 787; Rowell v. Satchell (1903) 2 Ch. 212; Judd v. Robinson, 41 Colo. 222, 124 Am. St. Rep. 128, 14 Ann. Cas. 1018, 92 Pac. 724; Washburn v. Miller,

117 Mass. 376; Moller v. Presbyterian Hospital, 65 N. Y. App. Div. 134.

53. Wilson v. Hart, 1 Ch. App. 463; Spicer v. Martin, 14 App. Cas. 12; Patman v. Harland, 17 Ch. Div. 353.

54. *Post*, § 572.

55. Patman v. Harland, 17 Ch. Div. 353; Wiegman v. Kusel, 270 Ill. 520, 110 N. E. 884; Duncan v. Central Passenger Ry. Co., 85 Ky. 525, 4 S. W. 228; Peck v. Conway, 119 Mass. 546; Oliver v. Kalick, 223 Mass. 252, 111 N. E. 879; Zoller v. Goldberg, 183 Mich. 197, 149 N. W. 089; Wabash, St. L. & P. Ry. Co., 24 Mo. App. 199; Brewer v. Marshall, 19 N. J. Eq. 537; Smith v. Graham, 217 N. Y. 655, 112 N. E. 1076. See Norfleet v. Cromwell, 64 N. C. 1.

56. Occasional statements that the purchaser is, in the particular case, charged with notice of the agreement because the convey-

If, however, the agreement is contained in a conveyance which is not in the chain of title, but which was made by a prior owner of neighboring land, the question of its record may be material for the purpose of charging a purchaser with notice of the agreement, and such may also be the case when the agreement is not contained in a conveyance of land, but is incorporated in an independent instrument. The former case, that of an agreement contained in a conveyance not in the chain of title of the person against whom it is sought to enforce it, is elsewhere discussed,⁵⁷ and the question of the record of an independent restrictive agreement will here alone be referred to. Whether such an agreement is entitled to be recorded, so that its record will affect the purchaser with constructive notice thereof is obviously a question to be determined by the language of the state recording law.⁵⁸

In accordance with the general equitable rule that a purchaser with notice from a purchaser without notice takes free of the equity,⁵⁹ the effect of the acquisition of the property by one having no notice of the restrictive agreement is to put an end to the enforceability of the agreement as against the land.⁶⁰

There are in England occasional *dicta*⁶¹ that a *bona fide* purchaser for value of an equitable, as distinguished from a legal, estate, takes subject to the burden of a restrictive agreement, the element of notice

ance in his chain of title in which it is contained is of record. (Schadt v. Brill, 173 Mich. 647, 45 L. R. A. (N. S.) 726, 139 N. W. 878; Miller v. Klein, 177 Mo. App. 557, 160 S. W. 562; Bowen v. Smith, 76 N. J. Eq. 456, 74 Atl. 675) appear to be beside the mark.

57. *Post*, § 567(d).

58. That it is entitled to record see Bradley v. Walker, 138 N. Y. 291, 33 N. E. 279; Boyden v. Roberts, 131 Wis. 659, 111 N. W. 701;

Sjblom v. Mark, 103 Minn. 193, 15 L. R. A. (N. S.) 1129, 114 N. W. 746.

59. *Post*, § 575.

60. Roak v. Davis, 194 Mass. 481, 80 N. E. 690; Wilkes v. Spooner [1911] 2 K. B. 473.

61. London & S. W. Rwy. Co. v. Gomm, 20 Ch. Div. 562; Rogers v. Hosegood [1900], 2 Ch. 388, 405; Osborne v. Bradley [1903], 2 Ch. 446, 451.

being thus material only when the agreement is asserted as against a purchaser of the legal estate. This accords with the rule generally stated, that the doctrine of *bona fide* purchase for value does not operate to protect the purchaser of a merely equitable interest, but the soundness of the rule from the standpoint of principle may be doubted⁶² and, as has been remarked, it is difficult to see the justice of exempting the *bona fide* purchaser of a legal fee simple from the burden of a restrictive covenant while not exempting such a purchaser of an equitable fee simple.⁶³

§ 399. Persons entitled to enforce restriction. The person with whom the agreement was made, owning land in the neighborhood which might be benefitted by reason of the restriction, may no doubt proceed in equity for its enforcement. If on the other hand he has no land to be benefitted by the enforcement of the restriction, he cannot, by the weight of authority,⁶⁴

62. See article by Professor J. B. Ames, in 1 Harv. Law Rev. at p. 8, *et seq.*, Lectures on Legal History p. 263, *et seq.*

63. See article by Professor Ames in 17 Harv. Law Rev. at p. 178, note, Lectures on Legal History at p. 385.

64. *Forman v. Safe Deposit & Trust Co.*, 114 Md. 574, 80 Atl. 298; *Genung v. Harvey*, 79 N. J. Eq. 57, 80 Atl. 955; *St. Stephen's Church v. Church of Transfiguration*, 201 N. Y. 1; *Los Angeles University v. Swarth*, 107 Fed. 798, 54 L. R. A. 262, 46 C. C. A. 647. See *Trustees v. Lynch*, 70 N. Y. 440; *Dana v. Wentworth*, 111 Mass. 191.

A contrary view is adopted in *Van Sant v. Rose*, 260 Ill. 401, 103 N. E. 194, criticized in 9 Ill.

Law Rev. at p. 58, 27 Harv. Law at p. 493, 16 Mich. Law Rev. at p. 97. In Massachusetts it has been decided that the original vendor, who has disposed of all his land, may properly join in a suit by one of his vendees against another to enforce a restriction. *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 34 L. R. A. (N. S.) 730, 95 N. E. 216. That the heirs of a promisee who disposed of all his land cannot enforce the restriction, see *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655.

In England the fact that the promisee had parted with all his property was considered not to preclude him from enforcing the restriction when its violation subjected him to a possible lia-

obtain such relief, a view which accords with the general practice of courts of equity, to give relief only in favor of one who shows an interest in the subject matter of the suit.

As regards the right of one claiming under the person with whom the agreement was made, to enforce the agreement, the cases are usually to the effect that, provided the agreement was intended to benefit particular land belonging to the promisee, rather than the promisee personally, and not otherwise, any purchaser of the whole or of part of that land is entitled to enforce the agreement to the same extent as the promisee himself could have enforced it.⁶⁵ In such case the benefit of the agreement passes as incident to the land which the agreement was intended to benefit, in the same manner as the benefit of a covenant runs with the land at law.⁶⁶ The question ordinarily arises in connection with a restrictive agreement entered into by the grantee of land with his grantor, who subsequently transfers adjoining land, in whole or in part, to another, who undertakes to assert the agreement as against the original grantee or one claiming under such grantee. In some cases the fact that the person with whom the agreement was made had at the time neighboring land which might be benefitted by compliance with the restriction appears to be regarded as sufficient to show that the agreement was intended to benefit the

bility for breach of covenant of title. *Spencer v. Bailey*, 69 *Law Times*, 179.

65. *Keates v. Lyon*, 4 Ch. App. 218; *Renals v. Colishaw*, 9 Ch. Div. 125, 11 Ch. Div. 866; *Leek v. Meeks*. — Ala. —, 74 So. 31; *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N. S.) 5, 17 Pac. 677; *Hay v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040; *Sharp v. Ropes*, 110

Mass. 381; *Skinner v. Shepard*, 130 Mass. 180; *Beals v. Case*, 133 Mass. 138; *Clapp v. Wilder*, 176 Mass. 332, 50 L. R. A. 120, 51 N. E. 692; *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 24 Atl. 388; *Equitable Life Assur. Soc. of United States, v. Brennan*, 148 N. Y. 661, 43 N. E. 173; *Duester v. Alvin*, 74 Ore. 544, 145 Pac. 660.

66. *Ante*, § 389.

land, so that it would enure to a subsequent purchaser of a part or the whole thereof.⁶⁷ In other cases a contrary view is taken, that the person claiming the right to enforce the restrictive agreement as transferee of land which belonged to the promisee has the burden of showing that the agreement was intended to benefit the promisee's land rather than the promisee personally.⁶⁸ Adopting the latter view, it is not entirely clear how this intention may be shown. In England and in two or three states the rule appears to be that, unless the restriction is in aid of some common plan or general scheme of development,⁶⁹ it must be shown by the language of the instrument itself in which the agreement appears,⁷⁰ construed with reference to the

67. *McMahon v. Williams*, 79 Ala. 288. *Leek v. Meeks*, — Ala. —, 74 So. 31; *Roberts v. Porter*, 100 Ky. 130, 37 S. W. 485; *Herrick v. Marshall*, 66 Me. 435; *Peck v. Conway*, 119 Mass. 546 (*semble*); *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; *Hartwig v. Grace Hospital*, 198 Mich. 725, 165 N. W. 827; *Post v. Weil*, 115 N. Y. 361, 5 L. R. A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; *Clark v. Martin*, 49 Pa. 289; *Muzzarelli v. Holshizer*, 163 Pa. 643, 30 Atl. 291; *Ball v. Muliken*, 31 R. I. 36, 37 L. R. A. (N. S.) 623, Ann. Cas. 1912B, 30, 76 Atl. 789.

68. *Keates v. Lyon*, L. R. 4 Ch. 218; *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 117 Pac. 677, 37 L. R. A. (N. S.) 5; *Loomis v. Collins*, 272 Ill. 221 111 N. E. 999; *Sbarr v. Ropes*, 110 Mass. 381; *Skinner v. Shepard*, 130 Mass. 181; *Lowell Institute for Savings v. Lowell*, 153 Mass. 530, 27 N. E. 518; *Hobart v. Weston*, 223 Mass.

161, 111 N. E. 779; *Coughlin v. Barker*, 46 Mo. App. 54. *Helm-sley v. Marlborough House Co.*, 62 N. J. Eq. 164, 50 Atl. 14; *Mc-Nichol v. Townsend*, 73 N. J. Eq. 276, 67 Atl. 938, 73 N. J. Eq. 276, 76 Atl. 965.

69. *Post*, § 400.

70. *Renals v. Colishaw*, 9 Ch. Div. 125; *Reid v. Bickerstaff* (1909), 2 Ch. 305. *Judd v. Robinson*, 41 Colo. 222, 124 Am. St. Rep. 128, 92 Pac. 724, 14 Ann. Cas. 1018; *Helmsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, 63 N. J. Eq. 804; *Sailer v. Padolski*, 82 N. J. Eq. 459, 88 Atl. 967; *Skinner v. Shepard*, 130 Mass. 189; *St. Patrick's Religious etc., Ass'n v. Hale*, 227 Mass. 175, 116 N. E. 407. See *Beetem v. Garrison*, 129 Md. 664, 99 Atl. 897; *Equitable Life Ass'n. Soc. of United States v. Brennan*, 148 N. Y. 661, 43 N. E. 173.

In *Kiley v. Hall*, 96 Ohio, 374, 117 N. E. 359, it was considered necessary, in order to enable the

surrounding circumstances,⁷¹ but occasionally the view has been indicated that such an intention may be inferred from the surrounding circumstances alone, without reference to whether the instrument contains any indication of intention in this regard.⁷² Conceding that the intention to benefit the land must appear from the instrument itself in which the agreement occurs, the fact that the agreement is in terms with the promisee and his assigns would seem to be sufficient for this purpose⁷³ and that the agreement was with the promisee and his heirs has been given this effect.⁷⁴

In England the view has obtained that, although the agreement was not originally intended to benefit the land, the promisee may, upon the subsequent sale by him of the land, make the agreement enure to the benefit of the purchaser by the indication of an intention to that effect, that is, he may, as it were, annex the agreement to the land by making it a part of the subject of the sale.⁷⁵ Whether this power in the prom-

grantee of a lot to enforce a restriction inserted in the conveyance of a neighboring lot from the common grantor, that the latter grantee had reason to know either that the restriction in the deed to him was intended for the benefit of the owners of other lots, as well as of the grantor or that there was a common plan of improvement.

71. See *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040; *Coughlin v. Barker*, 46 Mo. App. 54; *Clapp v. Wilder*, 176 Mass. 332, 57 N. E. 692, 50 L. R. A. 120; *Hennen v. Deveny*, 71 W. Va. 629, L. R. A. 1917A, 524, 77 S. E. 142.

72. *Peabody Heights Co. v. Wilson*, 82 Md. 186, 36 L. R. A. 393, 32 Atl. 386, 1077; *Forman v.*

Safe Deposit & Trust Co., 114 Md. 574, 80 Atl. 298; *Badger v. Boardman*, 16 Gray (Mass.) 559; *Jewell v. Lee*, 14 Allen (Mass.) 145, 92 Am. Rep. 744; *Beals v. Case*, 138 Mass. 138; *Lowell Institute for Savings v. Lowell*, 153 Mass. 530, 27 N. E. 518; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Ball v. Mulliken*, 31 R. I. 36, 76 Atl. 789, 37 L. R. A. N. S. 623; *Hennen v. Deveny*, 71 W. Va. 629, L. R. A. 1917A, 524, 77 S. E. 142.

73. *Mann v. Stephens*, 15 Sim. 377; *Nicoll v. Flenning*, 19 Ch. D. 258; *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591. See *McMahon v. Williams*, 79 Ala. 288.

74. *Helmsley v. Marlborough Hotel Co.*, 68 N. J. Eq. 596, 61 Atl. 455.

75. *Renals v. Cowlishaw*, 9 Ch. Div. 125, 11 Ch. Div. 866. Cas.

isee to annex the agreement to the land is to be regarded as based on an intention in the promisor to confer on him such power, or is entirely independent of the intention of the promisor, does not clearly appear, and recognition of any such a power appears to be unnecessary and confusing. As has been remarked by a writer of great discrimination: "The instances must be rare in which a promisor, willing to give the promisee the power of transferring the benefit of the agreement, would care whether the power were exercised by a double assignment of land and agreement or by the mere assignment of the land. Nor is it easy to see why this distinction should be of value to the promisee. For if the agreement be interpreted in the wider sense, as intended to give the benefit to the promisee and any assignee of the land as such, a promisee, wishing under exceptional circumstances to convey the land without the benefit, could easily release the restriction to the land about to be conveyed."⁷⁶ This doctrine does not appear to have been adopted in this country.

There are occasional dicta to the effect that, even in the absence of a general plan,^{76a} a restrictive agreement may be enforced by one who is neither the original promisee, nor a successor in interest of the latter, provided he owned neighboring land at the time of the agreement, and it was the intention that he should enjoy the benefit thereof.^{76b}

If the agreement was for the benefit of particular land, not only a subsequent grantee in fee of such land, but a lessee thereof for years, is entitled to assert the agreement.⁷⁷

489; *Spicer v. Martin*, 14 App. Cas. 12; *Rogers v. Hosegood* (1900), 2 Ch. 388, 408; *Nalder etc. Brewery Co. v. Harman*, 82 Law Times 594.

76. Professor J. B. Ames, in 17 Harv. Law Rev. 174, Lectures on Legal History, 381.

76a. *Post*, § 400.

76b. *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040; *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547. See editorial note, 12 Columbia Law Rev. 158, and *post*, § 400, note 83.

77. *Taite v. Gosling*, 11 Ch. D.

The right of a subsequent grantee of the land for the benefit of which the agreement was made to assert the agreement is, it has been decided, independent of whether he knew of its existence at the time of the conveyance to him.⁷⁸

An agreement restricting the use of a particular tract of land is *prima facie* not to be construed as intended to restrict the use of one part of the tract in favor of another part thereof. For instance, an agreement by the grantee of land with his grantor that he will not make a particular use of the land conveyed cannot ordinarily be asserted by a subsequent purchaser of a part of that land as against the owner of another part.⁷⁹

§ 400. **Existence of general plan.** The question of who may enforce a restrictive agreement as to the use of land has arisen most frequently in connection with agreements entered into in furtherance of some general plan or scheme of improvement devised by the owner of land upon its division into building lots, it being intended that the purchasers of lots shall, for the common benefit of all, utilize the lots only in accordance with such plan. The cases are to the effect that when such a general plan exists, any purchaser of a lot with knowledge of such plan may assert the restrictions involved therein as against any other purchaser.⁸⁰ In spite of the unanimity with which the

273; *Johnson v. Robertson*, 156 Iowa, 64, 135 N. W. 585.

78. *Rogers v. Hosegood* (1900), 2 Ch. 388, 407; *Child v. Douglas*, Kay 560, 571.

79. *King v. Dickson*, 40 Ch. D. 596; *Graham v. Hite*, 93 Ky. 474, 20 S. W. 506; *Jewell v. Lee*, 14 Allen (Mass.) 145, 92 Am. Dec. 744; *Dana v. Wentworth*, 111 Mass. 291; *Korn v. Campbell*, 192 N. Y. 490, 37 L. R. A. (N. S.)

1, 127 Am. St. Rep. 925, 85 N. E. 687; *Lewis v. Ely*, 100 N. Y. App. Div. 252; *Wright v. Pfrimmer*, 99 Neb. 447, 156 N. W. 1060; *Contra Winfield v. Henning*, 21 N. J. Eq. 188; *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701 (two judges dissenting).

80. *Spicer v. Martin*, 14 App. Cas. 12; *Mackenzie v. Childers*, 43 Ch. Div. 265. *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157; *Mc-*

courts, when the matter has been presented, have accepted this doctrine, there is a singular and disappointing lack of explanation of the principle on which it is to be regarded as based. As between two purchasers of different lots at different times, the right of the later purchaser to enforce the agreement of the earlier purchaser is readily explicable on the theory that the existence of the general plan shows an intention that such agreement shall enure to the benefit of all the lots not then disposed of by the common vendor, so that, upon the subsequent sale of one of these latter lots, the purchaser thereof will, in accordance with the rule before stated,⁸¹ be entitled to enforce the agreement. But this does not explain how an earlier purchaser is enabled to enforce a restrictive agreement entered into at a later date by a later purchaser. An agreement cannot well pass on a transfer of land unless there is an agreement then in existence to pass.⁸² In some of the states the right of the prior

Neil v. Gary, 40 App. D. C. 397, 46 L. R. A. (N. S.) 1113; Parker v. Nightingale, 6 Allen (Mass.) 341, 83 Am. Dec. 632; Evans v. Foss, 194 Mass. 513, 9 L. R. A. (N. S.) 1039, 80 N. E. 587; Allen v. Barrett, 213 Mass. 36, 30 Ann. Cas. 820, 99 N. E. 575; Allen v. Detroit, 167 Mich. 464, 36 L. R. A. (N. S.) 890, 133 N. W. 317; Reed v. Hazard, 187 Mo. App. 547, 174 S. W. 111; Winfield v. Henning 21 N. J. Eq. 133; De Gray v. Monmouth Beach Club House Co., 50 N. J. Eq. 329, 24 Atl. 388, 67 N. J. Eq. 731, 63 Atl. 1118; Mulligan v. Jordan, 50 N. J. Eq. 363, 24 Atl. 543; Hyman v. Tash — (N. J. Eq.) —, 71 Atl. 742; Tallmadge v. East River Bank, 26 N. Y. 105; Barron v. Richard, 8 Paige (N. Y.) 105; Wallace v. Clifton Land Co., 92 Ohio St. 349, 110 N. E. 94; Hooper

v. Lottman, — Tex. Civ. —, 171, 171 S. W. 27; Boyden v. Roberts, 131 Wis. 659, 111 N. W. 701.

It has been held that if one includes in a common plan not only his own land, but adjoining land which he does not own, and he subsequently acquires this land, a purchaser of lots therein from him takes it subject to the plan. Schmidt v. Palisade Supply Co., — N. J. Ch. —, 84 Atl. 807. The equitable obligation in effect attaches to the land when it is acquired by him. See 13 Columbia Law Rev. at p. 77.

81. *Ante*, § 399.

82. Summers v. Beeler, 90 Md. 474, 45 Atl. 19, 48 L. R. A. 54, 78 Am. St. Rep. 446; Mulligan v. Jordan, 50 N. J. Eq. 363, 24 Atl. 543; Helmsley v. Marlboro Hotel Co., 62 N. J. Eq. 164, 63 N. J. Eq.

purchaser to enforce the subsequent agreement of another purchaser might be supported on the ground that the beneficiary of a contract, although not a party thereto, can maintain suit thereon.⁸³ In jurisdictions which do not concede such a right to the beneficiary of a contract, the view might perhaps be adopted that what the prior purchaser in such case is allowed to enforce is, not the agreement entered into by the subsequent purchaser, but an agreement to the same effect, entered into by the common vendor, either expressed, or inferred from the existence of a common plan of improvement. That is, if different persons purchase lots from A and there is a common plan of improvement brought by A to the knowledge of each purchaser, this evidences an agreement by A with each purchaser that the lots subsequently to be sold by him shall not be utilized in violation of such plan, and this agreement can be enforced as against any subsequent purchaser (with notice thereof) from A, without regard to the agreement in this regard between such subsequent purchaser and A. It must be conceded, however, that such a theory has but rarely been judicially asserted,⁸⁴ and the courts, in adjudicating the right of purchasers

804, 52 Atl. 1132; *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111; *McNichol v. Townsend*, 73 N. J. Eq. 276, 70 Atl. 965; *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547; *Wright v. Pfrimmer*, 99 Neb. 447, 156 N. W. 1060.

83. See *Pollock, Contracts*, (Williston's Edition) at p. 237 *et seq.*

In a discriminative note in 12 *Columbia Law Rev.* at p. 160, this theory is adopted to explain the reciprocal rights of the purchasers under a general plan, it being said that the results reached by the courts "cannot be entirely ex-

plained upon established principles, but must be accepted as a further extension of equity jurisprudence, whereby in a limited class of cases the interests of beneficiaries of a contract are recognized and protected."

84. It is more or less clearly indicated in *Talmadge v. East River Bank*, 26 N. Y. 105; *Equitable Life Insurance Coe. v. Brennan*, 148 N. Y. 661, 43 N. E. 173; *Lawrence v. Woods*, 54 Tex. Civ. App. 233, 118 S. W. 551; *Spicer v. Martin*, 14 App. Cas. 2. See 5 *Harv. Law Rev.* at p. 283, article by Charles I. Giddings, Esq.

under a common plan to enforce restrictions as between themselves, base this right in terms not upon the implication of an agreement by the common vendor, but upon the express agreements entered into by the purchasers themselves. Furthermore the Statute of Frauds might possibly operate to deprive of legal effectiveness an agreement so implied from oral statements as to a general plan. Another explanation which has been given of the rights of enforcement as between various purchasers is that the equity "springs from the presumption that each purchaser has paid an enhanced price for his property, relying on the general plan, by which all the property is to be subjected to the restricted use, being carried out, and that while he is bound by and observes the covenant, it would be inequitable to him to allow any other owners of lands, subject to the same restrictions, to violate it."⁸⁵ And it has also been said that in such case the covenant is enforceable by any grantee against any other upon the theory that there is a mutuality of covenant and consideration which binds each, and gives to each the appropriate remedy.⁸⁶

The question of the existence of a general plan is one of fact, to be determined with reference to the particulars and conditions of the laying out and sale of the lots, as indicated either verbally or in writing.⁸⁷ That the vendor retains adjoining property without himself

85. *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 24 Atl. 388, per Green, V. C.

86. *Korn v. Campbell*, 192 N. Y. 490, 37 L. R. A. (N. S.) 1, 85 N. E. 689, per Werner, J. And see *Parker v. Nightingale*, 6 Allen (Mass.) 241.

So in *Spicer v. Martin*, 14 App. Cas. 12, Lord Macnaghten says that the community of interest

necessarily requires and imports reciprocity of obligation.

87. See *Hano v. Bigelow*, 155 Mass. 341, 29 N. E. 628; *Allen v. Barrett*, 213 Mass. 36, 99 N. E. 575; *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622; *Barton v. Slifer*, 72 N. J. Eq. 812, 66 Atl. 199; *Foreman v. Sadler*, 114 Md. 574, 80 Atl. 298; *Re Birmingham & District Land Co.*, (1893), 1 Ch. 342.

entering into any agreement similar to that which he exacts from purchasers has been regarded as tending to show the absence of a general plan enuring to the benefit of all the purchasers.⁸⁸ That similar agreements were exacted of a considerable portion of the purchasers does not of itself show the existence of a general plan.⁸⁹ On the other hand the fact that agreements are not exacted of a portion of the purchasers has been decided not to show the non existence of a general plan.⁹⁰ The fact that a like agreement was exacted from all of the various purchasers has been regarded as showing the existence of a general plan,⁹¹

88. *Keates v. Lyon*, 4 Ch. at p. 225; *Osborne v. Bradley* (1903), 2 Ch. at p. 454; *Sharp v. Ropes*, 110 Mass. 381. Compare *Re Birmingham & District Land Co.*, (1893), 1 Ch. 342.

89. *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111; *McNichol v. Townsend*, 73 N. J. Eq. 276, 67 Atl. 938; *McNeil v. Gary*, 40 App. D. C. 397, 46 L. R. A. (N. S.) 1113; *Summers v. Beeler*, 90 Md. 474, 48 L. R. A. 54, 78 Am. St. Rep. 446, 45 Atl. 19; *Coughlin v. Barker*, 46 Mo. App. 54.

90. *Leader v. La Flamme*, 11 Mc. 242, 88 Atl. 859; *Velie v. Richardson*, 126 Minn. 334, 148 N. W. 286; *Hano v. Bigelow*, 155 Mass. 341, 29 N. E. 628; *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936; *Sargent v. Leonardi*, 223 Mass. 556, 112 N. E. 633; *Allen v. Detroit*, 167 Mich. 464, 36 L. R. A. (N. S.) 890, 133 N. W. 317; *Chopin v. Dougherty*, 165 Ill. App. 426.

The exaction of different agreements from the various purchasers does not tend to show

a common plan. *Webber v. Landrigan*, 215 Mass. 221, 102 N. E. 460; *Clark v. McGee*, 159 Ill. 518, 42 N. E. 965; *Helmsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, 50 Atl. 14.

That in some conveyances there are restrictions additional to those which occur in all the conveyances does not show the non existence of a general plan. *Evans v. Foss*, 194 Mass. 513, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171, 80 N. E. 587; *Allen v. Barrett*, 213 Mass. 36, Ann. Cas. 1913E, 820, 99 N. E. 575. Nor is this shown by lack of exact uniformity in the restrictions in the different conveyances. *Hart v. Ruter*, 223 Mass. 207, 111 N. E. 1; *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369; *Coates v. Cullingford*, 147 App. Div. 39, 131 N. Y. S. 700; *Hooper v. Lottman*, — Tex. Civ. —, 171 S. W. 270.

91. *Fete v. Foerstel*, 159 Mo. App. 75, 139 S. W. 820; *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157 (*semble*); *Hano v. Bigelow*,

but a contrary view has also been asserted.⁹² A common plan cannot be shown, as against one who purchased without knowledge of any restriction, by evidence that after his purchase the neighboring lots were sold by the common vendor subject to a particular restriction.⁹³

That a building line appeared on a recorded plat of property has been referred to as indicating that there was a general plan in this regard, subject to which each purchaser of a lot acquired title.⁹⁴ On the other hand the appearance of such a line on a plat has been regarded as insufficient to show a general plan.⁹⁵

Restrictions imposed in accordance with a general plan, like other restrictions,⁹⁶ are enforceable only as against purchasers with notice thereof,⁹⁷ and a purchaser with notice from a purchaser without notice takes free therefrom.⁹⁸ A purchaser is, it has been decided, not charged with notice of a general plan by the uniformity of construction of buildings on other lots sold by the same vendor.⁹⁹ A purchaser can obviously not be charged with notice of a general plan, or affected thereby, if his purchase was prior to the establishment of such plan.¹

155 Mass. 341, 29 N. E. 638 (*semble*); *McNeil v. Gary*, 40 App. Dist. Col. 397, 46 L. R. A. (N. S.) 1113; *Wright v. Pfrimmer*, 99 Neb. 447, 156 N. W. 1060.

92. *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543; *Roberts v. Lombard*, 78 Ore. 100, 152 Pac. 499.

93. *Lambrecht v. Gramlich*, 187 Mich. 251, 153 N. W. 834.

94. *Loomis v. Collins*, 272 Ill. 221, 111 N. E. 999. See *Oliver v. Kalick*, 223 Mass. 252, 111 N. E. 879.

95. *McCloskey v. Kirk*, 243 Pa.

319, 90 Atl. 73.

96. *Ante*, § 398.

97. *Roak v. Davis*, 194 Mass. 481, 80 N. E. 690; *Hyman v. Tash* (N. J. Eq.), 71 Atl. 742.

98. *McCuster v. Goode*, 185 Mass. 607, 71 N. E. 76.

99. *Bradley v. Walker*, 138 N. Y. 291, 33 N. E. 1079, overruling dictum in *Tallmadge v. East River Bank*, 26 N. Y. 105, 111; *Casterton v. Plotkin*, 188 Mich. 333, 154 N. W. 151.

1. *Casterton v. Plotkin*, 188 Mich. 333, 154 N. W. 151.

In England the doctrine of a general plan has been applied in connection with leases of flats in an apartment building, with the result that the lessee of a flat, whose written and printed lease shows that the whole building was used or intended to be used for residential flats, and imposes certain regulations upon the lessee in accordance with this intended use, is entitled to an injunction against the lessor, seeking to utilize the balance of the building for other than residential purposes.²

§ 401. **Defenses to enforcement.** The right to enforce a restrictive agreement may be lost by laches or acquiescence,³ especially when this results in the making of expenditures by defendant.⁴ And if the promisee or his successor in title, by his conduct, in any way induces a violation of the agreement, he cannot ordinarily complain thereof.⁵ That the agreement has but a limited time to run has, in connection with other circumstances,⁶ been regarded as a consideration adverse to its enforcement.

2. *Hudson v. Cripps* (1896), 1 Ch. 265; *Alexander v. Mansions Proprietary*, 16 Times Law Rep. 131; *Gedge v. Bartlett*, 17 Times Law Rep. 43; *Jaeger v. Mansions, Limited*, 87 Law Times, 690.

3. *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111; *Sayers v. Collyer*, 28 Ch. Div. 103.

A delay of ten weeks before consulting an attorney was regarded as not necessarily precluding relief, no prejudice resulting to defendant. *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37. And see *Woodbine Land & Improvement Co. v. Riener*, — N. J. Eq. —, 85 Atl. 1004; *Star Brewery v. Primas*, 163 Ill. 652, 45 N. E. 145; *Orne v. Fridenburg*,

143 Pa. 487, 22 Atl. 832, 24 Am. St. Rep. 567.

4. *Bridgewater v. Ocean City Ass'n*, 85 N. J. Eq. 379, 96 Atl. 905; *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158; *Whitney v. Union Railway Co.*, 11 Gray (Mass.) 359, 367; *Kelsey v. Dodd*, 52 L. J. Ch. 34.

5. *Stott v. Avery*, 156 Mich. 674, 121 N. W. 825; *Union Trust & Realty Co. v. Best*, 160 Cal. 263, 116 Pac. 737. *De Gama v. D'Aquila*, — N. J. Ch. —, 101 Atl. 1028.

6. *Loud v. Prendergast*, 206 Mass. 122, 92 N. E. 40; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11; *McClure v. Leaycraft*, 183 N. Y. 36, 5 Ann. Cas. 45, 75 N. E.

In the case of restrictions imposed in pursuance of a general plan, that the originator of the plan, the common grantor, acquiesces in, that is, fails to take legal action to prevent, substantial infringements of the plan by some of his grantees, has been regarded as showing an abandonment by him of the plan, precluding him from subsequently enforcing the restriction as against others.⁷ And one to whom he conveys a lot subject to such a common plan of restriction has occasionally been regarded as precluded from enjoining the violation of the restriction if he acquiesced in a violation thereof by another which substantially affected his property,⁸ though his failure to object to a violation by the owner of one lot does not affect his right to object to a violation by another, if the former violation, by reason of the distance of the lot, or for some other reason, did not affect the enjoyment of his lot.⁹ In one or two states the acquiescence by one

961; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11.

7. *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668; *Chelsea Land & Improvement Co. v. Adams*, 71 N. J. Eq. 771, 66 Atl. 180, 14 Ann. Cas. 758; *Ocean City Land Co. v. Weber*, 83 N. J. 476, 91 Atl. 600; *Roper v. Williams*, Turn. & R. 18. *Peck v. Matthews*, L. R. 3 Eq. 515; *Sobey v. Sainsbury* (1913), 2 Ch. 513.

But his acquiescence in violations of a like covenant in deeds of neighboring lots has been held not to prevent his enforcement of the covenant, if these violations occurred before the covenant was made. *Sherrard v. Murphy*, 193 Mich. 352, 159 N. W. 524.

8. *Curtis v. Ruben*, 244 Ill. 88, 91 N. E. 84; *Ewertsen v. Gerstenberg*, 186 Ill. 344, 57 N. E. 1051, 21 L. R. A. 310; *Helmsley v. Marl-*

borough Hotel Co., 62 N. J. Eq. 164, 50 Atl. 14, 63 N. J. Eq. 804, 52 Atl. 1132; *Meany v. Stork*, 81 N. J. Eq. 210, 86 Atl. 398; *Ocean City Ass'n v. Chalfant*, 65 N. J. Eq. 156, 55 Atl. 801, 1 A. & E. Ann. Cas. 601.

9. *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157; *Johnson v. Robertson*, 156 Iowa. 64, 135 N. W. 585; *Barton v. Slifer*, 72 N. J. Eq. 812, 66 Atl. 899. *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675; *Rowland v. Miller*, 139 N. Y. 93, 22 L. R. A. 22, 34 N. E. 765; *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53; *Payson v. Burnham*, 141 Mass. 547, 6 N. E. 708; *Sayles v. Hall*, 210 Mass. 281, 96 N. E. 712; *Schadt v. Brill*, 173 Mich. 647, 139 N. W. 878, 45 L. R. A. (N. S.) 726; *Stewart v. Stork*, 181 Mich. 408, 148 N. W. 393 (*semble*).

grantee in the violation of the common restriction by another, even though such violation be substantial, does not, it seems, preclude the former from subsequently asserting the restriction as against a third grantee,¹⁰ while in England the view has been adopted that, in order that acquiescence in other violations shall preclude equitable relief, such violations must have been of a character which would prevent the attainment of the purpose which it was sought to attain by the execution of the agreement, that is, uniformity in the improvement of the various lots, or the preservation of the general character of the property considered as a whole.¹¹

Acquiescence in a breach of a minor character would not, in any state, it seems probable, constitute grounds for denying relief against a breach of a much more serious character,¹² and likewise former breaches and acquiescence therein have been regarded as insufficient grounds for withholding relief when they resulted from a mistaken construction of the agreement.¹³

One cannot obtain relief in equity against the violation of a restrictive agreement entered into in pursuance of a general plan if he himself is guilty of

10. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936. *Codman v. Bradley*, 179 Mass. 396, 60 N. E. 936; *Andre v. Donovan*, 198 Mich. 256, 164 N. W. 543; *O'Gallagher v. Lockhart*, 263 Ill. 489, 105 N. E. 295, 52 L. R. A. (N. S.) 1044. And see *Misch v. Lehman*, 178 Mich. 225, 144 N. W. 556; *Lattimer v. Livermore*, 72 N. Y. 174; *Yeomans v. Herrick*, 178 Mo. App. 274, 165 S. W. 1112.

11. *German v. Chapman*, 7 Ch. Div. 271; *Knight v. Simmonds* (1896), 2 Ch. 295. See note in 17 Harv. Law Rev. at p. 138 criticiz-

ing *Ocean City Ass'n v. Chalfant*, 65 N. J. Eq. 156, 1 Ann. Cas. 601, 55 Atl. 801.

12. See *Richards v. Revitt*, 7 Ch. Div. 224; *Meredith v. Wilson*, 69 Law Times 336. *Seawright v. Blount*, 139 Ga. 323, 77 S. E. 152; *Newberry v. Barkalow*, 75 N. J. Eq. 128, 71 Atl. 752. And see *Ball v. Milliken*, 31 R. I. 36, 37 L. R. A. (N. S.) 623, Ann. Cas. 1912B, 30, 76 Atl. 789.

13. *Right v. Winters*, 68 N. J. Eq. 252, 59 Atl. 770; *Brigham v. Mulock Co.*, 74 N. J. Eq. 287, 70 Atl. 185. And see *Stewart v.*

a substantial breach of the same restriction.¹⁴ But the fact that the plaintiff has himself committed a minor breach of the agreement will not disentitle him to an injunction against a breach by another of considerable magnitude.¹⁵

While the original promisee may release the restricted land from the burden of the restriction, so long as he is the only one interested in the observance thereof, he cannot so do to the detriment of one claiming under him, who shares with him the right to assert the restriction.¹⁶

If, by reason of the course of action pursued by the complainant, or of his predecessor in title, the character of the neighborhood has been so altered as to render impossible the attainment of the purpose which originally dictated the making of the restrictive agreement, equity will not enforce the agreement.¹⁷

Finkelstone, 206 Mass. 28, 28 L. R. A. (N. S.) 634, 138 Am. St. Rep. 370, 92 N. E. 37.

14. *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84; *Kneip v. Schroeder*, 255 Ill. 621, 99 N. E. 617; *Compton Hill Improvement Co. v. Tower*, 158 Mo. 282, 59 S. W. 239; *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40; *Olcott v. Sheppard K. & Co.*, 96 N. Y. App. Div. 281, 89 N. Y. Supp. 201. *Sutcliffe v. Eisele*, 62 N. J. Eq. 222, 50 Atl. Rep. 69; *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158.

15. *Western v. MacDermott*, L. R. 2 Ch. 72; *Meredith v. Wilson*, 69 Law Times 336; *Hooper v. Bromet*, 89 Law Times 37; *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936; *Stewart v. Finkelstone*, 206 Mass. 28, 28 L. R. A. (N. S.) 634, 138 Am. St. Rep. 370, 92 N. E. 37; *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369. *Hy-*

man v. Tash (N. J. Eq.), 71 Atl. 742; *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53; *Adams v. Howell*, 58 Misc. 435, 108 N. Y. Supp. 945; *Tripp v. O'Brien*, 57 Ill. App. 407.

16. *Mackenzie v. Childers*, 43 Ch. D. 265; *Johnson v. Robertson*, 156 Iowa, 64, 135 N. W. 585; *Spahr v. Cape*, 143 Mo. App. 114, 122 S. W. 379; *Coudert v. Sayre*, 46 N. J. Eq. 386. *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675; *Duester v. Alvin*, 74 Ore. 544, 145 Pac. 660. And see *Landell v. Hamilton*, 177 Pa. 23, 35 Atl. 242.

17. *Bedford v. British Museum*, 2 Myl. & K. 552; *Star Brewery v. Primas*, 163 Ill. 652, 45 N. E. 145; *Ewertsen v. Gerstenberg*, 186 Ill. 344, 51 L. R. A. 310, 57 N. E. 1051; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11. Compare *Hennen v. Deveny*, 71 W. Va. 629, L. R. A. 1917A, 524, 77 S. E. 142.

Thus in a leading English case it was decided that one who had, for the protection of the outlook from his mansion house, required one to whom he sold neighboring property to enter into an agreement as to the mode of improving the property sold, could not, after having torn down his mansion house, obtain an injunction against a breach of the agreement.¹⁸ And it is apparently on this theory that a restrictive agreement has occasionally been regarded as unenforceable after the promisee had sold neighboring property free from any such restriction, it being considered that by the making of such sales he in effect made the agreement useless for the purpose of preserving the character of the neighborhood.¹⁹ Such is apparently the extent to which, in England, a change in the character of the neighborhood, subsequent to the making of the agreement, is regarded as operating to prevent the enforcement of the agreement, that is, the change in the neighborhood has this effect if, and only if, it is a result of the course of action pursued by the complainant or his predecessor in interest.²⁰ In this country, on the contrary, a change of condition has not infrequently been regarded as precluding the enforcement of the restrictive agreement even though the change was not the result of the course of action pursued by the complainant or his predecessor in title. In one case, frequently referred to,²¹ it was decided

18. *Bedford v. British Museum*, 2 Myl. & K. 552.

So it was held that, if the owner of a lot had, by building a wall, rendered a restriction upon the height of buildings on the next lot partially valueless to his lot, he could not enforce the restriction so as to prevent the construction of buildings no higher than the wall. *Landell v. Hamilton*, 177 Pa. St. 23, 35 Atl. 242.

19. *Duncan v. Central Pas-*

senger Rwy. Co., 85 Ky. 525, 4 S. W. 228; *Jenks v. Pawlowski*, 98 Mich. 110, 22 L. R. A. 863, 39 Am. St. Rep. 522, 56 N. W. 1105.

20. *Sayers v. Collyer*, L. R. 28 Ch. D. 103; *Osborne v. Bradley* (1903), 2 Ch. 446. *Craig v. Green* (1899), 1 Ir. Ch. 258. But see dicta in *Sobey v. Sainsbury* (1913), 2 Ch. 513; *German v. Chapman*, 7 Ch. D. 279; *Knight v. Simmonds* (1896), 2 Ch. 297.

21. *Columbia College v. Thach-*

that a change of conditions which could not have been foreseen at the time of the making of the agreement, the construction of an elevated railway in front of the restricted property, was a sufficient defense to the enforcement of a restriction, imposed for the purpose of fitting the property for high class residences; and in a number of cases even an alteration in the character of the neighborhood which could have been foreseen, such as the encroachment of business upon a residence neighborhood, has been regarded as justifying the refusal of equitable relief,²² especially when the enforcement of the restriction would materially injure the defendant without benefitting the complainant.²³ Such a change in the character of the neighborhood has however been decided not to be a defense to the suit to enforce the restriction, if the restriction continued to be of value to the property sought to be benefitted.²⁴ It would seem probable that the courts, in regarding an alteration in the neighborhood, which might have been foreseen, as ground for refusing

er, 87 N. Y. 311, 41 Am. Rep. 365.

22. Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Kneip v. Schroeder, 255 Ill., 621, 29 Ann. Cas. 426, 99 N. E. 617; McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162; Amerman v. Deane, 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741; McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961, 5 Ann. Cas. 45. Misch v. Lehman, 178 Mich. 225, 144 N. W. 556. But not the mere anticipation of such a change. Evans v. Foss, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. N. S. 1039, 11 A. & E. Ann. Cas. 171; Spahr v. Cape, 143 Mo. App. 114, 122 S. W. 379.

23. Star Brewery Co. v. Primas, 163 Ill. 652, 45 N. E. 145;

Jackson v. Stevenson, 156 Mass., 496, 31 N. E. 691, 32 Am. St. Rep. 476; Rowland v. Miller, 139 N. Y. 93, 22 L. R. A. 182, 34 N. E. 765; McClure v. Leaycraft, 183 N. Y. 36, 5 Ann. Cas. 45, 75 N. E. 961; Batchelor v. Hinkle, 210 N. Y. 243, 104 N. E. 629; Page v. Murray, 46 N. J. Eq. 325, 19 Atl. 11.

24. Codman v. Bradley, 201 Mass. 361, 87 N. E. 591; Zipp v. Barker, 40 App. Div. 1, 57 N. Y. Supp. 569, 166 N. Y. 621, as explained in Batchelor v. Hinkle, 210 N. Y. 243, 104 N. E. 629; Brown v. Huber, 80 Ohio St. 183, 88 N. E. 322; Landell v. Hamilton, 175 Pa. 327, 34 L. R. A. 227, 34 Atl. 663. See Witherspoon v. Hurst, 88 S. C. 561, 71 S. E. 232.

equitable relief, have been moved by the consideration that otherwise such restrictions might operate to hamper municipal development.²⁵

25. See 14 Columbia Law Rev. at p. 438, and the full discussion of the various New York decisions in 6 Bench & Bar 56, 96, by Adolph Sieker, Esq. In a note in 31 Harv. Law Rev. at p. 877, it

is suggested that the view referred to may be supported on the theory of a presumed intention to that effect in the creation of the restriction.

CHAPTER XVI.

RENT.

- § 402. The nature of rent.
- 403. What may be reserved as rent.
- 404. Classes of rents.
- 405. Payments which are not rent.
- 406. The reservation of rent.
- 407. Transfer of rights and liabilities.
- 408. Death of person entitled.
- 409. Time at which rent is due.
- 410. Apportionment as to time.
- 411. Amount of the rent.
- 412. Apportionment as to amount.
- 413. Extinction or suspension of rent.
- 414. Actions for rent.
- 415. Distress for rent.
- 416. Lien for rent.

§ 402. **The nature of rent.** Rent may be defined, in a general way, as a tribute or return of a certain amount, which is regarded as issuing out of the land, as part of its actual or possible profits, and is payable by one having an estate in the land, as compensation for his use possession and enjoyment of the land, or occasionally, as a charge on the land. The word "rent" is derived from "render," and the name thus emphasizes the distinction between rent, which is actually rendered or paid by the tenant, and a *profit à prendre*, which is taken by the person entitled thereto, without the active intervention of the tenant.¹ The word is used in the law in at least four distinct senses, which it is desirable clearly to distinguish. It is in the first place used in a general sense, to describe any and every tribute which may be payable by one on account of an estate in the land, as when we say that rent

1. Co. Litt. 142a; Leake, Prop. in Land, 373.

is usually payable in money, or rent is collectible by distress, or rent must be certain in amount, and, thus used, it applies either to one payment of tribute to be made, one "installment of rent," or to a succession of such payments. The word, when used in this sense, is, ordinarily at least, not accompanied by any article. In the second place, the word is used specifically, to describe a particular payment of tribute, to be made by a tenant of particular land, or a succession of such payments. For instance, we may say that the rent due by a tenant of certain land is over due, meaning thereby that one installment of the rent is overdue or that a number of installments are overdue. And so we speak of an action having been brought for "the rent," meaning thereby an action for one installment or several installments. The word rent when used in this sense is ordinarily preceded by the definite article. In the third place, the word is used specifically to describe the right which a particular person or persons may have to a succession of payments by the tenant or tenants of a particular piece of land, as when we refer to a man as having a rent or a ground rent, or say that the rent upon (issuing from) a certain piece of land belongs to a named individual. The word "rent," when used in this sense, is used with either the definite or indefinite article. In the fourth place, the word is used to designate sums paid as rent, the proceeds, that is, of the payment of one or more of the periodic installments, as when one speaks of applying the rent in a certain manner, meaning thereby what is received on account of rent. The word is frequently used in this sense in the phrase "rents and profits." When so used, the word is ordinarily preceded by the definite article.

§ 403. **What may be reserved as rent.** It is said by Coke that rent is reserved out of the profits of the land,² and by Blackstone that rent is a profit issuing

2. Co. Litt. 141b.

out of the land.³ The use of the term "profit" in this connection has reference to the common law theory of rent, that it is part of the actual or possible profits of the land, a theory which was closely connected with another theory, that rent, like any other feudal service, was something issuing from and owed by the land itself.⁴ The chief consequences of the theory that rent is payable out of the profits of the land are that if the tenant is deprived of the opportunity to take the profits, as by eviction, the landlord's right to rent ceases or is suspended,⁵ and that the rent is not regarded as an actual debt until the profits have been received by the tenant, in the absence of an express provision to the contrary.⁶

The statement that rent is a profit, or a part of the profits, issuing out of the land, does not mean that part of the actual products of the soil must be delivered as rent. Rent is, in fact, usually reserved or made payable in money, but the tribute to be rendered may, by the terms of the reservation, take almost any form, as, for instance, the delivery of a horse,⁷ or of a certain amount of grain or cotton,⁸ the furnishing of board or

3. 2 Blackst. Comm. 41.

4. See 2 Pollock & Maitland, Hist. Eng. Law, 126, 129.

5. See Clun's Case, 10 Co. 126b and *post*, § 413, notes 93 et seq.

6. Litt., § 513; Co. Litt. 292b; Bordman v. Osborn, 23 Pick. (Mass.) 295; Thorp v. Preston, 42 Mich. 511, 4 N. W. 227; Ordway v. Remington, 12 R. I. 319, 34 Am. Rep. 646; Haffey v. Miller, 6 Gratt. (Va.) 454.

Consequently a claim for rent subsequently to accrue cannot be presented as a claim against a bankrupt's estate. Atkins v. Wilcox, 105 Fed. 595; *Ex parte*

Houghton, 1 Lowell, 554, Fed. Cas. No. 6,725; Wilson v. Pennsylvania Trust Co., 114 Fed. 742. But that rent to become due constitutes a present debt, see Rowell v. Felker, 54 Vt. 526. And see also Brown v. Cairns, 107 Iowa, 277, 77 N. W. 478.

7. Co. Litt. 142a.

8. Co. Litt. 142a; Townsend v. Isenberger, 45 Iowa, 670; Boyd v. McCombs, 4 Pa. St. 146; McDougal v. Sanders, 75 Ga. 140. Frequently, in this country, rent consists of a named portion of the crop raised. See *ante*, § 265.

support,⁹ or the performance of manual services on or off the land.¹⁰

It is said by Coke that "a man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like. For a reservation ought not to be a reservation of the profits themselves, since these are granted, but of a new return out of the profits;"¹¹ and his statement in this regard has been followed by other English writers.¹² A like view has been strongly asserted in a New Hampshire decision.¹³ And so it has been said that when the grantor or lessor undertakes to reserve as rent a share of the ore which may be removed from the land, this constitutes properly, not a reservation of rent, but an exception of a part of the property granted or leased.¹⁴ But whatever the rule may be in this regard in England, it is not open to question, in most parts of this country, that a reservation as rent of part of the crops to be produced on the land is perfectly valid.

§ 404. Classes of rents. The classification of rents at common law was based primarily upon the distinction between a rent which was reserved upon the conveyance or lease of land, as a compensation to the

9. *Baker v. Adams*, 5 Cush. (Mass.) 99; *Shouse v. Krusor*, 24 Mo. App. 279; *In re Williams' Estate*, 1 N. Y. Misc. 35, 22 N. Y. Supp. 906.

In *Munroe v. Syracuse, Lake Shore & Northern R. Co.*, 200 N. Y. 224, a stipulation for the issue of an annual railroad pass was regarded as in the nature of one for rent.

10. *Co. Litt.* 96a, 96b; *Doe d. Edney v. Benham*, 7 Q. B. 976; *Van Renssalaer v. Jewett*, 2 N. Y. 141; *Price v. Thompson*, 4

Ga. App. 46, 60 S. E. 800.

11. *Co. Litt.* 142a.

12. *Sheppard's Touchstone*, 80; 3 *Cruise's Dig. tit.* 28, c. 1, § 3; *Comyn, Landlord & Ten.*, 95.

13. *Moulton v. Robinson*, 27 N. H. 550.

14. See *Gowan v. Christie*, L. R. 2 H. L. Sc. 273, 284, per Lord Cairns; *Coltness Iron Co. v. Black*, 6 App. Cas. 315, 335, per Lord Blackburn; *Greville-Nugent v. Mackenzie* (1900), App. Cas. 83, per Lord Halsbury; *Fairchild v. Fairchild* (Pa.) 9 Atl. 255.

grantor or lessor, and a rent which was granted by the owner of land to another person, without any transfer of the land, being merely a right to a periodical payment secured on the land.

In the former case, before the Statute of *Quia Emptores*, since the conveyance of the land created a relation of tenure, even in the case of the conveyance of an estate in fee simple, the payment of the rent reserved was regarded as one of the services incident to that relation.¹⁵ Accordingly, a rent reserved upon the making of a feoffment, whereby the relation of tenure was created, was known as a "rent service."¹⁶

Upon a failure to perform this feudal service of paying rent, the lord was, as in the case of default in any other of the feudal services, entitled to enforce its performance by the seizure of chattels upon the land, this being known as the remedy of "distress."¹⁷ This right of distress was a distinctive feature of the particular class of rents known as "rents service."

The right of distress was an incident of the right of lordship, the "seignory," or, when the tenure was for an estate less than a fee simple, of the reversion remaining in the lord, and consequently, if the lord granted the seignory or reversion while retaining the rent, or granted the rent while retaining the seignory or reversion, the rent could no longer be enforced by distress, and was accordingly thereafter termed a "rent seek" or "dry rent."¹⁸

In the case of a rent created by the grant of a rent by the owner of land, of which he retained the ownership, no relation of tenure was created, and consequently there was no remedy by way of distress for the enforcement of the obligation. A rent so created was accordingly another form of "rent seek." A

15. *Ante*, § 6.

§ 415.

16. Litt., § 122; Gilbert, Rents, 9.

18. Litt. §§ 218, 225-228; Den d. Farley v. Craig, 15 N. J. L.

17. Litt., §§ 213, 216. See *post*, 182.

right of distress might, however, be expressly given in the grant, in which case the rent was known as a "rent charge."¹⁹ Rents charge, thus created by a grant of a rent by the owner of land, he retaining the entire interest in the land, are quite common in England, they being sometimes granted by the purchaser of land as part of the consideration therefor, and also being utilized as a mode of providing for younger sons and others in family settlements. In this country, however, they are very infrequent. They are in effect merely annuities secured on land, and in some cases equity will enforce their payment by a sale of the land, as in the case of a mortgage or other lien.

After the Statute *Quia Emptores*, a conveyance of land in fee simple no longer had the effect of creating a relation of tenure between the feoffor and feoffee, but the feoffee merely became substituted in place of the feoffor. Consequently, a reservation of rent on such a conveyance thereafter made could not be regarded as a rent service, and was a rent seek, without the right of distress, unless this right was expressly given, so as to render it a rent charge.²⁰ Since, however, this statute did not apply in the case of a conveyance of an estate less than a fee, a rent service is, even at the present day, created by the reservation of rent upon the conveyance or lease by a tenant in fee of a less estate, either an estate tail, an estate for life, or one for years; and likewise when a tenant of an estate less than a fee conveys or leases for a period less than his own estate, so as to leave a reversion in him. Consequently, the

19. Litt. §§ 218, 219; Co. Litt. 150b; 2 Pollock & Maitland, Hist. Eng. Law, 129.

20. Litt. §§ 215-217; Co. Litt. 143b, Hargrave's note; Bradbury v. Wright, 2 Doug. 624; Van Rensselaer v. Chadwick, 22 N. Y. 32.

In Pennsylvania, a rent created by a reservation upon the conveyance of land in fee simple is a rent service, but this is owing to the fact that the statute *Quia Emptores* is not in force there. *Ingersoll v. Sargeant*, 1 Whart. (Pa.) 336.

rent reserved on the ordinary lease for years is properly a rent service.²¹

It is stated by Coke that rent service is so called "because it hath some corporal service incident to it, which at least is fealty,"²² and upon the strength of this statement, as transmitted by Blackstone,²³ it has been asserted, in two states,²⁴ that in view of the fact that fealty is not there recognized, rent service is non-existent. In the time of Coke, since rent service was essentially tenurial in character, and fealty was an incident of tenure,²⁵ it followed that rent service was accompanied by fealty, but the reason that rent service was so called appears really to have been that it was in itself a service. The expression rent service was in use nearly three hundred years before Coke,²⁶ and the writers of that earlier time, as well as the judges, speak of rent as one class of service.²⁷

§ 405. Payments which are not properly rent. Rent can, by the common law authorities, be reserved only out of land or things constituting in law a part of the land, to which the landlord may have recourse to distrain, and cannot be reserved out of incorporeal things.²⁸ Whether the statement that rent must be reserved out of things to which the landlord may have recourse to

21. Litt. §§ 214, 215; Ehrman v. Mayer, 57 Md. 621; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337; Den d. Farley v. Craig, 15 N. J. L. 192.

22. Co. Litt. 142a.

23. 2 Blackst. Comm. 42.

24. Herr v. Johnson, 11 Colo. 393, 18 Pac. 342; Penny v. Little, 4 Ill. 301.

25. Litt. §§ 91, 132; Co. Litt. 67b, 93a.

26. See Y. B. 33-35 Edw. 1, p. 52, referred to in 2 Pollock &

Maitland, Hist. Eng. Law, 128 note.

27. See Bracton, bk. 2, c. 16, fol. 35a; Britton (Nichol's Ed.) bk. 1, c. 28, § 16, bk. 2, c. 10, § 1; Y. B. 33-35 Edw. 1, p. 208; Y. B. 1 & 2, Edw. 2 (Selden Soc.) p. 119, pl. 36; Y. B. 2 & 3, Edw. 2, p. 140, pl. 58.

28. Co. Litt. 47, 142a; Gilbert. Rents, 120; 2 Blackst. Comm. 41; Buszard v. Capel, 8 Barn. & Cr. 141.

distrain is to be regarded as a statement of the reason for the rule precluding the reservation of rent out of incorporeal things, or a statement of the result of the rule, does not clearly appear. In favor of the former view reference may be made to statements to be found that the king may reserve rent upon a lease of incorporeal things for the reason that, by virtue of his prerogative, he can distrain on all lands of his lessee,²⁹ and that rent may be reserved on a demise of the vesture or herbage of land for the reason that the lessor may distrain the cattle on the land.³⁰ If the common law rule precluding the reservation of rent upon a lease of an incorporeal thing is to be regarded as based on the inability to distrain thereon, the question might arise whether the rule remains the same in any jurisdiction in which, as is the case in most of the states, the right of distress no longer exists.³¹ A differentiation originating in the existence or non existence of a right of distress might well be ignored after the right of distress has been entirely abolished. But whether or not the sum named upon a lease of an incorporeal thing, to be paid by the lessee, is to be regarded as rent, it is recoverable by the lessor in an action of contract against the lessee.³²

Rent cannot be reserved out of chattels, and consequently sums to be paid by a bailee of chattels, as compensation for their use and enjoyment, are not properly referred to as rent.³³ In the case of a lease of

29. Co. Litt. 47a, Hargrave's note.

30. Co. Litt. 47a.

31. In *Raby v. Reeves*, 112 N. C. 688, 16 S. E. 760, sums so reserved were regarded as not constituting rent, while a contrary view was adopted, without discussion, in *Jordan v. Indianapolis Water Co.*, 159 Ind. 337, 64 N. E. 680. See 1 *Tiffany, Landlord & Ten.* p. 1119.

32. Co. Litt. 47a; *Dean & Chapter of Windsor v. Gover*, 2 Wms. Saund. 392; *Raby v. Reeves*, 112 N. C. 688, 16 S. E. 760.

33. *Spencer's Case*, 5 Coke 17a; *Sutliff v. Atwood*, 15 Ohio St. 186. In *Mickle v. Miles*, 31 Pa. St. 20, and *Vetter's Appeal*, 99 Pa. St. 52, it was said that rent may issue, not only from lands and tenements, but also from the personal property necessary for

land together with chattels, as for instance of a farm with the stock thereon, or of a house with the furniture therein, the whole rent has been regarded as issuing from the land alone, so as to authorize a distress on the land for the entire amount.³⁴ So, upon an eviction from the land, the liability for rent has been regarded as entirely suspended, without reference to the fact that the lessee continues to enjoy the use of the chattels included in the lease.³⁵ And a declaration in an action for the rent was not regarded as defective because it averred a demise of land alone, although chattels also were included.³⁶ On the same principle, that the rent issues entirely out of the land, it has been decided in one state that the executor of the lessor, though entitled to the chattels at the end of the lease, has no right to any portion of the rent reserved on a lease of land and chattels.³⁷ There are other cases, however, which refuse or fail to apply this theory when calculated to produce unjust results. For instance, it has been decided that the grantee of the reversion in the land, without any interest in the chattels, is not entitled to the whole rent as against the grantor retaining the chattels,³⁸ and there are two cases

their enjoyment, but by this the court evidently meant merely that rent does not cease to be rent because reserved upon a lease of land which also includes chattels.

34. *Newman v. Anderton*, 2 Bos. & P. (N. R.) 224; *Selby v. Greaves*, L. R. 3 C. P. 594; *Lathrop v. Clewis*, 63 Ga. 232; *Stein v. Stely*, — (Tex. Civ. App.) —, 32 S. W. 782.

35. *Gilbert*, Rents, 175; *Y. B.* 12 Hen. 8, 11, pl. 5. *Emott v. Cole*, Cro. Eliz. 255; *Read v. Lawnse*, 2 Dyer 212 b; *Contra Bro. Abr. Apportionment*, pl. 24.

36. *Farewell v. Dickenson*, 6 Barn. & C. 251.

37. *Armstrong v. Cummings*, 58 How. Pr. 332; *Fay v. Holloran*, 35 Barb. (N. Y.) 295.

38. *Buffum v. Deane*, 4 Gray (Mass.) 385. In *Newton v. Speare Laundering Co.*, 19 R. I. 546, 37 Atl. 11, it is decided that the transferee of the land in such case is entitled only to the value of the use and occupation of the land.

The decision in *Jones v. Smith*, 14 Ohio, 606, that when chattels are included in the lease, the covenant to pay rent does not

in which it is decided that if the chattels leased with the land are lost or destroyed, the rent should be apportioned, that is, diminished proportionally.³⁹ These cases, however, appear hardly to accord with the ordinary rule, hereafter stated,⁴⁰ that no apportionment of rent occurs on the destruction of the buildings on the land leased, and in one of these cases the decision is apparently regarded as involving a repudiation of that rule.

All payments which a lessee agrees with the lessor to make, are not necessarily rent. For instance, sums which the lessee agrees to pay to the lessor on account of good will,⁴¹ of improvements made by the latter,⁴² or of existing indebtedness,⁴³ are not rent, the payments not being made by way of compensation for the use and enjoyment of the property. And this appears to be so regardless of whether the parties refer to such payments as rent, since what constitutes rent is a question of law and not of intention. Likewise, in spite of several decisions to the effect that an agreement by the lessee with the lessor to pay the taxes is in effect one to pay rent,⁴⁴ the proper view is, it is submitted, that sums thus to be paid to a third person, not a representative of the lessor, do not constitute rent.⁴⁵

pass upon a transfer of the rent alone appears questionable.

39. *Newton v. Wilson*, 3 Hen. & M. (Va.) 470; *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277. The same view is favored by *Le Taverner's Case*, 1 Dyer 56a.

40. *Post*, § 413, notes 81-85.

41. *Smith v. Mapleback*, 1 Term. Rep. 441.

42. *Hoby v. Roebuck*, 7 Taunt. 157; *Donellan v. Read*, 3 Barn. & Adol. 899.

43. *First Nat. Bank v. Flynn*, 117 Iowa, 493, 91 N. W. 784. *Paxton v. Kennedy*, 70 Miss. 865, 12

So. 546; *Miners' Bank of Pottsville v. Heilner*, 47 Pa. 452.

44. *Gedge v. Shoenberger*, 83 Ky. 91; *Roberts v. Sims*, 64 Miss. 597, 2 So. 72; *Neagle v. Kelly*, 146 Ill. 460, 34 N. E. 947; *Knight v. Orchard*, 92 Mo. App. 466; *McCann v. Evans*, 185 Fed. 93, 107 C. C. A. 313.

45. That a stipulation to pay taxes is not a stipulation to pay rent, see *Hodgkins v. Price*, 137 Mass. 13; *Evans v. Lincoln County*, 204 Pa. 448, 54 Atl. 321 ("water rents"); *People v. Swayze*, 15 Abb. Pr. (N. Y.) 432.

It has been well said in this connection that "rent has a fixed legal meaning, and to consider all payments which, by the terms of the lease, a tenant is bound to make, as coming within its definition, would lead to a confusion of ideas without necessity or advantage."⁴⁶

§ 406. The reservation of rent. In technical language, the rent which is provided for by the lease is "reserved," as distinguished from a part of the land, which may be "excepted."⁴⁷ No particular language is necessary, it being sufficient if it indicates an intention that the rent named shall be paid or rendered to the lessor.⁴⁸

It is a well recognized rule of the common law that rent must be reserved in favor of the lessor or grantor himself, and not in favor of a stranger, since it is paid by way of retribution for the land and should consequently go to him from whom the land passes.⁴⁹ In several states, however, the courts have referred to money which the lessee agrees to pay to a stranger as rent, without apparently any suspicion that this is not in accordance with the common law.⁵⁰

As a rent may be reserved on a conveyance in fee, so it may be reserved upon the transfer of the whole interest of a tenant for life or for years, a reversion in the transferor being unnecessary.⁵¹

§ 407. Transfer of rights and liabilities. Upon the conveyance of a reversion to which rent is incident,

46. *Garner v. Hannah*, 13 N. Y. Super. Ct. (6 Duer) 262, per Slosson, J.

47. *Co. Litt.* 47a; *Doe d. Douglas v. Lock*, 2 Ad. & El. 705, 743. See *post*, § 436.

48. *Harrington v. Wise*, Cro. Eliz. 486; *Attoe v. Hemmings*, 2 Bulstr. 281; *Doe d. Rains v. Knelser*, 4 Car. & P. 3.

49. *Litt.* § 346; *Co. Litt.* 143b. 2 R. P.—18

Rolle, Abr. 447; *Gilbert*, Rents, 54; *Ryerson v. Quackenbush*, 26 N. J. L. 232.

50. *Toan v. Pline*, 60 Mich. 385, 27 N. W. 557; *Brett v. Sayle*, 60 Miss. 192; *Schneider v. White*, 12 Ore. 503, 8 Pac. 652; *Broddie v. Johnson*, 1 Sneed (Tenn.) 464. And cases cited *ante*, this section, note 44.

51. *Newcomb v. Harvey*, Carth.

the rent also passes unless there is a stipulation to the contrary;⁵² but the reversion may be conveyed without the rent, or the rent may be assigned without the reversion, the rent and the reversion being thereby separated.⁵³

The right to rent which has already become due does not pass upon a transfer of the reversion unless there is an express provision that it shall pass.⁵⁴ An assignment of rent already due is an assignment of a mere chose in action, while an assignment of the rent, that is, of the right to the instalments as they come due in the future, is properly not an assignment of a chose in action, but is a transfer of an interest in land.^{54a} Were rent a chose in action, and not an interest in land, it would not have been transferable at common law.

The liability for rent reserved on a lease for years passes to an assignee of the leasehold by reason of the "privity of estate" existing between him and the owner of the reversion, and a transferee of the reversion has also, on the same theory, a right to recover the rent. This question of the rights and liabilities of the trans-

161; *Williams v. Hayward*, 1 El. & El. 1040; *McMurphy v. Minot*, 4 N. H. 251.

52. *Walker's Case*, 3 Coke 22; *Butt v. Ellett*, 19 Wall. (U. S.) 544, 22 L. Ed. 183; *Steed v. Hinson*, 76 Ala. 298; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134; *Patten v. Deshon*, 1 Gray (Mass.) 325.

53. *Crosby v. Loop*, 13 Ill. 625; *Watson v. Hunkins*, 13 Iowa, 547; *Damren v. American Light & Power Co.*, 91 Me. 334; *Beal v. Boston Car Spring Co.*, 125 Mass. 157, 28 Am. Rep. 216; *Brownson v. Roy*, 133 Mich. 617, 95 N. W. 710; *Moffatt v. Smith*, 4 N. Y.

126; *Gates v. Max*, 125 N. C. 139, 34 S. E. 266; *Co. Litt.* 143a, 151 b; 1 *Tiffany, Landlord & Ten.* § 180c.

54. *Flight v. Bentley*, 7 Sim. 149; *Thornton v. Strauss*, 79 Ala. 164; *Damren v. American Light & Power Co.*, 91 Me. 334, 40 Atl. 63; *Wise v. Pfaff*, 98 Md. 576, 56 Atl. 815; *Burden v. Thayer*, 3 Metc. (Mass.) 76, 37 Am. Dec. 117; *Farmers' & Mechanics' Bank v. Ege*, 9 Watts (Pa.) 436, 36 Am. Dec. 130; *Dobbs v. Atlas Elevator Co.*, 25 S. Dak. 177, 126 N. W. 250; *Kneeland Investment Co. v. Aldrich*, 63 Wash. 609, 116 Pac. 264.

54a. See 1 *Tiffany, Landlord & Ten.* § 180c.

ferees by reason of their privity of estate will be more conveniently considered in connection with the subject of the common-law action of "debt" as a remedy for nonpayment of rent.⁵⁵

— **Covenants to pay rent.** An instrument of lease usually contains a covenant on the part of the lessee to pay rent. Both the benefit and the burden of a covenant to pay rent, upon a demise leaving a reversion in the lessor, run with the land,⁵⁶ and consequently an action thereon may be brought by the transferee of the reversion,⁵⁷ and against an assignee of the lessee.⁵⁸

The liability of the original lessee upon his covenant to pay rent, being of a purely contractual nature, is not affected by his assignment of the leasehold, even though the assignment is assented to by the landlord.⁵⁹

55. *Post*, § 414, notes 18-29.

56. See *ante*, § 56.

57. *Thursby v. Plant*, 1 Saund. 240, 1 Lev. 259; *Midgleys v. Love-lace*, 12 Mod. 45; *Baldwin v. Walker*, 21 Conn. 168; *Webster v. Nichols*, 104 Ill. 160; *Outtoun v. Dulin*, 72 Md. 536; *Main v. Feathers*, 21 Barb. (N. Y.) 646; *Maden v. Woodman*, 205 Mass. 4, 91 N. E. 206.

58. *Palmer v. Edwards*, 1 Doug. 187, note; *Steward v. Wolveridge*, 9 Bing. 60; *Salisbury v. Shirley*, 66 Cal. 225, 5 Pac. 104; *Webster v. Nichols*, 104 Ill. 160; *Carley v. Lewis*, 24 Ind. 73; *Donelson v. Polk*, 64 Md. 504, 2 Atl. 824; *Lee v. Payne*, 4 Mich. 106, 119; *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443; *Hogg v. Reynolds*, 61 Neb. 758, 87 Am. St. Rep. 522, 86 N. W. 479; *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *Tyler Commercial College v. Stapleton*,

33 Okla. 305, 125 Pac. 443; *Moline v. Portland Brewing Co.*, 73 Ore. 532, 144 Pac. 572; *Hannen v. Ewalt*, 18 Pa. 9; *Bowdre v. Hampton*, 6 Rich. Law (S. C.) 208; *Pingry v. Watkins*, 17 Vt. 379.

59. *Thursby v. Plant*, 1 Saund. 237, 1 Lev. 259; *Mills v. Auriol*, 1 H. Bl. 433; *Randall v. Rigby*, 4 Mees. & W. 134; *Evans v. McClure*, 108 Ark. 531, 158 S. W. 487; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; *Samuels v. Ottinger*, 169 Cal. 209, Ann. Cas. 1918E, 830, 146 Pac. 638; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248, 35 N. E. 820; *Johnstone v. Stone*, 215 Mass. 219, 102 N. E. 366; *Latta v. Weiss*, 131 Mo. 230, 32 S. W. 1005; *Creveling v. De Hart*, 54 N. J. Law, 338, 23 Atl. 611; *Taylor v. De Bus*, 31 Ohio St. 468; *Pittsburg Consol. Coal Co. v. Greenlee*, 164 Pa. 549, 30 Atl. 589; *Almy v. Greene*, 13 R.

Occasional statements that, in the particular case, the lessor's acquiescence in the assignment, or failure to assert any claim for rent as against the lessee, had the effect of relieving him from liability,^{59a} can be supported only on the theory that such action on the part of the lessor constituted, under the circumstances of the case, a new lease to the assignee, thus causing a surrender by operation of law.^{59b} And the same may be said of occasional statements,^{59c} that the acceptance of rent by the landlord from the assignee relieves the lessee from liability.^{59d} Such acceptance of rent can have this effect only if it can be regarded as evidencing a new lease by the landlord to such assignee.

An assignee of the leasehold is in a position different from that of the lessee, in that he can relieve himself from further liability for rent by making an assignment to another.⁶⁰

I. 350, 43 Am. Rep. 32; Granite Building Corp. v. Rubin, 40 R. I. 208, L. R. A. 1917D, 100 Atl. 310; Kanawha-Gauley Coal & Coke Co. v. Sharp, 73 W. Va. 427, 52 L. R. A. (N. S.) 968, Ann. Cas. 1916E, 786, 80 S. E. 781.

59a. Fry v. Partridge, 73 Ill. 51; Colton v. Garham, 72 Iowa, 324, 33 N. W. 76; Brayton v. Boomer, 131 Iowa, 28, 107 N. W. 1099; Kinsey v. Minnick, 43 Md. 112; Patton v. Deshon, 1 Gray (Mass.) 325; Hutcheson v. Jones, 79 Mo. 496; Jamison v. Reilly, 92 Wash. 538, 59 Pac. 699.

59b. Post, § 431, note 89.

59c. Fry v. Partridge, 73 Ill. 51; Kinsey v. Minnick, 43 Md. 112; Hutcheson v. Jones, 79 Mo. 496. Jamison v. Reilly, 92 Wash. 538, 159 Pac. 699 (*semble*).

59d. That acceptance of rent from the assignee does not have that effect, see Copeland v. Watts.

1 Starkie 95; Beall v. White, 94 U. S. 382, 24 L. Ed. 173; Schehr v. Berkey, 166 Cal. 157, 135 Pac. 41; Grommes v. St. Paul Trust Co., 147 Ill. 634, 7 Am. St. Rep. 248, 35 N. E. 820; Powell v. Jones, 59 Ind. App. 493, 98 N. E. 646; Harris v. Heackman, 62 Iowa, 411; Johnson v. Stone, 215 Mass. 219, 102 N. E. 366; Hunt v. Gardner, 39 N. J. Law 530; Decker v. Hartshorn, 60 N. J. L. 548, 38 Atl. 678; McFarland v. May, — Okla. —, 162 Pac. 753; Hooks v. Bailey, 5 Ga. App. 211, 62 S. E. 1054; Kanawha-Gauley Coal & Coke Co. v. Sharp, 73 W. Va. 427, 52 L. R. A. (N. S.) 968, Ann. Cas. 1916E, 786, 80 S. E. 781. And cases cited *post*, 8 431, note 94.

60. Paul v. Nurse, 8 Barn. & Cres. 486. Johnson v. Sherman, 15 Cal. 287, 76 Am. Dec. 481; Consolidated Coal Co. v. Peers, 166 Ill. 361, 38 L. R. A. 624, 46

It has been decided in this country that, even upon the assignment of rent, reserved on a lease for years, apart from the reversion, the benefit of the lessee's covenant runs with the rent, so as to authorize suit by the assignee thereon.⁶¹

In case of the transfer of the reversion in a part only of the land by the lessor, he and his transferee are each entitled to recover, on the lessee's covenant to pay rent, a proportional part of the rent.⁶²

The liability on the covenant to pay rent has been regarded as apportionable to such an extent as to render an assignee of the leasehold interest in part of the land subject to a proportional part thereof, and no more.⁶³

— **Covenant to pay rent in fee.** The benefit of a covenant to pay rent reserved or granted in fee will, according to the English cases, it seems, not run with the rent, so as to be available to subsequent owners thereof, the theory being that a covenant will never

N. E. 1105; *Trabue v. McAdams*, 8 Bush. (Ky.) 74; *Consumers Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Bell v. American Protective League*, 163 Mass. 558, 28 L. R. A. 452, 47 Am. St. Rep. 481, 40 N. E. 857; *Cohen v. Todd*, 130 Minn. 227, L. R. A. 1915E, 846, 153 N. W. 531; *Meyer v. Alliance Inv. Co.*, 86 N. J. L. 694, 92 At. 1086, affirming 84 N. J. L. 450, 87 At. 476; *Durand v. Curtis*, 57 N. Y. 7, 15 Am. Rep. 453; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576, 10 Am. St. Rep. 553, 16 At. 799; *Harvard Inv. Co. v. Smith*, 66 Wash. 429, 119 Pac. 864.

61. *Willard v. Tillman*, 2 Hill (N. Y.) 274; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Patten v. Deshon*, 1 Gray (Mass.) 325. See

Wineman v. Hughson, 44 Ill. App. 22. *Contra*, *Allen v. Wooley*, 1 Blackf. (Ind.) 148.

62. *City of Swansea v. Thomas*, 10 Q. B. Div. 48. *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. 193; *Crosby v. Loop*, 13 Ill. 625; *Worthington v. Cooke*, 56 Md. 51; *Linton v. Hart*, 25 Pa. St. 193, 64 Am. Dec. 691; *Pelton v. Place*, 71 Vt. 430, 76 Am. St. Rep. 782, 46 Atl. 63.

63. *Babcock v. Scoville*, 56 Ill. 461; *Cox v. Fenwick*, 4 Bibb. (Ky.) 538; *Daniels v. Richardson*, 22 Pick. (Mass.) 565; *Harris v. Frank*, 52 Miss. 155; *St. Louis Public Schools v. Boatmen's Ins. & Trust Co.*, 5 Mo. App. 91 (*semble*); *Hogg v. Reynolds*, 61 Neb. 758, 87 Am. St. Rep. 522, 86 N. W. 479; *Van Rensselaer v. Bradley*,

run with an incorporeal thing.⁶⁴ In this country, on the other hand, it has been usually held that the benefit of the covenant will run with the rent,⁶⁵ this being in accord with the view held here that a covenant will run with an incorporeal thing.⁶⁶

In this country, likewise, the burden of a covenant to pay rent reserved or granted in fee is regarded as passing with the land, so as to render the grantee of the land personally liable thereon.⁶⁷ In England, it would seem, in view of the expressions adverse to the running of the burden of covenants on conveyances in fee,⁶⁸ that the grantee of the land would not be liable on the covenant.⁶⁹

§ 408. Death of person entitled. A rent charge granted by the owner of land is real or personal property, according as the grantee is given a freehold estate therein, or an estate less than freehold.⁷⁰ A rent

3 Denia (N. Y.) 135, 45 Am. Dec. 451; Van Rensselaer v. Gifford, 24 Barb. N. Ry. 349.

64. Milnes v. Branch, 5 Maule & S. 411; Randall v. Rigby, 4 Mees. & W. 130, 135.

65. Scott v. Lunt's Adm'r, 7 Pet. (U. S.) 596, 8 L. Ed. 584; Streaper v. Fisher, 1 Rawle (Pa.) 155, 18 Am. Dec. 604; Trustees of St. Mary's Church v. Miles, 1 Whart. (Pa.) 229; Cook v. Brightly, 46 Pa. St. 439; Van Rensselaer v. Read, 26 N. Y. 558, distinguishing Devisees of Van Rensselaer v. Executors of Platner, 2 Johns. Cas. (N. Y.) 24. But see Irish v. Johnston, 11 Pa. St. 488, and the discussion of the question in American notes to Spencer's Case, 1 Smith, Lead. Cas. 193.

66. See *ante*, § 391, notes 30-34.

67. Streaper v. Fisher, 1 Rawle (Pa.) 155; Herbaugh v. Zentmyer, 2 Rawle (Pa.) 159; Hannen v. Ewalt, 18 Pa. St. 9; Van Rensselaer v. Read, 26 N. Y. 558; Van Rensselaer v. Dennison, 35 N. Y. 393; Carley v. Lewis, 24 Ind. 123. On the same principle, the burden of a covenant to pay rent reserved upon the transfer of a life interest in land will bind a subsequent transferee of such interest. *McMurphy v. Minot*, 4 N. H. 251.

68. See *ante*, § 390.

69. Holt, C. J., in *Brewster v. Kidgill*, 12 Mod. 166; *Copinger & Munro's Law of Rents*, 473-476. But that the burden does run, see *Sugden, Vendor & Purchaser* (13th Ed.) 483; *Harrison, Chief Rents*, 102.

70. *Knolle's Case*, 1 Dyer, 5b;

reserved upon the grant of a fee-simple estate in land is real property passing to the heir or devisee.⁷¹

A rent incident to a reversion partakes of the nature of the reversion, and passes therewith on the death of the reversioner. Accordingly, it more usually passes to the heir, as being reserved by a tenant in fee simple making a lease for years, though it is personally belonging to the executor or administrator, if reserved on a sublease by a tenant for years.⁷² If, however, a rent reserved on a lease for years by a tenant in fee simple becomes separated from the reversion,⁷³ it is equivalent to an estate for years merely in a rent charge, and passes to the personal representative of the owner, and not to the heir or devisee.⁷⁴

Rent which has become due is personal property, and consequently, upon the death of the person entitled thereto, though still unpaid, it goes to his personal representative, and not to his heir or devisee.⁷⁵

§ 409. Time at which rent is due. A lease of land ordinarily states either the periods with reference to which the installments of rent are to be computed, as by providing for a "weekly," "monthly," "quarterly" or "annual" rent, or it specifies the exact days on

Butt's Case, 7 Coke, 23a; 1 Woerner, Administration, § 297.

71. Cobb v. Biddle, 14 Pa. St. 444; *In re White's Estate*, 167 Pa. St. 206, 31 Atl. 569. As to the particular mode of descent of a rent charge created by the reservation of a rent on a grant in fee, see Co. Litt. 12b, 3 Preston, Abstracts, 54; Van Rensselaer v. Hays, 19 N. Y. 68.

72. 1 Woerner, Administration, § 300; Sacheverell v. Froggatt, 2 Saund, 367a, notes; Dixon v. Nicolls, 39 Ill. 372, 89 Am. Dec. 312; Rubottom v. Morrow, 24 Ind. 202,

87 Am. Dec. 324; Stinson v. Stinson, 38 Me. 593. Towle v. Swasey, 106 Mass. 100; Woodburn's Estate, 138 Pa. St. 606, 21 Am. St. Rep. 932, 21 Atl. 16; Huff v. Latimer, 33 S. C. 253, 11 S. E. 758.

73. See *ante*, § 407, note 53.

74. Knolle's Case, Dyer, 5b; Williams, Executors (9th Ed.) 727.

75. 1 Woerner, Administration, § 300; Mills v. Merryman, 49 Me. 65; Haslage v. Krugh, 25 Pa. St. 97. Bealey v. Blake's Adm'r, 70 Mo. App. 229; Ball v. First Nat. Bank of Covington, 80 Ky. 501.

which rent is to be paid. In the latter case the question as to the time for payment of the successive installments of rent is merely one of construction of the language used. In the former case the rent for the particular period named, whether it be a week, a month, a quarter, or a year, does not become due until the end of such period,⁷⁶ in the absence of a stipulation,⁷⁷ or, it seems, a custom,⁷⁸ to the contrary, the theory being that, since rent is a part of the profits of the land, it is not payable until it has been earned by the tenant's enjoyment of the premises. In determining what is the last day of the rent period, whether a year, a quarter, a month, or a week, for this purpose, the same method of computation is employed, it seems, as in determining the length of the term,⁷⁹ that is, the last day of each period, on which day the rent becomes due, is not that corresponding to the first day, but the day previous thereto. For instance, if the term begins on the second day of January, and rent is in terms payable monthly, it becomes due on the first and not the second day of each of the following months, and if payable yearly, it becomes due on the first day of each of the following years.⁸⁰

Not infrequently there is an express provision for the payment of the rent, not at the end of the period

76. *Coomber v. Howard*, 1 C. B. 440; *Parker v. Gortatowsky*, 129 Ga. 623, 59 S. E. 286; *Castleman v. Du Val*, 89 Md. 657, 43 Atl. 821; *Hilsendegen v. Scheich*, 55 Mich. 468, 21 N. W. 894; *Kistler v. McBride*, 65 N. J. L. 553, 48 Atl. 558. *Ridgley v. Stillwell*, 27 Mo. 128; *Holt v. Nixon*, 73 C. C. A. 268, 141 Fed. 952.

77. *Menough's Appeal*, 5 Watts & S. (Pa.) 432; *Hilsendegen v. Scheich*, 55 Mich. 468, 21 N. W. 894; *Gibbs v. Ross*, 2 Head. (Tenn.) 437.

78. *Tignor v. Bradley*, 32 Ark. 781; *McFarlane v. Williams*, 107 Ill. 33; *Watson v. Penn*, 108 Ind. 21, 58 Am. Rep. 262, 8 N. E. 636; *Calhoun v. Atchison*, 4 Bush. (Ky.) 261, 96 Am. Dec. 299; *Buckley v. Taylor*, 2 Term. Rep. 600.

79. 1 *Tiffany, Landlord & Ten.* p. 63.

80. So if the term begins January 10th, and the rent is payable quarterly, the rent falls due on April 9th, July 9th, October 9th, and January 9th, and not on the tenth day of each of these

during which it is earned, but at the commencement of such period, that is, the rent is made payable "in advance," as it is usually expressed.

— **Time of day for payment.** Rent may be paid at any hour of the day on which it becomes due,⁸¹ but there is no obligation to pay it until midnight of that day, and the tenant is consequently not in default until the next day.⁸² Applying this doctrine, it has been held that if the landlord, by his action, the tenancy being at will, terminates the tenancy during the day on which the rent is payable, the tenant is relieved from liability,⁸³ and that an eviction on that day under paramount title has a like effect.⁸⁴ On the same theory it has been decided that if a tenant in fee simple, after making a lease, dies on the rent day, the installment of rent falling due on that day belongs, not to his personal representative, but to his heir or devisee, as having become due after his death.⁸⁵ And it seems that, in case the reversion is transferred on that day, the transferee is entitled to the installment then falling due.⁸⁶ The English courts refused, however, to apply such a theory in the case of a life tenant who, after leasing, not under a power, died on a rent day, and they regarded the rent in such a case as belonging to the personal representative of the life tenant,⁸⁷ being moved, presumably, to this determination, by the fact

months. *Donaldson v. Smith*, 1 Ashm. (Pa.) 197.

81. *Clun's Case*, 10 Co. Rep. 127b; *Dibble v. Bowater*, 2 El. & Bl. 564; *Comyn, Landlord & Tenant*, 219.

82. *Duppa v. Mayo*, 1 Wms. Saund. 287 and note (17); *Cutting v. Derby*, 2 W. Bl. 1077. *Leftley v. Mills*, 4 Term Rep. 170; *Wolf v. Rauck*, 150 Iowa, 87, Ann. Cas. 1912D, 386, 129 N. W. 319; *Sherlock v. Thayer*, 4 Mich. 355, 66 Am. Dec. 539.

83. *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137.

84. *Smith v. Shepard*, 15 Pick. (Mass.) 147, 25 Am. Dec. 432.

85. *Duppa v. Mayo*, 1 Wms. Saund. 287; *Rockingham v. Penrice*, 1 P. Wms. 177.

86. See *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137.

87. *Rockingham v. Penrice*, 1 P. Wms. 177; *Southern v. Bellasis*, 1 P. Wms. 179, note. *Strafford v. Wentworth*, Prec. Ch. 555.

that otherwise the tenant under the lease would have escaped liability for the entire rent period.⁸⁸

— **Acceleration of rent.** Occasionally the lease provides that the rent for the whole term shall immediately become payable upon a named contingency, as for instance, upon the insolvency or bankruptcy of the tenant,^{88a} the removal of his personal property from the premises,^{88b} or his failure to pay an installment of rent when due.^{88c} Occasionally the courts appear to have applied the doctrine of “anticipatory breach,” which has been the subject of considerable discussion in connection with the law of contracts,^{88d} to a case in which the liability for rent was repudiated, this being regarded as immediately giving the landlord a right of action against the tenant for damages, estimated on the theory that the latter would make no further payments of rent as stipulated.^{88e}

§ 410. **Apportionment as to time.** At common law, rent is not regarded as accruing from day to day, like interest, but it is only upon the day fixed for payment that any part of it becomes due.⁸⁹ The result of this principle is that, ordinarily, the person who is on that day the owner of the reversion is entitled to the entire installment of rent due on that day, though he may have been the owner of the reversion or rent but a part of the time which has elapsed since the last

88. See *post*, § 410.

88a. *Platt v. Johnson*, 168 Pa. 47, 47 Am. St. Rep. 877, 31 Atl. 935.

88b. *Goodwin v. Sharkey*, 80 Pa. St. 149.

88c. *Johns v. Winters*, 251 Pa. 169, 96 Atl. 130; *Hart v. Wynne*, — (Tex. Civ.) —, 40 S. W. 848.

88d. See *Wald's Pollock, Contracts* (Williston's Ed.) p. 355 *et seq*

88e. *Bradbury v. Higgenson*,

162 Cal. 602, 123 Pac. 797; *Minneapolis Baseball Co. v. City Bank*, 74 Minn. 98, 76 N. W. 1024; *Brown v. Hayes*, 92 Wash. 300, 159 Pac. 89.

89. *Clun's Case*, 10 Coke 126b; *Dexter v. Phillips*, 121 Mass. 178, 23 Am. Rep. 261; *Anderson v. Robbins*, 82 Me. 422, 9 L. R. A. 568, 19 Atl. 910; *Marshall v. Moseley*, 21 N. Y. 280; *Bank of Pennsylvania v. Wise*, 3 Watts (Pa.)

394.

rent day. Conversely, one who has been the owner of the reversion or rent during a part of that period can claim no portion of the installment unless he is such owner at the time at which the installment is payable by the terms of the lease. The general rule in this regard is ordinarily expressed by the statement that rent cannot be apportioned as to time.

Applications of this rule occur as follows: If a tenant in fee simple, having made a lease, dies between two rent days, the entire installment of rent falling due belongs to his heir or devisee, as being the owner of the reversion at the time the installment falls due, and the executor or administrator can assert a claim to no portion thereof.⁹⁰ And when the landlord makes a conveyance of the reversion, the grantee is entitled, in the absence of a contrary stipulation, to all the rent which falls due at the next rent day, and the grantor can claim no part thereof.⁹¹ So in case the tenant is evicted by title paramount between rent days, the landlord cannot claim any portion of the installment next falling due,⁹² and this is *a fortiori* the case if the landlord himself evicts the tenant. The case is the same if the landlord terminates the tenancy, either by force of an express option so to do,⁹³⁻⁹⁴ or in accordance with the nature of the tenancy, as being one at

90. Clun's Case, 10 Coke, 127a; Duppa v. Mayo, 1 Wms. Saund. 287; Anderson v. Robbins, 82 Me. 422, 8 L. R. A. 588, 19 Atl. 910. Bloodworth v. Stevens, 51 Miss. 475; Dorsett v. Gray, 98 Ind. 237; Allen v. Van Houton, 19 N. J. Law (4 Harr.) 47.

91. English v. Key, 39 Ala. 113; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Hull v. Stevenson, 58 How. Pr. (N. Y.) 135, note. Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 394; Hearne v. Lewis, 78 Tex. 276, 14 S. W. 572.

92. English v. Key, 39 Ala. 113; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Adams v. Bigelow, 128 Mass. 365; Russell v. Fabyan, 28 N. H. 543, 61 Am. Dec. 629.

93-94. Zule v. Zule, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600; Nicholson v. Munigle, 6 Allen (88 Mass.) 215. But see *dictum* in Perry v. Aldrich, 13 N. H. 343, 38 Am. Dec. 493, to the effect that a lease providing for the termination on a contingency should be construed as providing for apportionment.

will,⁹⁵ or for breach of a condition subsequent.⁹⁶ By force of this rule, at common law, if a tenant for his own or another's life makes a lease for years, and the lease comes to an end by reason of his death or that of the *cestui que vie*, the lessee entirely escapes liability for the installment of rent next falling due.⁹⁷ The lessor or his executor cannot recover the whole installment, since the life interest has ceased before the installment falls due, and he cannot, under the rule against apportionment, recover a portion calculated up to the time of the cessation of his interest. Nor can the remainderman recover any portion of the rent, since the lease by which the rent was reserved is no longer operative, and also because he is a stranger to the lease.

The rule forbidding the apportionment of rent, so far as concerns a rent reserved on a lease by a tenant for his own life, was changed in England, by Stat. II Geo. 2, c. 19, § 15, providing that if any tenant for life should die before the day for the payment of rent reserved on a lease which terminated on such death, his executors or administrators might recover from the under tenant a proper proportion of the rent, according to the length of time between the last rent day and the death of the tenant for life. And a similar statute has been enacted in a number of states. By later legislation in England the right of apportionment has been greatly extended, and in a few states there is legislation of a like tendency.⁹⁸

§ 411. Amount of the rent. The amount of the rent to be paid must be certain or capable of reduction

95. *Leighton v. Theed*, 2 Salk. 413; *Robinson v. Deering*, 56 Me. 357; *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137.

96. *Hall v. Joseph Middleby*, 197 Mass. 485, 83 N. E. 1114.

97. *Clun's Case*, 10 Coke 127a; *ex parte Smyth*, 1 Swanst. 337, and notes; *Hogland v. Crum*, 113

Ill. 365, 55 Am. Rep. 424; *Watson v. Penn*, 108 Ind. 21, 8 N. E. 636, 58 Am. Rep. 26. *Gee v. Gee*, 22 N. C. (2 Dev. & B. Eq.) 103.

98. See *Tiffany, Landlord & Ten.* pp. 1076-1079; *Wilson v. Hagey*, 251 Ill. 452, 96 N. E. 277; *Smithwick v. Oliver*, 94 Ark. 451, 127 S. W. 706.

to a certainty,⁹⁹ but it is sufficient that the amount can be ascertained before the time for payment.¹ As an example of rent which is thus ascertainable at the time for its payment, though not at the time of the demise, may be mentioned rent consisting of a certain portion of the crop which may be raised upon the land, or computed with reference to the amount of minerals extracted from the land. So it may be made to fluctuate with the price of wheat,² with the income which the tenant may derive from the use of the premises,³ or with the particular use which the tenant may make of the land.⁴

Not infrequently the amount of the rent is reduced by an agreement entered into between the landlord and tenant after the making of the lease. That such an agreement must be supported by a valid consideration has been recognized in a number of cases,⁵ and there are several decisions upon the sufficiency of the consideration in the particular case.⁶ In spite of these decisions, there is, it is submitted, room for question whether, applying common law standards, a consideration should be regarded as necessary. At common law, one entitled

99. Co. Litt. 142a; Gilbert, Rents, 9.

1. Co. Litt. 96a; Selby v. Greaves, L. R. 3 C. P. 594; Walsh v. Lonsdale, 21 Ch. Div. 9; McFarlane v. Williams, 107 Ill. 33; Dutcher v. Culver, 24 Minn. 584.

2. Kendall v. Baker, 11 C. B. 842.

3. Hardy v. Briggs, 14 Allen (Mass.) 473; Long v. Fitzsimmons, 1 Watts & S. (Pa.) 530.

4. Roulston v. Clark, 2 H. Bl. 563; Bowers v. Nixon, 12 Q. B. 558.

5. Goldsborough v. Gable, 140 Ill. 269, 15 L. R. A. 294, 29 N. E. 722. Id. 152 Ill. 594, 38 N. E. 1025; Wheeler v. Baker, 59

Iowa, 86, 12 N. W. 767; Bowditch v. Chickering, 139 Mass. 283, 30 N. E. 92; Wharton v. Anderson, 28 Minn. 301, 9 N. W. 860; Hazeltine v. Ausherman, 87 Mo. 410; Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120.

6. Doherty v. Doe, 18 Colo. 456, 33 Pac. 165; Raymond v. Krauskopf, 87 Iowa, 602, 54 N. W. 432; Lamb v. Rathburn, 118 Mich. 666, 77 N. W. 268; Ten Eyck v. Sleeper, 65 Minn. 413, 67 N. W. 1076; Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; Holmquist v. Bavarian Star Brew. Co., 1 App. Div. 347, 72 N. Y. St. Rep. 443, 37 N. Y. Supp. 380.

to rent can extinguish it by executing a release in favor of the person whose estate was charged therewith,⁷ and an agreement to reduce the rent is, it is conceived, in effect merely a partial release of the rent, that is, a *pro tanto* transfer of the rent by way of release, which is perfectly valid at common law, without any consideration.⁸ The common law release, however, required a seal, and in so far as a seal may still be necessary to the validity of a release, an agreement, not under seal, for the partial or total extinguishment of rent, might well be regarded as a contract to execute a release, to which the court would give effect only if supported by a consideration.

An agreement, made after the making of the lease, in terms to increase the rent, does not, strictly speaking, increase the rent. The additional sum agreed to be paid is not rent, since it is not reserved upon the making of a lease or other conveyance.⁹ The only theory on which it could be regarded as rent would be by considering the agreement as a new demise, effecting a surrender by operation of law of the original lease,¹⁰ but this would give to the agreement a force ordinarily not contemplated by the parties.¹¹

§ 412. Apportionment as to amount. Rent may be apportioned as regards the amount thereof, that is, a person may become entitled to, or liable for, a portion only of the rent originally reserved.¹² Either one of three different cases of such apportionment may arise, that is: (1) a right to a distinct portion of the rent, and to such portion only, may be vested in each of two or more persons; (2) a liability for a

7. *Post*, § 413, note 39-41.

8. See Pollock, *Contracts* (Williston's Ed.) 813.

9. *Donellan v. Read*, 3 Barn. & Adol. 899; *Hoby v. Roebuck*, 7 Taunt. 157; *Coit v. Braunsdorf*,

32 N. Y. Super. Ct. (2 Sweeny) 74.

10. *Post*, § 431.

11. See *Doe d. Monck v. Geekie*, 5 Q. B. 841.

12. As to apportionment of

distinct portion of the rent, and for such portion only, may be imposed on one person, another being liable for the balance; or (3) the rent may be extinguished as to a portion, and a portion only.

An apportionment of the character first referred to, resulting from the vesting of the right to a distinct portion of the rent in each of two or more persons, occurs when the landlord grants the reversion in part of the land, retaining the balance,¹³ and also when he transfers the reversion in different parts of the land to different persons, not retaining any part thereof.¹⁴ And the case is the same when he severs the reversion by devise.¹⁵ An apportionment also takes place if the reversion is severed by act of the law, as when, on the death of the landlord, it passes to two or more heirs,¹⁶ or when it passes to the heir, and, as to one-third, to the widow.¹⁷ In the case of such a severance of the reversion, the tenant is entitled to demand that the jury determine, in an action for the rent, the respective values of the different portions of the land, and the consequent extent of his obligation to each owner of a part of the reversion.¹⁸

Not only may the rent be apportioned by a severance of the reversion, but it may also be apportioned

rent on lease of land and chattels, see *ante*, § 405, notes 34-40.

13. Co. Litt. 148a; 2 Co. Inst. 504; West v. Lassells, Cro. Eliz. 851; Bliss v. Collins, 5 Barn. & Ald. 876; Worthington v. Cooke, 56 Md. 51; Biddler v. Hussman, 23 Mo. 597; Grubbie v. Toms, 70 N. J. Law 522, 57 Atl. 144. Id. 71 N. J. Law, 338, 59 Atl. 1117; Linton v. Hart, 25 Pa. 193, 64 Am. Dec. 691.

14. Gilbert, Rents, 173; Ehrman v. Mayer, 57 Md. 612, 40 Am. Rep. 448; Crosby v. Loop, 13 Ill. 625, 14 Ill. 320; Reed v. Ward,

22 Pa. 144.

15. Ewer v. Moyle, Cro. Eliz. 771; Hare v. Proudfoot, 6 U. C. Q. B. (O. S.) 617.

16. Leitch v. Boyington, 84 Ill. 179, 25 Am. Rep. 442; Cole v. Patterson, 25 Wend. (N. Y.) 456; Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 404.

17. 1 Rolle Abr. 237, pl. 5.

18. Bac. Abr. Rent (M. 3); Fish v. Campion, 1 Rolle, Abr. 237, pl. 1; Bliss v. Collins, 5 Barn. & Ald. 876; Hare v. Proudfoot, 6 U. C. Q. B. (O. S.) 617; Biddle v. Huss, 23 Mo. 597.

by the landlord without reference to the reversion, this being either retained by him or transferred to another, as when one who has demised land for a term of years, reserving rent, grants to each of several persons, or to one person, a portion of the rent.¹⁹ So tenants in common of land, after making a lease thereof, reserving one entire rent, may, without partitioning the reversion, apportion the rent between them.²⁰

— **On severance of leasehold.** In case the leasehold interest in different parts of the premises becomes vested in different persons, each part, or the owner of each part, is ordinarily liable only for a proportioned part of the rent.²¹ And the original lessee remains liable to the landlord for the whole rent, under his covenant to pay rent.²²

A tenant cannot, without the consent of the owner of the rent, by any disposition of the land or of a part thereof, apportion the rent so as to affect the right of such owner to collect the whole rent which may at any time fall due, by means of a proceeding against the land. Accordingly, if the tenant of part of the leased premises is in default, the landlord may distrain upon another part,²³ and he may presumably enforce a condition of forfeiture against such other part as well as against that part which belongs to the tenant in default.

— **Partial extinction or suspension of rent.** Cases of the apportionment of the rent by reason of the extinction or suspension of a portion of the rent occur

19. *Ards v. Watkins*, Cro. Eliz. 651; *Bliss v. Collins*, 5 Barn. & Ald. 876, 882; *Rivis v. Watson*, 5 Mees. & W. 255.

20. *Powis v. Smith*, 5 Barn. & Ald. 850; *Woolsey v. Lasher*, 35 App. Div. 108, 54 N. Y. Supp. 737.

21. *Babcock v. Seoville*, 56 Ill. 461; *St. Louis Public Schools v. Boatmen's Insurance & Trust Co.*, 5 Mo. App. 91; *Daniels v. Rich-*

ardson, 39 Mass. (22 Pick.) 565; *Hogg v. Reynolds*, 61 Neb. 758, 87 Am. St. Rep. 522, 86 N. W. 479; *Van Rennselaer v. Bradley*, 3 Denio (N. Y.) 135, 45 Am. Dec. 451.

22. *Ante*, § 407, note 59.

23. *Curtis v. Spitty*, 1 Bing. N. Cas. 756; *Jackson v. Wychoff*, 5 Wend. (N. Y.) 53.

upon the termination of the tenant's estate as regards a part of the premises. Thus, if the tenant of the whole premises leased surrenders his leasehold interest in a part thereof, or his leasehold is otherwise in part merged in the reversion, the rent is apportioned, it being extinguished in an amount proportioned to the value of the portion as to which the lease is no longer outstanding, while still existent as regards the balance.²⁴ The rent is also apportioned in case the landlord re-enters upon a part only of the land for breach of a condition of the lease,²⁵ and in case the tenant is evicted from part of the land by title paramount, the landlord being thereafter entitled to such portion only of the rent as is proportioned to the part of the leased premises which the tenant still holds under him.²⁶ Occasionally the rent is apportioned by reason of the lessee's inability to obtain possession of the whole of the demised premises.²⁷

— **In action on covenant for rent.** There is a *dictum* in an English case,²⁸ that "in covenant as between lessor and lessee, where the action is personal, and upon a mere privity of contract, and on that account transitory as any other personal contract is, the rent is not apportionable." This *dictum*, it seems clear,

24. Litt. § 222; Co. Litt. 148a; Smith v. Malings, Cro. Jac. 160; Higgins v. California Petroleum & Asphalt Co., 109 Cal. 304, 41 Pac. 1087; Leitch v. Boyington, 84 Ill. 179, 34 L. R. A. 55, 57 Am. St. Rep. 396; Ehrman v. Mayer, 57 Md. 612, 40 Am. Rep. 448; Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; Van Rensselaer v. Gifford, 24 Barb. (N. Y.) 349.

25. Walker's Case, 3 Coke 22; Collins v. Harding, 13 Coke 58.

26. Halligan v. Wade, 21 Ill.

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470, 74 Am. Dec. 108; Fillebrown v. Hoar, 124 Mass. 580; Cheairs v. Coats, 77 Miss. 846, 50 L. R. A. 111, 78 Am. St. Rep. 546, 28 So. 728; Lawrence v. French, 25 Wend. (N. Y.) 445; Christopher v. Austin, 11 N. Y. 216; Poston v. Jones, 37 N. Car. (2 Ired. Eq.) 350; Tunis v. Grandy, 22 Gratt. (Va.) 109, Co. Litt. 148b.

27. *Ante*, § 413, notes 43-59.

28. Stevenson v. Lambard, 2 East 575, per Lord Ellenborough, C. J.

is not correct as applied to an action upon the covenant for rent, by a lessor who has disposed of the reversion in part of the leased premises, he being entitled to recover a proportionate part of the rent and no more.²⁹ Whether it is correct as applied to a case in which the rent is in part extinguished or suspended, as upon a surrender or eviction by title paramount, it is difficult to say. The covenant might frequently be construed as one to pay the rent that may become due, rather than to pay the amount reserved, in which case the liability under the covenant would be the same as in an action of debt for rent, and a loss of the possession of part of the premises would be a ground for a *pro tanto* reduction of liability in an action on the covenant, as in an action of debt.³⁰ In so far as the covenant is not susceptible of this construction, it is somewhat difficult to find a satisfactory ground on which to base a partial reduction of liability in case of the partial loss of possession by the tenant.³¹ The courts might possibly apply the somewhat indefinite doctrine of failure of consideration in this connection.

— **Of rent charge.** A rent charge is not apportionable to the same extent as a rent service. Rent charges were never favored by the courts as were rents service, which were regarded as a part of the feudal constitution of the realm.³² Consequently, if the owner of the rent acquires a part of the land from which it issues, by

29. *Swansea v. Thomas*, 10 Q. B. Div. 48; *Worthington v. Cooke*, 56 Md. 51; *Linton v. Hart*, 25 p. 193, 64 Am. Dec. 691.

30. See *Baynton v. Morgan*, 22 Q. B. Div. 81, per Fry, J.

31. In *Shuttleworth v. Shaw*, 6 Upper Can. Q. B. 539, it was decided that in an action of covenant for rent there could be no apportionment on account of the partial eviction of the tenant. In

Poston v. Jones, 37 N. C. (2 Ired. Eq.) 350, 38 Am. Dec. 683, it is at least suggested that in such case a court of equity would intervene in order to compel an apportionment.

32. See *Gilbert, Rents*, 152. A rent seck, likewise, has been regarded as not apportionable by the act of a party. *Vin. Abr., Apportionment* (A) 2; *Id., Rent* (Ga.) 12.

voluntary conveyance, no apportionment occurs, and the whole rent is extinguished.³³ It is apportioned, however, if the owner of the rent releases a part thereof,³⁴ or if he acquires a part of the land by descent.³⁵ And even on a voluntary conveyance to him of part of the land an apportionment occurs if it is so agreed between the parties to the conveyance, this in effect creating a new rent charge,³⁶ Upon a transfer of a portion of the rent to another an apportionment occurs.³⁷

§ 413. Extinction or suspension of rent—By release. The right to rent ceases upon the making of a release of the rent by the owner thereof in favor of the owner of the land.³⁸ If the release is in terms of a portion only of the rent, the balance remains existent as a charge on the whole land.³⁹ A release, as understood at common law, is an instrument under seal, and such an instrument is valid though without any consideration.⁴⁰ An agreement not to claim any rent, if not under seal, and not supported by a consideration, is, like any other such agreement, invalid.⁴¹

The fact that no rent has been demanded, or that no rent has been paid, for a very considerable period, even twenty years or more, does not raise a presumption that the rent has been released, though it may, by reason of the statute of limitations, prevent a re-

33. Litt. § 222; Co. Litt. 147b, 148a.

34. Co. Litt. 148a; Bac. Abr., Rent (m) 1.

35. Litt. § 224; Co. Litt. 194b; *Cruger v. McLaury*, 41 N. Y. 219.

36. Co. Litt. 147b, and note; *Van Rensselaer v. Chadwick*, 22 N. Y. 32.

37. Co. Litt. 148a; Gilbert, Rents, 163; *Farley v. Craig*, 11 N. J. Law (6 Halst.) 262.

38. Litt. § 479; Co. Litt. 280a; *Howell v. Lewis*, 7 C. & P. 566.

39. Co. Litt. 148a; 2 Leake 407; *Ingersoll v. Sargeant*, 1 Whart. (Pa.) 337.

40. Co. Litt. 264b; Bac. Abr., Release (A.); Wald's *Pollock, Contracts* (Williston's Ed.) 812.

41. See *Haseltine v. Ausher-man*, 87 Mo. 410; *Kaven v. Chrystie*, 84 N. Y. Supp. 470; *Donaldson v. Wherry*, 29 Ont.

covery of particular installments of rent overdue.⁴²

— **Withholding of possession.** It has ordinarily been held that the lessee is not liable for rent in case the lessor prevents him from taking possession under the lease.⁴³ By some decisions, even though the lessee takes possession of part of the leased premises, he is, if excluded from the balance, not liable for any part of the rent or on a *quantum meruit*,⁴⁴ but in other cases a different view is taken.⁴⁵ The exclusion of the tenant by the landlord from part of the leased premises appears so analogous to that of an eviction of the tenant by the landlord from part,⁴⁶ that it might well, it seems, be regarded as having a similar effect in suspending the entire rent.⁴⁷

That the lessee, without being prevented from taking possession, fails to take possession, is obviously no defense to a claim for rent.⁴⁸ One cannot thus rid himself of an obligation assumed by him, merely because he finds it convenient to withdraw from his bargain.

552. But in *Hill v. Williams*, 41 S. C. 134, 9 S. E. 290, the contrary appears to be assumed.

42. *Ehrman v. Meyer*, 57 Md. 612, 40 Am. Rep. 448; *Jackson v. Davis*, 5 Cow. 130, 15 Am. Dec. 451; *Lyon v. Odell*, 65 N. Y. 28; *St. Mary's Church Trustees v. Miles*, 1 Whart. (Pa.) 229.

43. *Reed v. Reynolds*, 37 Conn. 469; *Moore v. Guardian Trust Co.*, 173 Mo. 218, 73 S. W. 143; *Penny v. Fellner*, 6 Okla. 386, 50 Pac. 123; *McClurg v. Price*, 59 Pa. 420, 98 Am. Dec. 356; *Merrill v. Gordon*, 15 Ariz. 521, 140 Pac. 496. See *ante*, § 50.

44. *Moore v. Mansfield*, 182 Mass. 302, 65 N. E. 398, 94 Am. St. Rep. 657; *McClurg v. Price* 59

Pa. 420, 98 Am. Dec. 356; *Penny v. Fellner*, 6 Okla. 386, 50 Pac. 123. See *McLeod v. Russell*, 59 Wash. 676, 110 Pac. 626.

45. See *Knox v. Hexter*, 42 N. Y. Super. Ct. (10 Jones & S.) 8; *Eldred v. Leahy*, 31 Wis. 541, 11 Am. Rep. 613.

46. *Ante*, § 58.

47. *Post*, this section, note 95.

48. *Levi v. Lewis*, 6 C. B. N. S. 766; *Douglass v. Branch Bank*, 19 Ala. 659, 54 Am. Dec. 207; *Little v. Hudgins*, 117 Ark. 272, 174 S. W. 520; *Marix v. Stevens*, 10 Colo. 261, 15 Pac. 350; *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 164 Ill. 88, 45 N. E. 488; *Brown v. Cairns*, 107 Iowa, 727, 77 N. W. 478; *Becar v. Flues*,

— **Exclusion by paramount owner.** That the lessee is unable to obtain possession owing to the possession of one having paramount title, is a good defense to a claim for the rent,⁴⁹ and this has been held to be so even though the exclusion from possession extends to but a part of the premises.⁵⁰ It has been decided, however, that if the lessee takes possession of the part from which he is not excluded, he is liable in an action of use and occupation accordingly.⁵¹ It would seem that the partial exclusion of the lessee from possession by one having paramount title might well be assimilated, so far as concerns its effect on his liability for rent, to his partial eviction by such person, so as to call for an apportionment of the rent,⁵² and there are occasional decisions to that effect.⁵³

One holding under a previous unexpired lease by the same lessor holds by paramount title, for this purpose,⁵⁴ as for others.^{55.56}

It has been asserted in England and Canada,⁵⁷ that possession of part of the leased premises, by a third person holding under an unexpired prior lease

64 N. Y. 518; McGlynn v. Brock, 111 Mass. 219.

49. Brandt v. Philippi, 82 Cal. 640, 23 Pac. 122, 7 L. R. A. 224; Duncan v. Moloney, 115 Ill. App. 522; Andrews v. Woodcock, 14 Iowa, 397; Posten v. Jones, 37 N. C. (2 Ired, Eq.) 350, 38 Am. Dec. 683; Maverick v. Lewis, 3 McCord (S. C.) 211; State University v. Joslyn, 21 Vt. 52. See *ante*, § 50.

50. Neale v. McKenzie, 1 Mees. & W. 746; Dengler v. Michelssen, 76 Cal. 125, 18 Pac. 138.

51. Lawrence v. French, 25 Wend. (N. Y.) 443, 7 Hill, 519; Tunis v. Grandy, 22 Gratt. (Va.) 109; Wutson v. Wand, 8 Exch.

555 (semble).

52. *Post*, this section, note 9.

53. McLoughlin v. Craig, 7 Ir. C. L. 117; Seabrook v. Moyer, 88 Pa. 417.

54. See Neale v. McKenzie, 1 Mees. & W. 746; Dengler v. Michelssen, 76 Cal. 125, 18 Pac. 138; Lawrence v. French, 25 Wend. (N. Y.) 443, 7 Hill, 519; Tunis v. Grandy, 22 Gratt. (Va.) 519.

55-56. *Ante*, § 58(a), notes 43-46.

57. Neale v. McKenzie, 1 Mees. & W. 747; Ecclesiastical Com'rs of Ireland v. O'Connor, 9 Ir. C. L. 242; Holland v. Vanstone, 27 U. C. Q. B. 15.

made by the same lessor, will not constitute even a partial defense to an action for rent under the second lease, if this latter is under seal, the theory being that it then operates as a lease in possession of that part of the land of which the lessor has possession, and a lease of the reversion (concurrent lease⁵⁸) of that part held by the prior lessee. Such a view, that the second lease will, so far as possible be regarded as a concurrent lease, is not suggested in any of the cases decided in this country as to the liability for rent when a part or the whole of the premises is in the possession of a prior lessee.⁵⁹ In any case, it would seem, the question whether the second lease may be so regarded for the purpose of imposing liability for rent, would be one of the construction of the language used.

— **Exclusion by stranger without right.** There are several cases to the effect that the lessee's inability to obtain possession of the premises owing to the presence of a third person wrongfully in possession, such as a tenant holding over his term, is no defense to an action for rent.⁶⁰ This view accords with the recognized rule in the analogous case of the eviction of the tenant by a wrongdoer.⁶¹ There are, however, to be found occasional *dicta*⁶² and decisions⁶³ to the contrary.

— **Merger and surrender.** If the leasehold interest and the immediate reversion thereon become vested in the same person or persons, either by the acquisition of the former interest by the landlord, or

58. *Ante*, § 53(c).

59. *Ante*, this section, note 54.

60. *Mechanics' & Traders' Fire Insurance Co. v. Schott*, 2 Hilt. (N. Y.) 550; *Ward v. Edesheimer*, 43 N. Y. St. Rep. 138, 17 N. Y. Supp. 173; *Cozens v. Stevenson*, 5 Serg. & R. (Pa.) 421; *University of Vermont v. Joslyn*, 21 Vt.

52. And see *Field v. Herrick*, 101 Ill. 110.

61. 2 *Tiffany, Landlord & Ten.* p. 1301.

62. *Rieger v. Welles*, 110 Mo. App. 166, 84 S. W. 1136; *Smart v. Allegaert*, 14 Phila. (Pa.) 179.

63. *Kean v. Kolkschneider*, 21 Mo. App. 538; *Hatfield v. Fuller*—

by the acquisition of the latter interest by the tenant, or by the simultaneous acquisition of both interests by the same person or persons, the tenant's interest is merged in the reversion,⁶⁴ and the rent reserved upon the creation of the lesser estate is extinguished.⁶⁵ When merger occurs as a result of the acquisition of the tenant's interest by the landlord, the termination of the tenancy and extinguishment of the rent are ordinarily said to be the result, not of merger, but of surrender,⁶⁶ that is, of the yielding up of the particular estate to the landlord.⁶⁷ If the merger or surrender takes place as to a part of the leased premises only, the rent is proportionately extinguished.⁶⁸ The merger or surrender obviously does not affect the liability for rent which has previously accrued.⁶⁹

ton, 24 Ill. 278; *Goldman v. Dieves*, 159 Wis. 47, 149 N. W. 713.

64. *Ante*, § 59(e).

65. *Otis v. California Petroleum & Asphalt Co.*, 109 Cal. 304, 41 Pac. 1087; *Otis v. McMillan*, 70 Ala. 46; *Erving v. Jas. H. Goodman & Co. Bank*, 171 Cal. 559, 153 Pac. 945; *Liebschutz v. Moore*, 70 Ind. 142, 36 Am. Rep. 182; *Casey v. Gregory*, 52 Ky. (13 B. Mon.) 505, 56 Am. Dec. 581; *Matter of Eddy*, 10 Abb. N. Cas. (N. Y.) 396; *Nellis v. Lathrop*, 22 Wend. (N. Y.) 121, 34 Am. Dec. 585; *Mixon v. Coffield*, 24 N. Car. (2 Ired Law) 301; *Sutliff v. Atwood*, 15 Ohio St. 186; *Alvord v. Banfield*, 85 Ore. 49, 166 Pac. 549.

66. *American Bonding Co. v. Pueblo Inv. Co. (C. C. A.)*, 150 Fed. 17, 19 L. R. A. (N. S.) 557; *Terstegge v. First German Mut. Benevolent Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Dills v. Stobie*, 81

Ill. 202; *Armour Packing Co. v. Des Moines Pork Co.*, 116 Iowa, 723, 93 Am. St. Rep. 270, 89 N. W. 196; *Amory v. Kannoisky*, 117 Mass. 351, 19 Am. Rep. 416; *Kiernan v. Germain*, 61 Miss. 498; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *Everett v. Williamson*, 107 N. C. 204, 12 S. E. 187, 22 Am. St. Rep. 870; *Minneapolis Co-Operative Co. v. Williamson*, 51 Minn. 53, 38 Am. St. Rep. 473, 52 N. W. 98; *Frankel v. Steman*, 92 Ohio St. 197, 110 N. E. 747; *Pratt v. H. M. Richards Jewelry Co.*, 69 Pa. 53, 8 Am. Rep. 212; *West Concord Mill Co. v. Hosmer*, 129 Wis. 8, 116 Am. St. Rep. 931, 107 N. W. 12.

67. *Post*, § 431.

68. *Ante*, § 412, note 24.

69. *Kastner v. Campbell*, 6 Ariz. 145, 53 Pac. 586; *Sperry v. Miller*, 8 N. Y. 336, 16 N. Y. 407; *Nicol v. Young*, 68 Mo. App. 448; *Johnson v. Muzzy*, 42 Vt. 708, 1 Am. Rep. 365; *Attorney General v. Cox*, 3 H. L. Cas. 340.

By the English decisions,^{69a} if the reversion on a sublease is merged in the original reversion, the sublessee's liability for rent is terminated, the same principle applying as in the case of surrender of the subreversion. How far this doctrine would be applied in this country is doubtful.^{69b}

—**Abandonment by tenant.** That the tenant abandons the premises does not affect his liability for rent,^{69c} unless the landlord, by assuming control of the

69a. *Thre'r v. Barton*, Moore, 94; *Webb v. Russell*, 3 Term Rep. 393.

69b. The doctrine was referred to as an existing doctrine in *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910; *Buttner v. Kasser*, 19 Cal. App. 755, 127 Pac. 811; *Krider v. Ramsay*, 79 N. C. 354; *McDonald v. May*, 96 Mo. App. 236, 69 S. W. 1059. See *Williams v. Michigan Cent. R. Co.*, 133 Mich. 448, 103 Am. St. Rep. 458, 95 N. W. 708. That the sublessor cannot recover rent after his surrender of his leasehold interest is decided in *Grundin v. Carter*, 99 Mass. 15; *Pratt v. Richards Jewelry Co.*, 69 Pa. 53; and assumed in *Buttner v. Kasser*, 19 Cal. App. 755, 127 Pac. 811. But as opposed to the sublessee's immunity from rent on the theory of the merger of the subreversion, see *Hessel v. Johnson*, 129 Pa. 173, 5 L. R. A. 851, 15 Am. St. Rep. 716, 18 Atl. 754. See a judicious criticism of the doctrine in an editorial note in 13 Columbia Law Rev 245.

69c. *Wolffe v. Wolff*, 69 Ala. 549, 44 Am. Rep. 526; *Respini v. Porta*, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488; *Miller v. Ben-*

ton, 55 Conn. 540, 13 Atl. 678; *Stobie v. Dills*, 62 Ill. 432; *Martin v. Stearns*, 52 Iowa, 345, 35 Am. Rep. 278, 3 N. W. 92; *Bickford v. Kirwin*, 30 Mont. 1, 75 Pac. 518; *Prucha v. Coufal*, 91 Neb. 724, 136 N. W. 1019; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *Tyler Commercial College v. Stapleton*, 33 Okla. 305, 125 Pac. 443; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625, 30 Pac. 430; *Reeves v. Comesky*, 168 Pa. St. 571, 32 Atl. 96; *Barlow v. Wainwright*, 22 Vt. 88, 53 Am. Dec. 79.

In *Clinton Amusement etc. Co. v. Dranow*, 88 N. J. L. 701, 96 Atl. 893, the highest court of the state says that there was an abandonment, not a surrender, by the tenant. This refusal to recognize that a surrender by operation of law may result from an abandonment is caused apparently by a failure to distinguish the technical term "surrender," as applied to an estate, from its ordinary use as applied to a relinquishment of possession. The common law does not recognize abandonment as a method of transferring or terminating estates in land, and the statement

premises, or otherwise, can be regarded as in effect accepting the possession at the hands of the tenant, so as to effect a surrender by operation of law, as elsewhere explained.^{69d} The landlord is, in such case, under no obligation to lease the premises to another, but may allow them to lie vacant, and yet recover the installments of rent as they accrue.^{69e} The fact that the landlord, upon the abandonment by the tenant, makes a lease to another will, under some circumstances and in some jurisdictions, effect a surrender, so as to relieve the tenant from liability for rent thereafter accruing,^{69f} but in so far as it does not do this, the new letting is regarded as on behalf of the former tenant, so as to relieve him from the rent under the original lease to the extent of the rent received under the new lease, and no further.^{69g}

— **Forfeiture of leasehold.** Upon the assertion of a forfeiture by the landlord for breach of condition,⁷⁰ while he is entitled to rent which has already become

referred to seems unfortunate. The lower court was, it is submitted, correct in using the expression surrender.

69d. *Post*, § 431, note 96 *et seq.*

69e. *Bradbury v. Higgenson*, 162 Cal. 602, 123 Pac. 797; *Boardman Realty Co. v. Carlin*, 82 Conn. 413, 74 Atl. 682; *Rau v. Baker*, 118 Ill. App. 150; *Patterson v. Emerich*, 21 Ind. App. 614, 52 N. E. 1012; *Leavitt v. Maykel*, 210 Mass. 55, 96 N. E. 51; *Merrill v. Willis*, 51 Neb. 162, 70 N. W. 914; *Whitcomb v. Brant*, 90 N. J. L. 245, 100 Atl. 175; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *Nat. Exch. Bank v. Hahn*, 33 Okla. 516, 126 Pac. 554; *Milling v. Becker*, 96 Pa. 182; *Goldman v.*

Broyles, — Tex. Civ. —, 141 S. W. 283; *Brown v. Hayes*, 92 Wash. 300, 159 Pac. 89. See editorial note 13 Columbia Law Rev. 79.

69f. *Post*, § 431, note 8.

69g. *Meyer & Co. v. Smith*, 33 Ark. 627; *Marshall v. Grosse Clothing Co.*, 184 Ill. 421, 75 Am. St. Rep. 181, 56 N. E. 807; *Brown v. Cairns*, 107 Iowa, 727, 77 N. W. 478; *Oldewurtel v. Wiesenfeld*, 97 Md. 165, 99 Am. St. Rep. 427, 54 Atl. 969; *Alsup v. Banks*, 68 Miss. 664, L. R. A. 598, 24 Am. St. Rep. 294, 9 So. 895, 13; *Conner v. Warner*, 52 Okla. 630, 152 Pac. 1116; *Bowen v. Clarke*, 22 Ore. 566, 29 Am. St. Rep. 625, 30 Pac. 430; *Auer v. Penn*, 99 Pa. 370, 44 Am. Rep. 114.

70. *Ante*, §§ 74-89.

due,⁷¹ he cannot recover rent subsequently to become due, or rather, there is no rent subsequently to become due.⁷²

Though there is no liability for rent falling due after the enforcement of a forfeiture, a provision of the instrument of lease continuing the liability of the lessee in such case is usually regarded as effective. Thus it has been decided that the parties may validly stipulate that, upon the termination of the tenancy by re-entry or equivalent action on the part of the landlord, he may re-let to another at the risk of the tenant, the latter remaining liable for any deficiency in the amount so obtained as compared with that reserved by the original lease.⁷³ And likewise, a provision that the lessee shall remain liable for rent in spite of the forfeiture of his term will enable the landlord to claim from the former tenant any such deficiency in the amount obtained from the new tenant.⁷⁴ To obtain the benefit of such a provision, the landlord must exercise reasonable diligence to make a new lease at the best possible rent.⁷⁵ In the case

71. *Hartshorne v. Watson*, 4 Bing. N. Cas. 178; *Mackubin v. Wheteroft*, 4 Har. & McH. (Md.) 135; *Hinsdale v. White*, 6 Hill. (N. Y.) 507; *McCready v. Lindenborn*, 172 N. Y. 400, 65 N. E. 208; *Rubicum v. Williams*, 1 Ashm. (Pa.) 235; *Galbraith v. Wood*, 124 Minn. 210, 144 N. W. 945; *Youngs Mining Co. v. Courtney*, 219 Fed. 868, 135 C. C. A. 538.

72. *Oldershaw v. Holt*, 12 Adol. & E. 590; *Watson v. Merrill*, 69 C. C. A. 185, 136 Fed. 359; *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248, 35 N. E. 820; *Hall v. Joseph Middleby, Jr.*, 197 Mass. 485, 83 N. E. 1114; *Wreford v. Kenrick*,

107 Mich. 389, 65 N. W. 234; *Sharon v. American Fidelity Co.*, 172 Mo. App. 309, 157 S. W. 972; *Hackett v. Richards*, 13 N. Y. 138.

73. *Way v. Reed*, 6 Allen (Mass.) 364; *Woodbury v. Sparrell Print*, 187 Mass. 426, 73 N. E. 547; *Hall v. Gould*, 13 N. Y. 138; *Baldwin v. Thibadeau*, 28 Abb. N. Cases 14, 17 N. Y. Supp. 532; *Yuan Suey v. Fleshman*, 65 Ore. 606, 133 Pac. 803.

74. *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248, 35 N. E. 820. But in *Pusey v. Sipps*, 56 Pa. Super. Ct. 121, such a provision appears to be regarded as nugatory.

75. *International Trust Co. v. Weeks*, 203 U. S. 364, 51 L. Ed.

of a stipulation of this character, continuing the lessee's liability for the amount of the rent reserved in the lease, or for any excess of that amount over that obtainable on a new lease, the continuing liability is not, properly speaking, for rent, since the tenancy to which the rent appertained has ceased to exist. It is merely a contractual liability to the extent named.⁷⁶

As to whether, when rent is payable in advance, the landlord is entitled to the full installment of rent in spite of his re-entry during the rent period, the cases are not in accord. On principle, he having become entitled to the installment on the rent day, his right thereto would properly seem to be unaffected by his subsequent enforcement of a forfeiture.^{76a}

— **Taking land for public use.** Upon the taking of the whole of the leased land for public use under the power of eminent domain, the ownership of the land thereby passing to the state or other public agency, the liability for rent, it is usually agreed, comes to an end.⁷⁷ Upon the taking of a part of the premises, ac-

224; *Edmands v. Rust & Richardson Drug Co.*, 191 Mass. 123, 77 N. E. 713; *Woodbury v. Sparrell* Print, 198 Mass. 1, 84 N. E. 441.

76. See *Hall v. Gould*, 13 N. Y. 127; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248, 35 N. E. 820; *Woodbury v. Sparrell* Print, 187 Mass. 426, 73 N. E. 547; *Stott Realty Co. v. United Amusement Co.*, 195 Mich. 684, 162 N. W. 283.

76a. That he is entitled to the full installment, see *Ellis v. Rowbotham* (1900), 1 Q. B. 740; *Hepp Wall Paper Co. v. Deahl*, 53 Colo. 274, 125 Pac. 491; *Galbraith v. Wood*, 124 Minn. 210, 144 N. W. 945; *Healy v. McManus*, 23 How. Pr. (N. Y.); *Cunning-*

ham v. Phillips, 1 E. D. Smith (N. Y.) 416. See editorial note, 14 Columbia Law Rev. 354. *Contra*, *Sutton v. Goodman*, 194 Mass. 389, 80 N. E. 608; *Hall v. Middeby*, 197 Mass. 485, 83 N. E. 1114; *Wreford v. Kenrick*, 107 Mich. 389, 65 N. W. 234.

77. *Corrigan v. Chicago*, 144 Ill. 537, 21 L. R. A. 212, 33, N. E. 746; *O'Brien v. Ball*, 119 Mass. 28, 20 Am. Rep. 299; *Lodge v. Martin*, 31 App. Div. 13, 52 N. Y. Supp. 385; *Barclay v. Pickler*, 38 Mo. 143; *Dyer v. Wightman*, 66 Pa. 425; *McCardell v. Miller*, 22 R. I. 96, 46 Atl. 184. *Contra*, *Foote v. City of Cincinnati*, 11 Ohio, 408, 38 Am. Dec. 737; *Foltz v. Huntley*, 7 Wend. (N. Y.) 210.

according to some decisions, the liability for rent continues as before.⁷⁸ But there are other decisions to the effect that in such a case the rent is apportioned, the tenant being thereafter liable only for an amount proportioned to the value of the part of the premises not taken.⁷⁹ These latter decisions are, it is conceived entirely in harmony with principle, and they unquestionably arrive at an equitable result. Under such a view, the tenant is, in the condemnation proceeding, awarded merely the amount, if any, by which the value of his leasehold interest, that is, the excess in the rental value over the rent reserved, is diminished owing to the taking. Under the opposite view, the tenant is awarded the diminution in the rental value caused by the taking, on the theory that he will ultimately pay it over to the landlord in the form of rent, which, as a matter of fact, he may or may not do.

It would seem that when the ownership of either a part or the whole of the leased premises, the "fee" as it is usually referred to, is taken under the power of eminent domain, the liability for rent is proportionally reduced or extinguished, for the reason that the leasehold interest in the land taken has come to an end by reason of its merger in the reversion. When the reversion and the leasehold are voluntarily transferred to a single person by their respective owners, a merger results, and the same thing occurs when they are so transferred involuntarily, as by condemnation, the fact that the transferee is the state or some other public agency being immaterial. On the other hand, in

78. *Stubbings v. Village of Evanston*, 136 Ill. 37, 11 L. R. A. 839, 29 Am. St. Rep. 300, 26 N. E. 577; *Parks v. City of Boston*, 15 Pick. (Mass.) 198; *Olson Land Co. v. Alki Park Co.*, 63 Wash. 521, Ann. Cas. 1912D, 365, 115 Pac. 1083.

79. *Biddle v. Hussman*, 23 Mo.

597; *Board of Levee Commissioners v. Johnson*, 66 Miss. 248, 6 So. 199; *Cuthbert v. Kuhn*, 3 Whart. (Pa.) 357, 31 Am. Dec. 513; *Uhler v. Cowen*, 192 Pa. 443, 44 Atl. 42 (*semble*). See *Dyer v. Wightman*, 66 Pa. 427; *City of Baltimore v. Latrobe*, 101 Md. 621, 61 Atl. 203.

the case of the taking of, not the ownership or "fee," but merely an easement in the leased premises, the question of the continuing liability for rent may be most satisfactorily solved upon the theory that the dispossession of the tenant by the public agency, for the purpose of enjoying the easement, after the latter's acquisition thereof, constitutes an eviction under paramount title.⁸⁰ Such dispossession is not, indeed, under a paramount title if by paramount title we mean only a legal title outstanding at the time of the lease, but there is no reason for so confining its meaning. An eviction by one claiming by force of the foreclosure of a mortgage prior to the lease is no doubt an eviction under paramount title, regardless of whether the mortgagee had the legal title, and so an eviction by one claiming by force of the assertion of the paramount power of the state may well be regarded as an eviction under paramount title, or at least so analogous thereto as to be governed by the same principles.

— **Destruction of buildings.** The well established rule of the common law is that the liability of the tenant for the rent called for by the lease is in no way affected by the fact that buildings or improvements on the land leased are wholly or partially destroyed by some unforeseen casualty, however much this may decrease the utility of the premises to the tenant. This rule finds its most frequent application in the case of a total or partial destruction by fire of buildings on the leased premises,⁸¹ but it has also been applied when buildings

80. See *Emmes v. Feeley*, 132 Mass. 346; *Devine v. Lord*, 175 Mass. 384, 78 Am. St. Rep. 502, 56 N. E. 570; *Rhode Island Hospital Trust Co. v. Hayden*, 20 R. I. 544, 42 L. R. A. 107, 40 Atl. 421.

81. *Baker v. Holtzapffel*, 4 Taunt. 45; *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430; *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 108 Pac. 27; *Hunniston, Keeling & Co. v. Wheeler*, 175 Ill. 514, 67 Am. St.

or other improvements on the premises were destroyed by a flood,⁸² a tempest,⁸³ a hostile army,⁸⁴ or a mob.⁸⁵ Occasionally the common law rule has been disapproved, as bearing with undue hardship on the tenant.⁸⁶

In case of the destruction, even though total, of the buildings on the leased land, there is not a total destruction of the subject matter of the lease, and there remains something out of which, in theory, the rent can issue, however small may be the value of the land as compared with the buildings destroyed. In the case, on the other hand, of the lease of a building alone, without the land,⁸⁷ or of merely certain rooms in or parts of a building,⁸⁸ if the building, or the part thereof which is the subject of the lease, is destroyed, it has

Rep. 232, 51 N. E. 893; Fowler v. Mott, 6 Mass. 63; Roberts v. Lynn Ice Co., 187 Mass. 402, 73 N. E. 523; Bowen v. Clemens, 161 Mich. 493, 137 Am. St. Rep. 521, 126 N. W. 639; Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. 1007; Fowler v. Payne, 49 Miss. 32; Felix v. Griffiths, 56 Ohio St. 39, 45 N. E. 1092; Harrington v. Watson, 11 Ore. 143, 50 Am. Rep. 465, 3 Pac. 173; Nashville, C. & St. L. R. Co. v. Heikens, 112 Tenn. 378, 65 L. R. A. 298, 79 S. W. 1038; Arbenz v. Exley, Watkins & Co., 52 W. Va. 476, 61 L. R. A. 957, 44 S. E. 149.

82. Smith v. Ankrim, 13 Serg. & R. (Pa.) 39.

83. Peterson v. Edmonson, 5 Har. (Del.) 378.

84. Paradine v. Jane, Aley, 26; Robinson v. L'Engle, 13 Fla. 482; Pollard v. Shaffer, 1 Dall. (Pa.) 210.

85. Wagner v. White, 4 Har. & J. (Md.) 564.

86. See Whitaker v. Hawley, 25 Kan. 674, 37 Am. Rep. 277; Wattles v. South Omaha Ice & Coal Co., 50 Neb. 251, 36 L. R. A. 424, 61 Am. St. Rep. 554, 69 N. W. 785; Coogan v. Parker, 2 S. C. 255, 16 Am. Rep. 659. The question of the equity of the rule is discussed in 1 Tiffany, Landlord & Ten., § 182 m (1).

87. Ainsworth v. Ritt, 38 Cal. 89, 99 Am. Dec. 352; Schmidt v. Pettit, 8 Dist. Col. (1 Mc Arth) 179.

88. McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654; Womack v. McQuarry, 28 Ind. 103, 92 Am. Dec. 306; Stockwell v. Hunter, 11 Metc. (Mass.) 448, 45 Am. Dec. 222; Graves v. Berdan, 26 N. Y. 498; Moving Picture Co. v. Scottish etc. Ins. Co., 244 Pa. 358, 90 Atl. 642; Paxson & Comfort Co. v. Potter, 30 Pa. Super Ct. 615; Porter v. Tull, 6 Wash. 408, 22 L. R. A. 613, 36 Am. St. Rep. 172, 33 Pac. 965.

been usually held in this country that nothing remains from which the rent can issue, and that consequently the liability therefor immediately ceases. In England the same rule applies when the lease is of an apartment in a building as when it is of the land itself,⁸⁹ and the explanation would seem to be that there the lease of an apartment is construed as including an interest in the soil, from which the rent may be regarded as issuing even after the destruction of the apartment.

The operation of the rule that the liability for rent continues in spite of the partial or total destruction of the buildings on the leased premises may be, and frequently is, excluded by an express provision to the contrary in the instrument of lease. Provisions of this character have quite frequently been the subject of judicial construction.⁹⁰

In a number of jurisdictions statutes have been adopted which have the effect of partly or wholly relieving the tenant from rent in case of the destruction of the buildings, or any part thereof, during the term. For instance the New York statute⁹¹ provides that "where any building which is leased or occupied is destroyed or so injured by the elements, or any other cause, as to be untenable and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises; and he is not liable to pay to the lessor or owner rent for the time subsequent to the surrender." These statutes have frequently been before the courts for construction.⁹²

89. *Izon v. Gorton*, 5 Bing N. Cas. 501; *Marshall v. Schofield*, 52 L. J. Q. B. 58. See *Selby v. Greaves*, L. R. 3 C. P. 954.

90. See 1 *Tiffany, Landlord & Tenant*, § 182 m (6).

91. Real Property Law, § 197,

changing the language of the original act of 1860.

92. See cases cited 1 *Tiffany, Landlord & Tenant*, § 182 m (8), and *Harvey v. Weisbaum*, 159 Cal. 265, 33 L. R. A. (N. S.) 540, Ann. Cas. 1912B, 1115, 113 Pac. 656;

— **Eviction by landlord.** An eviction of the tenant by the landlord, the nature of which is elsewhere discussed,⁹³ has the effect of suspending the tenant's liability for rent thereafter to become due,⁹⁴ even though the eviction is as to merely a part of the premises, the tenant retaining possession of the balance.⁹⁵ Though the courts frequently refer to an eviction by the landlord as absolutely terminating the liability for rent, this is not quite correct. It merely suspends the liability for such time as the tenant remains out of possession of the whole or a part of the premises as a result of the eviction.⁹⁶ The tenant is free from liability for the rent becoming due between

Spear v. Baker, 117 Md. 570, 84 Atl. 62; Fink v. Weinholzer, 109 Minn. 381, 123 N. W. 931; Lindeke v. McArthur's Inc., 125 Minn. 1, Ann. Cas. 1915C, 600, 145 N. W. 399; Carley v. Liberty Hat Mfg. Co., 81 N. J. L. 502, 33 L. R. A. (N. S.) 545, 79 Atl. 447; Sayre v. Roseville Motor Co., 85 N. J. L. 10, 91 Atl. 596; Colonial Land Co. v. Asmus, 82 N. J. L. 521, 81 Atl. 827; Acme Ground Rent Co. v. Werner, 151 Wis. 417, 139 N. W. 314.

93. *Ante*, § 58(b).

94. Upton v. Townend, 17 C. B. 30; Engstrom v. Tyler, 46 Kan. 317, 26 Pac. 735; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Osmers v. Furey, 32 Mont. 581, 81 Pac. 345; Bennett v. Bittle, 4 Rawle (Pa.) 339; Poston v. Jones, 37 N. C. (3 Ired. Eq.) 350, 38 Am. Dec. 683; Wolf v. Eppenstein, 71 Ore. 1, 140 Pac. 751.

95. Co. Litt. 148b; Gilbert, Rents, 173; Skaggs v. Emerson, 50 Cal. 3; Frepons v. Grostein, 12

Idaho, 671, 87 Pac. 1004; Smith v. Wise, 58 Ill. 141; Smith v. McEnany, 170 Mass. 26, 64 Am. St. Rep. 272, 48 N. E. 781; Kuschinsky v. Flanigan, 170 Mich. 245, 41 L. R. A. (N. S.) 430, Ann. Cas. 1914A, 1228, 136 N. W. 362; Christopher v. Austin, 11 N. Y. 216; Galleher v. O'Grady, — N. H. —, 100 Atl. 549; Morris v. Kettle, 57 N. J. L. 218, 30 Atl. 879; Linton v. Hart, 25 Pa. 193, 64 Am. Dec. 691; Edmison v. Lowry, 3 S. D. 77, 17 L. R. A. 275, 44 Am. St. Rep. 774, 52 N. W. 583; Briggs v. Hall, 4 Leigh (Va.) 484, 26 Am. Dec. 326. New York Dry Goods Store v. Pabst Brewing Co., 50 C. C. A. 295, 112 Fed. 381; *Contra* in Alabama, Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446; Anderson v. Winton, 136 Ala. 422, 34 So. 962.

96. Co. Litt. 319a; Mackubin v. Whetcraft, 4 Har. & McH. (Md.) 135; Smith v. McEnany, 170 Mass. 26, 64 Am. St. Rep. 272, 48 N. E. 781; Day v. Watson, 8 Mich. 535; Tiley v. Moyers, 43 Pa. 404.

the time of the eviction of the tenant and his restoration to possession, even though the landlord does not himself retain the possession.⁹⁷

As to the effect of an eviction during a rent period, when the rent is payable in advance for that period, the cases are not agreed, some being to the effect that the tenant is,⁹⁸ and others to the effect that he is not,⁹⁹ relieved in such case. It is somewhat difficult to comprehend how, after the tenant has, by the terms of the lease, become absolutely liable for an instalment of rent, he can be relieved from such liability by a subsequent occurrence. The fact of such advance payment could, however, it seems, be considered in assessing damages on account of the eviction, whether the claim for damages is asserted by way of set off or in a separate action.¹ A mere trespass or entry by the landlord, not amounting to an eviction,² does not affect the liability for rent.³

— **Eviction under paramount title.** The liability for the rent comes to an end upon the eviction of the tenant from the entire premises by one having paramount title.⁴ Even though this eviction is merely con-

97. *Cibel v. Hill*, 1 Leon. 110; *Bennett v. Bittle*, 4 Rawle (Pa.) 339.

98. *The Richmond v. Cake*, 1 App. Dist. Col. 447; *Hall v. Joseph Middleby*, 197 Mass. 485, 83 N. E. 1114; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117 (*semble*). See *Hyman v. Jockey Club etc. Co.*, 9 Colo. App. 299, 48 Pac. 671.

99. *Ryerse v. Lyons*, 22 Up. Can. Q. B. 12; *Giles v. Comstock*, 4 N. Y. 270, 53 Am. Dec. 374; *Hunter v. Reiley*, 43 N. J. L. 480; *Gugel v. Isaacs*, 21 N. Y. App. Div. 503, 48 N. Y. Supp. 594.

1. *Schienze v. Eckels*, 227 Pa. 305, 76 Atl. 15.

2 R. P.—20

2. *Ante*, § 58(b).

3. *Roper v. Lloyd*, T. Jones 148; *Hunt v. Cape*, 1 Cowp. 242; *Lawrence v. French*, 25 Wend. (N. Y.) 443; *Bennett v. Bittle*, 4 Rawle (Pa.) 339.

4. *Cuthbertson v. Irving*, 4 Hurlst. & N. 742; *Wheelock v. Warschauer*, 34 Cal. 265; *Stubbings v. Evanstown*, 136 Ill. 37, 11 L. R. A. 839, 26 N. E. 577; *George v. Putney*, 58 Mass. (4 Cush.) 351, 50 Am. Dec. 788; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370; *Friend v. Oil Well Supply Co.*, 165 Pa. 652, 30 Atl. 1134; *Maxwell v. Urban*, 22 Tex. Civ. App. 565, 55 S. W. 1124.

structive,⁵ and the tenant assumes, by attornment or otherwise, the relation of tenant to the paramount owner and as such becomes liable for rent, this liability is under a different demise, and the rent is a different rent, even though similar in amount.

An eviction under paramount title, like an eviction by the landlord, does not affect the tenant's liability for rent which became due before the eviction occurred, since this rent was fully earned.⁶⁻⁷ This would seem properly to be the case even though the rent is payable in advance, and the eviction occurs before the end of the period for which it is payable.⁸

If the eviction under paramount title is partial merely, that is, from a part only of the leased premises, the rent is apportioned and the tenant is relieved from liability only for an amount proportioned to the value of that part,⁹ the rule being different in this regard when the partial eviction is under paramount title from that which controls when it is by the landlord.

— **Untenantable condition of premises.** Since, as before stated, the landlord is under no obligation to the tenant as regards the condition of the premises, and their fitness for the latter's use and occupation, either at the time of the lease or subsequently thereto,¹⁰ it would seem that the tenant should not be relieved

5. *Ante*, § 58(a).

6-7. 2 Rolle, Abr., Rent (O.); Grobham v. Thornborough, Hob. 82; Pepper v. Rowley, 73 Ill. 262; Fitchburg Cotton Manufactory Corp. v. Melven, 15 Mass. 268; Giles v. Comstock, 4 N. Y. 270, 53 Am. Dec. 374.

8. Giles v. Comstock, 4 N. Y. 270, 53 Am. Dec. 374. But see *ante*, this section, note 98.

9. Halligan v. Wade, 21 Ill. 470, 74 Am. Dec. 108; Fillebrown v. Hoar, 124 Mass. 580; Cheairs

v. Coats, 77 Miss. 846, 50 L. R. A. 111, 78 Am. St. Rep. 546, 28 So. 728; Christopher v. Austin, 11 N. Y. 216; Fifth Avenue Building Co. v. Kernochan, 221 N. Y. 370, 117 N. E. 579; Poston v. Jones, 37 S. C. (2 Ired. Eq.) 350, 38 Am. Dec. 683; Tunis v. Grandy, 22 Gratt. (Va.) 109; Mayor of Swansea v. Thomas, 10 Q. B. Div. 48. But see Wilson v. Sale, 41 Pa. Super. 566.

10. *Ante*, § 51.

from liability for rent in the absence of an express stipulation or a statutory provision in that regard, by reason of defects in the premises. And that this is so is attested by the numerous decisions at common law to the effect that even the destruction of the buildings on the leased premises will not have that effect.¹¹ In New York, however, the tenant has been regarded as relieved from liability by reason of the "untenantable" condition of the premises, the statute before referred to, providing that the tenant shall be relieved from rent if the building is destroyed or so injured by the elements as to be untenantable and unfit for occupancy, being apparently extended to cases in which the building becomes untenantable without being destroyed or injured.¹² In Michigan the tenant has been relieved from liability for rent on account of an untenantable condition existing at the time of his entry under the lease, apparently without reference to any statutes.¹³ Occasionally, particularly in New York, the existence of an untenantable condition, which the landlord might have removed by making repairs on the premises, but which he fails to remove, has been referred to as relieving the tenant from liability for rent, on the theory that it constitutes an eviction by him,¹⁴ and there is a distinct tendency on the part of the courts, because eviction, by the common law precedents, relieves the tenant from rent, to apply the term to any condition which is regarded as sufficient to relieve the

11. *Ante*, this section, notes 81-85.

12. *Meserole v. Hoyt*, 161 N. Y. 59, 55 N. E. 274; *Vann v. Rouse*, 94 N. Y. 401. So in Minnesota under a substantially similar statute. *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348; *Damkroger v. Pearson*, 74 Minn. 77, 76 N. W. 960; *Kafka v. Davidson*, 135 Minn. 389, 160 N. W. 1021. See

1 *Tiffany, Landlord & Ten.*, § 182n(2).

13. *Leonard v. Armstrong*, 73 Mich. 577, 41 N. W. 695; *Petz v. Voight Brewery Co.*, 116 Mich. 418, 72 Am. St. Rep. 531, 74 N. W. 651.

14. *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Sully v. Schmitt*, 147 N. Y. 248, 49 Am. St. Rep. 659, 41 N. E. 514.

tenant in this respect.^{14a} So an eviction has been said to occur in the case of the landlord's failure to furnish heat to the apartment leased, not only when the lease contained a stipulation requiring the lessor to furnish heat,^{14b} but also even in the absence of such stipulation, when the landlord's control of the heating apparatus and the custom of the community led the tenant to anticipate that heat would be furnished.^{14c} The application of the term, however, to the case of such a mere omission on the part of the landlord is, it is conceived, to be deprecated. Even conceding the desirability of relieving the tenant from liability for rent whenever the premises become untenable, it is undesirable to confuse the law of eviction for the sake of a merely nominal compliance with the precedents of the common law.^{14d}

— **Breach of covenant.** The question whether the breach of a particular covenant or stipulation by the landlord is a defense to the claim for rent, is properly a question merely whether the stipulation for the payment of rent and that by the landlord are in the particular case to be construed as dependent or independent. The question has more frequently arisen in connection

14a. So, in a recent case it was held that a refusal to allow the tenant to obtain water, in an emergency, from a neighboring building, constituted an eviction relieving him from rent. *Boston Veterinary Hospital v. Kiley*, 219 Mass. 533, 107 N. E. 426.

14b. *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348; *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53, 38 Am. St. Rep. 473, 52 N. W. 986; *Riley v. Pettis County*, 96 Mo. 318, 9 S. W. 906; *Lawrence v. Burrell*, 17 Abb. N. Cas. 312; *Filkins v. Steele*, 124

Iowa, 742, 100 N. W. 851; *Harmony Co. v. Rauch*, 64 Ill. App. 386; *McSorley v. Allen*, 36 Pa. Super. Ct. 271; *Buchanan v. Orange*, 118 Va. 511, 88 S. E. 52.

14c. *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Jackson v. Paterno*, 58 Misc. 201, 108 N. Y. Supp. 1073, 128 N. Y. App. Div. 474, 112 N. Y. Supp. 924; *Pakas v. Rawle*, 152 N. Y. Supp. 965; *O'Hanlon v. Grubb*, 38 App. D. C. 1213, 37 L. R. A. (N. S.) 1213. Compare *Martens v. Sloane*, 132 N. Y. App. Div. 114, 116 N. Y. Supp. 512.

14d. *Ante*, § 58(b).

with a stipulation for the making of repairs or improvements by the landlord, and in the majority of cases the stipulations have been regarded as independent.¹⁵ But there are a number of decisions in which, without any discussion of the matter on principle, the landlord's failure to comply with a stipulation for the making of repairs or improvements during the tenancy has been assumed to justify the tenant in abandoning the premises and refusing to pay rent.¹⁶ Likewise it has occasionally been decided that the landlord's failure to comply with his contract to furnish heat or power excuses the tenant from paying rent.¹⁷

— **Illegality of business.** If a lease is knowingly made for the purpose of carrying on an illegal business on the premises, such as prostitution, gambling,

15. *Surplice v. Farnsworth*, 7 Man. & G. 576; *Central Appalachian Co. v. Buchanan*, 73 Fed. 1006; *Young v. Berman*, 96 Ark. 78, 34 L. R. A. (N. S.) 977, 131 S. W. 62; *Lewis & Co. v. Chisholm*, 68 Ga. 40; *Arnold v. Krigbaum*, 169 Cal. 143, Ann. Cas. 1916D, 370, 146 Pac. 423; *Rubens v. Hill*, 213 Ill. 523, 72 N. E. 1127; *Long v. Gieret*, 57 Minn. 278, 59 N. W. 194; *Warren v. Hodges*, 137 Minn. 389, 163 N. W. 739; *Meredith Mechanic Ass'n v. American Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330; *Stewart v. Childs Co.*, 86 N. J. L. 648, L. R. A. 1915C, 649, 92 Atl. 392; *Watters v. Smaw*, 32 N. C. (10 Ind. Law) 292; *Partridge v. Dykins*, 28 Okla. 54, 34 L. R. A. (N. S.) 984, 113 Pac. 928; *Prescott v. Otterstatter*, 85 Pa. 534; *Smith v. Wiley*, 60 Tenn. (1 Baxt.) 418; *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 61 L. R. A. 957,

44 S. E. 149.

In *Wise v. Sparks*, — Ala. —, 73 So. 394, whether a contract to pay rent and one to make repairs were dependent was regarded as a question for the jury.

16. *Bissell v. Lloyd*, 100 Ill. 214; *Marks v. Chapman*, 135 Iowa, 320, 112 N. W. 817; *Hart-hill v. Cooke's Ex'r*, 19 Ky. L. Rep. 1524, 43 S. W. 705; *Pierce v. Joldersma*, 91 Mich. 463, 51 N. W. 1116; *Nelson v. Eichoff*, — Okla. —, 158 Pac. 370 (*semble*); *Auer v. Vahl*, 129 Wis. 635, 109 N. W. 529. See *Taylor v. Finne-gan*, 189 Mass. 568, 2 L. R. A. (N. S.) 973, 76 N. E. 203; *Tiffany, Landlord & Ten.* § 182r.

17. *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348; *Filkins v. Steele*, 124 Iowa, 742, 100 N. W. 851; *Rogers v. Babcock*, 139 Mich. 94, 102 N. W. 636; *Harmony Co. v. Rauch*, 64 Ill. App.

or the sale of liquor in violation of law, there can be no recovery of rent.^{17a}

Not infrequently, in recent years, a question has arisen as to the effect, upon the liability for rent, of the fact that the lease was made to enable the lessee to use the property for the sale of intoxicating liquors, and such use became invalid, after the making of the lease, by reason of the adoption of a prohibitory law. The cases are ordinarily to the effect that legislation of the character referred to did not terminate the tenancy or relieve from liability for the full amount of the stipulated rent,^{17b} the decision in a number of these cases being based on the theory that there was in the instrument of lease no reference to the liquor business which called for construction as excluding the sale on the premises of articles other than liquors, and that consequently the lessee could still utilize the premises.^{17c} In a few cases a contrary

386; *McSorley v. Allen*, 36 Pa. Super. Ct. 271. See *ante*, this section, note 14a.

17a. *Mitchell v. Campbell*, 111 Miss. 806, 72 So. 231; *Sherman v. Wilder*, 106 Mass. 537; *Berni v. Boyer*, 90 Minn. 469, 97 N. W. 121. And cases cited, 1 *Tiffany, Landlord & Ten.* § 40; editorial note 26 *Harv. Law Rev.* 181.

17b. *Lawrence v. White*, 131 Ga. 840, 19 L. R. A. (N. S.) 966, 63 S. E. 631; *Goodrum Tobacco Co. v. Potts-Thompson Liquor Co.*, 133 Ga. 776, 26 L. R. A. (N. S.) 498, 66 S. E. 1081; *Barghman v. Pöftman*, 12 Ky. L. Rep. 342, 14 S. W. 342; *Kerley v. Mayer*, 10 Misc. Rep. 718, 31 N. Y. Supp. 818, judgment aff'd., 155 N. Y. 636, 49 N. E. 1099; *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197; *Hecht v. Acme Coal Co.*, 19 Wyo. 18, 113 Pac. 788, 117

Pac. 132, 34 L. R. A. (N. S.) 773, A. & E. Ann. Cas. 1913E, 258. See the excellent note on the subject, by Professor R. W. Aigler, in 16 *Mich. Law Rev.* 534.

17c. *O'Byrne v. Henley*, 161 Ala. 620, 23 L. R. A. (N. S.) 496, 50 So. 83; *Harper v. Young*, 123 Ark. 162, 184 S. W. 447; *Shreveport Ice & Brew. Co. v. Mandel*, 128 La. 314, 54 So. 831; *San Antonio Co. v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368; *Warm Springs Co. v. Salt Lake City*, — Utah, —, 165 Pac. 788; *Hayton v. Seattle Brewing & Malting Co.*, 66 Wash. 248, 37 L. R. A. (N. S.) 432, 119 Pac. 739.

So the premises being still available for other purposes, the fact that an ordinance rendered them practically unavailable for the purpose of a garage, for which the lease was taken, was regarded

view, that the change in the law relieved the lessee from liability for rent, was asserted,^{17d} this view being sometimes based, however, on the fact that by the terms of the lease the tenant was precluded from making any use of the premises except for the sale of intoxicants.^{17e} In so far as these latter cases assume that a statement in the lease that the premises are to be used for a particular purpose precludes their use for another purpose, they in effect regard such a statement, presumably, as a covenant or condition against such user, since otherwise the statement as to user would seem to be inoperative.

The inability to obtain or renew a license for the sale of intoxicating liquors has been regarded as no defense to the claim for rent, although the lease was taken for the purpose of conducting that particular business on the premises.^{17f}

§ 414. Actions for rent. When the person to whom rent was payable had a freehold interest in the rent,

as no defense to the claim for rent. *Barnett v. Clark*, 225 Mass. 185, 114 N. E. 317.

17d. *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 19 L. R. A. (N. S.) 964, 130 Am. St. Rep. 753, 113 S. W. 364; *The Stratford, Inc. v. Seattle Brewing & Malting Co.*, 94 Wash. 125, L. R. A. 1917C, 431, 162 Pac. 31; *In Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098, it was decided, that even if the adoption of prohibition was otherwise ground for relief from rent, it was not ground therefor if the tenant continued in possession.

In McCullough Realty Co. v. Laemmle Film Service, — Iowa, —, 165 N. W. 33, it was held that when there was a lease for the purpose of carrying on a business in

“film theatre” supplies, a change in the law prohibiting such business relieved from liability for rent.

17e. *Greil Bros. v. Mabson*, 179 Ala. 444, 43 L. R. A. (N. S.) 664, 60, So. 876; *Kahn v. Wilhelm*, 118 Ark. 239, 177 S. W. 403; *Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co.*, 98 Wash. 12, 167 Pac. 58.

17f. *Standard Brewing Co. v. Weil*, 129 Md. 487, 99 Atl. 661; *Gaston v. Gordon*, 203 Mass. 265, 94 N. E. 307; *Teller v. Boyle*, 132 Pa. 56, 18 Atl. 1069; *Miller v. McGuire*, 18 R. I. 770, 30 Atl. 966; *Burgett v. Loeb*, 43 Ind. App. 657, 88 N. E. 346.

A like view was adopted when the city was made “dry” by an election held after the making of

the nonpayment thereof on demand was considered, at common law, a disseisin of the rent, and consequently the real action of *novel disseisin* was the proper form of proceeding by which to recover it.¹⁸ By statute, however, an exception to this rule was made in favor of the executors and administrators of tenants in fee of rents, who were authorized to sue in debt for arrears of rent due to their decedents.¹⁹

Since the abolition of real actions, it has, in England, been decided that an action of debt,²⁰ or its equivalent, will lie in favor of the owner of a rent charge in fee, on the theory that such an action did not lie at common law owing merely to the fact that the higher remedy by real action existed during the continuance of the freehold.²¹

the lease, the local option law under which the election was held being in force at the time of its making. *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197.

18. Litt. §§ 233-240.

19. 32 Hen. VIII. c. 37 (A. D. 1540); Co. Litt. 162a; *Harrison*, Chief Rents, 180.

A tenant of land in fee simple who has leased for years has been held not to be a tenant in fee of the rent reserved on the lease for years, so that the statute will authorize an action of debt for the rent by his executors. *Prescott v. Boucher*, 3 Barn. & Adol. 849.

20. Though the distinct forms of action known as "debt," "covenant," and "*assumpsit*" no longer exist in many states, they represent, as connected with the recovery of rent, distinctions of a substantive character in regard to

the right and basis of recovery, and consequently, even in "code" states, a knowledge of the particular circumstances appropriate to the bringing of one rather than the other of these actions is most desirable.

21. *Thomas v. Sylvester*, L. R. 8 Q. B. 368, 2 Gray's Cas. 704; *Christie v. Barker*, 53 Law J. Q. B. 537; *Searle v. Cooke*, 43 Ch. Div. 519. See *In re Herbage Rents* [1896] 2 Ch. 811. The correctness of these decisions has, however, been questioned, on the ground that the duty of paying rent was, at common law, imposed on the land alone,—a "real obligation,"—and hence the mere abolition of real actions could not make it a personal obligation. See the learned review of the subject by T. Cyprian Williams, Esq., 13 Law Quart. Rev. 288, and the references therein to *Oguel's Case*, 4 Coke, 48b.

In the case of a rent for life, whether rent reserved on a lease for life or a rent charge granted for life, the tenant of the land was regarded as personally liable for the rent, and, while this personal liability could not be enforced during the existence of the life interest in the rent, because temporarily superseded by the existence of the "real" obligation on the part of the land, upon the termination of such real obligation by the termination of the life interest, the tenant's personal obligation became enforceable by the owner of the rent, or his personal representatives.²²

The right of one leasing for years to sue for arrears of rent reserved in an action of debt was recognized at an early date in the history of that action,²³ and that the action is available for this purpose has never been questioned.²⁴ The action will also lie for rent reserved upon a tenancy at will.²⁵

Since the common-law action of debt is not founded upon a contract, but is rather a remedy for the recovery of a specific sum in the possession of the defendant belonging to the plaintiff,²⁶ the tenant, in order to be liable therein, need not have contracted to pay the rent, but he is made liable as having taken

22. Ognel's Case, 4 Coke, 49a. Gilbert, Rents, 98; Co. Litt. 162a, Hargrave's note; 13 Law Quart. Rev. 291.

By statute (8 Anne, c. 14, § 4, A. D. 1709), the right was given to bring an action of debt for the recovery of rent service reserved upon a lease for life, even during the lease, but it applied in no case where the relation of landlord and tenant did not exist. Webb v. Jiggs, 4 Maule & S. 113. There are similar statutes in several states. See 1 Tiffany, Landlord & Ten. p. 1819, note 7.

23. 2 Pollock & Maitland, Hist. Eng. Law, 209.

24. Litt. §§ 58, 72; Co. Litt. 47b; Gilbert, Rents, 93; Trapnall v. Merriek, 21 Ark. 503; Howland v. Coffin, 26 Mass. (9 Pick.) 52; Id, 29 Mass. (12 Pick.) 125; Outtoun v. Dulin, 72 Md. 536, 20 Atl. 134; McKeon v. Whitney, 3 Denio, 452; McEwen v. Joy, 7 Rich. Law (S. Car.) 33; Elder v. Henry, 34 Tenn. (2 Sued) 81.

25. Litt. § 72.

26. Ames, Lectures on Legal History, 88.

the profits due by the land, and, consequently, mere privity of estate, as distinct from privity of contract, is sufficient to sustain the action. Accordingly, a transferee of the land, or of the particular estate therein which owes the rent, is liable in debt to the person entitled to the rent;²⁷ and a transferee of the reversion may recover therein against the lessee or an assignee of the lessee,²⁸ as may a transferee of the rent without the reversion.²⁹

Debt will, moreover, lie against the original lessee, although the latter has assigned his lease, since the lessee cannot substitute another in his place without the landlord's assent. If, however, the landlord accept the lessee's assignee as tenant, he cannot thereafter bring debt against the original lessee.³⁰ If the lessee's interest in a part of the premises is assigned to another person, or in different parts to different persons, each of such assignees is liable in debt, by reason of privity of estate, for a proportional part of the rent.³¹ The assignee of the reversion cannot bring debt against the original lessee after the latter's assignment of the term, since there is, in such case, neither privity of contract nor of estate.³²

27. Walker's Case, 3 Coke, 22a; Thursby v. Plant, 1 Saund. 237, note (1); Howland v. Coffin, 9 Pick. (Mass.) 52, 12 Pick. 125; McKeon v. Whitney, 3 Denio (N. Y.) 452.

28. Walker's Case, 3 Coke, 22a; Thursby v. Plant, 1 Saund. 237, 1 Lev. 259; Howland v. Coffin, 12 Pick. (Mass.) 125; Patten v. Deshon, 1 Gray (Mass.) 325; Outtoun v. Dulin, 72 Md. 536, 20 Atl. 134.

29. Williams v. Hayward, 1 El. & El. 1040; Allen v. Bryan, 5 Barn. & C. 512; Ryerson v. Quackebush, 26 N. J. Law, 236; Dema-

rest v. Willard, 8 Cow. (N. Y.) 206; Kendall v. Carland, 5 Cush. (Mass.) 74.

30. Walker's Case, 3 Coke, 22a; Marsh v. Braae, Cro. Jac. 334; Mills v. Auriol, 1 H. Bl. 433, 440; Wadham v. Marlowe, 8 East, 314, note.

31. Gamon v. Vernon, 2 Lev. 231; Curtis v. Spitty, 1 Bing. N. C. 760; Harris v. Frank, 52 Miss. 155; St. Louis Public Schools v. Boatmen's Ins. & Trust Co., 5 Mo. App. 91. Compare Damainville v. Mann, 32 N. Y. 197.

32. Humble v. Glover, Cro. Eliz. 328; Walker's Case, 3 Coke. 22a.

An action of debt, if brought by or against one not a party to the original lease, as in the case of an action by the assignee of the lessor or against the assignee of the lessee, being based on privity of estate, has always been regarded as a "local" action, which must be brought in the county where the land lies;³³ while, if brought against the original lessee by the lessor, being based on contract, it is "transitory," and may be brought where the lessee may be found, or where the contract was made.³⁴

— **Action of covenant.** On the lessee's covenant to pay the rent, usually contained in the instrument of lease, an action of covenant may be brought at common law,³⁵ and, in jurisdictions where such form of action is abolished, an equivalent action to enforce the tenant's liability on his covenant will lie.

To support the common law action of covenant there must be a technical covenant by the lessee, that is, the instrument must be sealed by him³⁶ since the proper action on a written agreement to pay rent, not under seal, is *assumpsit*.

An action by the lessor against the lessee on the covenant to pay rent has been regarded as transitory, as being based purely on contract,³⁷ and the weight

33. *Bord v. Cudmore*, Cro. Car. 183; *Pine v. Leicester*, Hob. 37; *Stevenson v. Lambard*, 2 East, 575; *Whitaker v. Forbes*, L. R. 10 C. P. 583; *Bracket v. Alvord*, 5 Cow. (N. Y.) 18.

34. *Wey v. Yally*, 6 Mod. 194; *Thursby v. Plant*, 1 Wms. Saund. (Ed. 1871) 306-308; *Bracket v. Alvord*, 5 Cow. (N. Y.) 18; *Henwood v. Cheeseman*, 3 Serg. & R. (Pa.) 502; *Chitty, Pleading* (7th Ed.) 282.

35. *Thursby v. Plant*, 1 Saund. 237, 1 Lev. 259, 2 Gray's Cas. 671; *Cross v. United States*, 14

Wall. (U. S.) 479, 20 L. Ed. 721; *Greenleaf v. Allen*, 127 Mass. 248; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 164 Ill. 88. *Russell v. Fabyan*, 28 N. H. 543, 61 Am. Dec. 629; *Taylor v. De Bus*, 31 Ohio St. 468.

36. *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214; *Hinsdale v. Humphrey*, 15 Conn. 433; *Trustees of Hoeking County v. Spencer*, 7 Ohio (2nd pt.) 143.

37. *Bulwer's Case*, 7 Coke, 3a; *Wey v. Yally*, 6 Mod. 194; 1 *Chitty, Pleading* (7th Ed.) 283.

of authority is to the same effect as regards an action by the transferee of the reversion against the original lessee, on the theory that the privity of contract is transferred by the Statute 32 Hen. VIII. c. 34.³⁸ On the other hand, an action, whether by the original lessor or his transferee, against the assignee of the lessee, has been regarded as local, as being based on privity of estate.³⁹

—**Assumpsit.** An action of special *assumpsit* may be maintained upon the lessee's express promise to pay a certain sum as rent, provided such promise is not under seal.⁴⁰

—**Under the code procedure.** In a large number of jurisdictions, the common law forms of action having been abolished, the statements made above as to the appropriate forms of action for the recovery of rent, and their distinguishing characteristics in this regard, have no longer any practical application, though an understanding thereof is desirable for a full comprehension of the common law view of rent. Likewise, in most states, the common law distinctions, above referred to, between local and transitory actions, have been superseded by statutes directing where suit shall be brought, as, for instance, by provisions that suit

38. *Thursby v. Plant*, 1 Saund. 237, 1 Lev. 259, and notes in 1 Wms. Saund. (Ed. 1871) 278, 307; 1 Clitty, Pleading (7th Ed.) 283.

39. *Barker v. Damer*, Carth. 182; *Stevenson v. Lambard*, 2 East, 575, 2 Gray's Case. 679; *Thursby v. Plant*, 1 Saund. 237; *Bowdre v. Hampton*, 6 Rich. Law (S. C.) 208. See *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104. *Bonetti v. Treat*, 91 Cal. 223, 14 L. R. A. 151, 27 Pac. 612; *Hintze v. Thomas*, 7 Md. 346, to the effect that the action is based on privity of estate.

40. See cases cited in article by Prof. J. B. Ames, on *Assumpsit* for Use and Occupation, in 2 Harv. Law Rev. at pp. 378, 379, Lectures on Legal History, pp. 168, 169. And see, also, *Hinsdale v. Humphrey*, 35 Conn. 443; *Rubens v. Hill*, 213 Ill. 523, 72 N. E. 1127; *Trustees of Hocking County v. Spencer*, 7 Ohio (2nd part) 149; *Burnham v. Best*, 49 Ky. (10 B. Mon.) 227; *Swem v. Sharretts*, 48 Md. 408; *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214.

shall be brought in the county of the defendant's residence, or where he may be served with process, and so if the rent is payable in a certain county, the venue may be determined by a provision that an action on a contract shall be brought at the place of performance.

— **Remedy in equity.** Equity will occasionally take jurisdiction of a proceeding by the landlord for the recovery of rent on the ground that the remedy at law is inadequate. One case in which equity thus takes jurisdiction is where the tenant has made a sublease, and the tenant is insolvent, in which case the court will direct the subtenant to pay the rent to the chief landlord, on the theory that the rent should be discharged out of the profits of the land.⁴¹ This theory, that the profits of the land are properly applicable to the payment of rent, and that equity alone can enforce such application, would seem to be the grounds on which the jurisdiction of equity should be sought and sustained. It cannot, however, be said that this reason for the assumption of jurisdiction by equity clearly appears from the cases, such jurisdiction having ordinarily been sustained on the ground that the remedy by distress was for some reason not available in the particular case.⁴² That the amount of rent due and payable by defendant is uncertain, either because he is tenant of but a part of the land subject to the lease⁴³ or for other reasons,⁴⁴ has also been regarded as ground for the interposition of equity.

41. *Goddard v. Keate*, 1 Vern. 87; *Haley v. Boston Belting Co.*, 140 Mass. 73, 2 N. E. 785; *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481; *Otis v. Conway*, 114 N. Y. 13, 20 N. E. 628; *Kemp v. San Antonio Catering Co.*, 118 Mo. App. 134, 93 S. W. 342.

42. *Collet v. Jacques*, 1 Ch. Cas. 120; *Cocks v. Foley*, 1 Vern. 359; *North v. Strafford*, 3 P. Wms. 148; *Benson v. Baldwin*, 1 Atk.

598; *Leeds v. Powell*, 1 Ves. Sr. 171. See article by Prof. C. C. Langdell, 10 Harv. Law Rev. 93.

43. *Swedesborough Church v. Shivers*, 16 N. J. Eq. (1 C. E. Green) 453.

44. *Livingston v. Livingston*, 4 Johns Ch. (N. Y.) 287, 8 Am. Dec. 562; *Van Rensselaer v. Layman*, 39 Harv. Pr. (N. Y.) 9. See 2 Tiffany, Landlord & Ten. § 292.

— **Action for use and occupation.** At common law, as above stated, *assumpsit* would lie upon a contract not under seal for the payment of rent.⁴⁵ And it would also lie upon a contract to pay a reasonable compensation for the use and occupation of land, provided no certain rent was reserved.⁴⁶ The statute 11 Geo. 2, c. 19, § 14, authorised a landlord, provided the demise is not by deed, that is, is not under seal, to recover a reasonable satisfaction in an action on the case for the use and occupation of the land, even though a certain rent is reserved and there is no proof of an express promise. A statute of a similar character has been enacted in a number of states,⁴⁷ while in several, upon what appears to be a somewhat questionable reading of the earlier English decisions, it has been decided that a landlord may recover in such an action apart from a statute bearing on the subject.⁴⁸

In this action, the technical name of which is *indebitatus assumpsit* for use and occupation, rent as such is not recovered, but merely a reasonable satisfaction for the use of the premises; and the recovery is based on the theory that a contract to pay such reasonable satisfaction is to be inferred from the circumstances in conformity with the intention of the parties. If one person permits another to take and retain possession of his land, it is, in the ordinary case, a reasonable inference that the former expects the latter to pay the reasonable value of such pos-

45. *Ante*, this section, note 40.

46. Ames, *Assumpsit* for Use and Occupation, 2 Harv. Law Rev. 379, Lectures on Legal History, 169.

47. See 2 Tiffany, Landlord & Ten. p. 1856.

48. Gunn v. Scovil, 4 Day (Conn.) 228, 4 Am. Dec. 208; Crouch v. Briles, 30 Ky. (7 J. J.

Marsh) 255, 23 Am. Dec. 404;

Dwight v. Cutler, 3 Mich. 566, 64 Am. Dec. 105; Heidelberg v. Slad-
er, 1 Handy (Ohio) 457; Eppes
v. Cole, 4 Hen. & M. (Va.) 161,
4 Am. Dec. 512. That it does not
lie apart from statute, see Bell v.
Ellis' Heirs, 1 Stew. & P. (Ala.)
294; Byrd v. Chase, 10 Ark. 602;
Long v. Bonner, 33 N. C. 27.

session or occupation, and that the latter expects to pay, and the law recognizes the reasonableness of such inference and enforces a contract so inferred. It is in this sense only that, as is frequently stated, "the law implies an obligation" to pay the value of the use and occupation, the obligation not being implied by law without reference to the presumed intentions of the parties, as in the case of *quasi* contract.

To sustain an action for use and occupation the relation of landlord and tenant must, ordinarily at least, exist between the parties.⁴⁹ And consequently it will not lie in favor of the owner of land against a person who has entered thereon as a trespasser.⁵⁰ Occasionally a state statute has been construed as authorizing such an action against a trespasser,⁵¹ and in several states, where the line between the different forms of action has been obscured by statutory enactments, a trespasser may, it seems, be made liable for the rental value of land under allegations of use and occupation by him.⁵² Such an action cannot however

49. *Carpenter v. United States*, 84 U. S. (17 Wall) 489, 21 L. Ed. 680; *Hamby v. Wall*, 48 Ark. 135, 3 Am. St. Rep. 218, 2 S. W. 705; *Emerson v. Weeks*, 58 Cal. 439; *Cambridge Lodge v. Routh*, 163 Ind. 1, 71 N. E. 148; *Jones v. Donnelly*, 221 Mass. 213, 108 N. E. 1063; *Hogsett v. Ellis*, 17 Mich. 351; *McFarlan v. Watson*, 3 N. Y. 286; *Aull Sav. Bank v. Aull's Adm'r*, 80 Mo. 199; *Rosenberg v. Sprecher*, 74 Neb. 176, 103 N. W. 1045; *Clark v. Clark's Estate*, 58 Vt. 527, 3 Atl. 508.

50. *Pico v. Phelan*, 77 Cal. 86, 19 Pac. 186; *Lathrop v. Standard Oil Co.*, 83 Ga. 307, 9 S. E. 1041; *Carrigg v. Mechanics' Bank of Providence*, 136 Iowa, 261, 111 N. W. 329; *Stockett v. Watkins' Adm'rs*, 2 Gill. & J. (Md.) 326,

20 Am. Dec. 438; *Emery v. Emery*, 87 Me. 281, 32 Atl. 900; *Inman v. Morris*, 63 Miss. 347; *Brolasky v. Ferguson*, 48 Pa. 434; *Galveston Wharf Co. v. Gulf C. & S. F. R. Co.*, 72 Tex. 454, 10 S. W. 537.

51. *Dell v. Gardner*, 25 Ark. 134; *Missouri Pac. R. Co. v. Atchison*, 43 Kan. 529, 23 Pac. 610; *Newberg v. Cowan*, 62 Miss. 570; *Earl v. Tyler*, 36 Okla. 179, 128 Pac. 269.

52. See *Lindt v. Linder*, 117 Iowa, 110, 90 N. W. 596; *Hidden v. Jordan*, 57 Cal. 184; *Lamb v. Lamb*, 146 N. Y. 317, 41 N. E. 26; *Long Bell Lumber Co. v. Martin*, 11 Okla. 192, 66 Pac. 328; *Olson v. Huntamer*, 6 S. Dak. 364, 55 Am. St. Rep. 844, 61 N. W. 479.

be regarded as the equivalent of assumpsit for use and occupation, but is more properly an action of trespass for mesne profits, according to the common law nomenclature.

— **Forfeiture of leasehold.** The landlord is, by the express terms of the lease, frequently given the right to re-enter on the land, and thereby terminate the tenant's interest, in case of nonpayment of rent, such a stipulation rendering the tenant's estate one on condition.⁵³ In a number of states, apart from any such provision in the lease, the landlord is authorized to resume possession upon the tenant's failure to pay rent, such a provision being most frequently introduced as a part of a statute authorizing summary proceedings, and the non payment of rent being named as one of the grounds for such a proceeding, while in a few states the non payment of rent is made a ground of forfeiture, without any reference to the mode of proceeding by which the forfeiture may be enforced.⁵⁴

§ 415. **Distress for rent.** As before stated, the remedy by distress existed at common law in the case of a rent service, unless the rent and the seignory or reversion became separated, and also in the case of a rent charge.⁵⁵ In England the right of distress has been given by statute in the case of all rents, and consequently rents seek no longer exist there as a distinct class.⁵⁶ The question whether this statute is in force in any particular state has been seldom passed upon,⁵⁷ this being a natural result of the infrequency of rents other than rents service reserved on leases for years.

53. *Ante*, §§ 74-89.

54. 2 Tiffany, *Landlord & Ten.* §§ 193a, 274d, e.

55. *Ante*, § 404.

56. 4 Geo. 2, c. 28, § 5 (A. D. 1731).

57. In Illinois the English statute was, in a quite early decision, recognized as in force (*Penny v. Little*, 4 Ill. 301), while a different view was taken in New

The remedy by distress has not been favored in this country, it being often regarded as affording opportunity for injustice and oppression, and as unfairly discriminating in favor of a particular class of creditors. In some states it has been abolished by statute,⁵⁸ and in some the courts have refused to recognize it as an existing part of the law.⁵⁹ The remedy, under its common-law name, still exists in a number of states; but even in those states it is quite frequently modified by statutory provisions, the general tendency of which is more or less to withdraw the control of the proceedings from the landlord and to vest it in public officials, thus assimilating it to the process of attachment.^{59a} In New England the remedy of attachment on mesne process has superseded that of distress.

Originally, the remedy by distress merely enabled the landlord to seize the chattels on the land, and hold them as a pledge for the payment of rent;⁶⁰ but by statute the landlord was authorized to sell the goods levied upon, and to apply the proceeds on the rent,⁶¹ the proceeding being thus changed from one to secure the rent to one to collect it. Furthermore, the seizure of the goods was formerly made by the landlord himself; but at the present day, in most jurisdictions, the actual levy is made by an officer of the law.⁶²

It has been quite frequently stated that to support a distress the rent reserved must be certain or

York (Cornell v. Lamb, 2 Cow. 652).

58. 2 Tiffany, Landlord & Ten. § 325.

59. Folmar v. Copeland, 57 Ala. 588; Herr v. Johnson, 11 Colo. 393, 18 Pac. 342; Crocker v. Mann. 3 Mo. 472, 26 Am. Dec. 684; Bohm v. Dunphy, 1 Mont. 333; Deaver v. Rice, 20 N. Car. (4 Dev. & B. Law) 567, 34 Am. Dec. 69; Smith v. Wheeler, 4 Okla. 138, 44 Pac. 203.

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59a. See 2 Tiffany, Landlord & Ten. §§ 325-346. The gist of the statutory provisions in the various states are conveniently presented in a note in 2 Cornell Law Quart. Rev. at p. 357, by D. R. Perry, Esq.

60. Co. Litt. 47; 3 Blackst. Comm. 614.

61. 2 Wm. & Mary c. 5 (A. D. 1690).

62. 2 Tiffany, Landlord & Ten. § 336.

capable of reduction to a certainty,⁶³ and occasionally reasons have been stated for this requirement, connected with the method of proceeding at common law.⁶⁴ But, it is conceived, the true and sufficient ground for the requirement of a certain rent as a basis for distress is that, as before stated,⁶⁵ there is no such thing as a rent which is not certain or capable of reduction to a certainty. The statement of this requirement has occasionally been made as a justification for a holding that there was no right of distress although there was a right of recovery for use and occupation.⁶⁶ The reasonable value of the use and occupation, though recoverable by action, is not rent, and it is for this reason, rather than because the amount is uncertain, that it cannot be recovered by distress.

— **Who may distrain.** Since the right of distress is based upon the relation of tenure, a distress for rent reserved on a lease can be made only by one having the reversion, that is, the landlord.⁶⁷ Consequently, at common law, a lessor who has disposed of the reversion, retaining the rent, cannot distrain,⁶⁸ though he may do so, it seems, in some states, by force of a statutory provision giving the right of distress to persons entitled to rent, as he might in any state in which the English statute,^{68a} giving the right in the case of a rent seek, may be regarded as in force.

63. *Regnart v. Porter*, 7 Bing. 451; *United States v. Williams*, 2 Cranch. C. C. 438, Fed. Cas. No. 16,710; *Smoot v. Strauss*, 21 Fla. 611; *Marr v. Ray*, 151 Ill. 799, 26 L. R. A. 799, 37 N. E. 1029; *Briscoe v. McElween*, 43 Miss. 556; *Smith v. Fyler*, 2 Hill. (N. Y.) 648; *Jocks v. Smith*, 1 Bay, (S. Car.) 315.

64. See 2 *Tiffany, Landlord & Ten.* § 327d.

65. *Ante*, § 411, note 99.

66. *Stayton v. Morris*, 4 Har. (Del.) 224; *Smoot v. Strauss*, 21

Fla. 611; *Tift v. Verden*, 19 Miss. (11 Smedes & M.) 153; *Valentine v. Jackson*, 9 Wend. (N. Y.) 302; *Wells v. Hornish*, 3 Pen. & W. (Pa.) 31.

67. *Sims v. Price*, 123 Ga. 97, 50 S. E. 961; *Marr v. Ray*, 151 Ill. 340, 26 L. R. A. 799, 37 N. E. 1029; *Patty v. Bogle*, 59 Miss. 491; *Grier v. McAlarney*, 148 Pa. 587, 24 Atl. 119; *McKenzie v. Roper*, 2 Strob. (S. Car.) 306.

68. *Litt.* § 226.

68a. *Ante*, this section, note 56.

At common law the executor or administrator of a deceased owner of a rent had no right to distrain for rent which belonged to him as having accrued in the lifetime of such owner, but by St. 32 Hen. VIII. c. 37, § 1, the right of distress was given to the executors and administrators of tenants in fee, fee tail, or for term of life.⁶⁹ This statute has, however, been held to give no right of distraint to the executor of a tenant of land in fee who demised the land for years, reserving a rent,⁷⁰ and, on this construction of the statute, an executor or administrator has, in jurisdictions where there is no statute to the contrary, no right to collect by distress rent due by a tenant of his decedent under a lease for years. There are in a few states statutes expressly giving the right of distress to the executors or administrators of a deceased landlord, or giving them the same remedies for the collection of rent as the decedent had.

— **Chattels subject to distress.** All chattels on the demised premises are, generally speaking, liable to be distrained upon, and the fact that they belong to a person other than a party to the lease is immaterial.⁷¹ In some states, however, by statute, a stranger's property is exempt from distress.⁷² Things which are part of the freehold, as fixtures, cannot be distrained upon.⁷³

Things which are liable to be injured by keeping,⁷⁴ and also, it seems, things not readily capable of

69. Co. Litt. 162a.

70. Prescott v. Boucher, 3 Barn. & Adol. 849; Jones v. Jones, 3 Barn. & Adol. 967.

71. Gilbert, Distresses, 33; Bradley, Distresses, 73; 3 Blackst. Comm. 8.

72. 2 Tiffany, Landlord & Ten. § 328a(9).

73. Co. Litt. 47b; Gilbert, Distresses, 42; Turner v. Cameron, L. R. 5, Q. B. 30; Kassing v. Keo-

hane, 4 Ill. App. (4 Bradw.) 460; Reynolds v. Shuler, 5 Cow. (N. Y.) 323. In Furbush v. Chappell, 105 Pa. St. 187, it is decided that fixtures removable by a tenant are distrainable, a view which accords with the rule existing in that state that removable fixtures are personalty. See *ante*, § 272(d).

74. 2 Blackst. Comm. 101; Morley v. Pinchcombe, 2 Exch. 101.

identification, such as loose pieces of money,⁷⁵ are not subject to distress. Things in a person's actual use or possession, such as a horse which he is riding, or a machine at which he is working, are also exempt, in order that a breach of the peace may not be caused by an attempt to distrain thereon.⁷⁶ Implements or utensils of one's trade or profession, such as the axe of a carpenter or the books of a scholar, are exempt, if there be other things on the premises sufficient in amount to satisfy the distress; and beasts used for working a farm, and sheep thereon, are in the same way conditionally exempt.⁷⁷

Goods which are in the custody of the law,⁷⁸ as when they have been levied upon under execution,⁷⁹ or attachment,⁸⁰ are not distrainable. The rigor of this rule is, however, considerably alleviated, in England and in some states, by reason of statutes securing to the landlord, as against an execution levy, arrears of rent to the amount of one year's rent.⁸¹

The most important class of exemptions from distress consists of those in favor of trade or commerce, being generally of those things belonging to a third person which are temporarily on the leased premises

75. 1 Rolle's Abr. 667; Bac. Abr., Distress (B).

76. Co. Litt. 47a; Simpson v. Hartopp, Willes, 512; Beall v. Beck, 3 Cranch C. C. 666, Fed. Cas. No. 1,161; Couch v. Crawford, 10 Up. Can. C. P. 491.

77. Co. Litt. 47b; 3 Blackst. Comm. 9; Jenner v. Yolland, 6 Price, 3.

78. Co. Litt. 47b; Eaton v. Southby, Willes, 131; Bowser v. Scott, 8 Blackf. (Ind.) 86; Mulherin v. Porter, 1 Ga. App. 153, 58 S. E. 60; Karns v. McKinney, 78 Pa. 387; Cooley v. Perry, 34 S. C. 554, 13 S. E. 853; Meyer v. Oliver, 61 Tex. 584.

79. Herron v. Gill, 112 Ill. 247; Craddock v. Riddlesbarger, 32 Ky. (2 Dana) 205; Van Horn v. Goken, 41 N. J. L. 499; Sullivan v. Ellison, 20 S. C. 481.

80. Thomson v. Baltimore & Susquehenna Steam Co., 33 Md. 312; Pierce v. Scott, 4 Watts & S. (Pa.) 344; Ayres v. Depras, 2 Speers Law (S. Car.) 367; Meyer v. Oliver, 61 Tex. 584.

81. The English statute is that of 8 Anne c. 14, § 1. The various decisions upon this and the more or less similar state statutes are discussed in 1 Tiffany, Landlord & Ten. § 183.

for the purposes of the business there conducted, as in the case of raw material left there to be worked up,⁸² or goods placed there for purposes of sale⁸³ or for safe keeping.⁸⁴ For a similar reason, it seems, the property of a guest at an inn are exempt.⁸⁵

— **Things not on the premises.** Apart from statute,⁸⁶ only goods upon the demised premises can be distrained for the rent thereof, or, as it is frequently expressed, the distress must be made upon the premises.⁸⁷ In at least three states the law in this regard has been changed by statutes allowing the goods of the tenant to be distrained upon wherever located.⁸⁸ There are also, in a number of states,⁸⁹ as in Eng-

82. Co. Litt. 47a; *Read v. Burley*, Cro. Eliz. 596; *Knowles v. Pierce*, 5 Houst. (Del.) 178; *Hoskins v. Paul*, 9 N. J. L. 110, 17 Am. Dec. 455.

83. *McCreery v. Clafin*, 37 Md. 435, 11 Am. Rep. 542; *Connah v. Hale*, 23 Wend. (N. Y.) 462; *Brown v. Stackhouse*, 155 Pa. 582, 35 Am. St. Rep. 908, 26 Atl. 669; *Walker v. Johnson*, 4 McCord (S. Car.) 552.

84. *Miles v. Furber*, L. R. 8, Q. B. 77; *Beall v. Beck*, 3 Cranch. C. C. 666, Fed. Cas. No. 1,161; *Owen v. Boyle*, 22 Me. 47; *Brown v. Sims*, 17 Serg. & R. (Pa.) 138.

85. 3 Blackst. Comm. 8; *Bradley*, Distresses, 144; *Gorton v. Falkner*, 4 Term Rep. 567; *Lyons v. Elliott*, 1 Q. B. Div. 210; *Beall v. Beck*, 3 Cranch C. C. 666, Fed. Cas. No. 1,161; *Karns v. McKinney*, 74 Pa. 389; *Kellogg Newspaper Co. v. Peterson*, 162 Ill. 158, 53 Am. St. Rep. 300, 44 N. E. 411; *Elford v. Clark*, 3 Brev. (S. Car.) 88.

In one jurisdiction things belonging to a permanent boarder at

an inn or boarding house have been regarded as exempt. *Riddle v. Welden*, 5 Whart. (Pa.) 9. *Contra*, *Trieber v. Knabe*, 12 Md. 491, 71 Am. Dec. 607.

86. Except in the case of cattle driven off the premises in the sight of the landlord or his agent when about to distrain. Co. Litt. 161a; 2 Co. Inst. 132; *Bradby*, Distresses, 94. Or when there is an express stipulation allowing distress on things belonging to the lessee off the premises. *In re Roundwood Colliery Co.* [1897] 1 Ch. 373; *Dinquer v. McAndrews*, 10 Pa. Dist. R. 221.

87. Co. Litt. 161a; *White v. Hoeninghaus*, 74 Md. 127, 21 Atl. 700; *Crocker v. Mann*, 3 Mo. 472, 26 Am. Dec. 684; *Weiss v. John*, 37 N. J. L. 93; *Pemberton v. Van Rensselaer*, 1 Wend. (N. Y.) 307; *Clifford v. Beems*, 3 Watts. (Pa.) 246; *Mosby v. Leeds*, 3 Call (Va.) 439.

88. 2 Tiffany, Landlord & Tenant, § 3281(4).

89. *Id.*, § 3281(3).

land,⁹⁰ statutes authorizing a distress on the tenant's goods and chattels if removed by him from the premises in order to prevent a distress thereon. And in several states the same end of realizing from chattels removed from the premises, or liable to be removed, is secured by statutory provisions for attachment for rent.⁹¹

§ 416. **Lien for rent.** In quite a number of states there are statutes subjecting chattels or crops upon the demised premises to a lien in favor of the landlord for rent. Such a statutory lien on crops is not ordinarily restricted to the crops of the tenant, but the crops of a subtenant are subject thereto, while a lien given by statute on things other than crops is usually restricted to things belonging to the tenant himself. The statute ordinarily names the method of enforcing the lien, as, for instance, by attachment, or by statutory distress. But even when the statute named another method of enforcing the lien, a right to foreclose it by a proceeding in equity has not infrequently been upheld.⁹²

Occasionally a lien is created upon crops or other personal property upon the leased premises by express stipulation in the instrument of lease. A lien so created resembles, more or less, a chattel mortgage, and the courts are inclined to determine the rights of the lessor thereunder from this point of view. It is usually enforced by the decree of a court of equity for the sale of the property subject to the lien.⁹³

90. St. 11 Geo. 2, c. 19, § 1.

92. See 2 Tiffany, Landlord &

91. 2 Tiffany, Landlord & Tenant, §§ 347-351.

Tenant, § 321.

93. *Id.*, § 322.

CHAPTER XVII.

PUBLIC RIGHTS.

- § 417. Highways.
- 418. Parks, squares, and commons.
- 419. Customary rights.
- 420. Rights of fishing.
- 421. Rights of navigation.

§ 417. **Highways.** We have before referred to rights as to the use of the land of an individual for a public or *quasi* public purpose, such as a right of way for a railroad, for a drain, or for irrigation purposes.¹ These, however, though they involve a public use of the land, do not usually give a right of user to each member of the public, while the rights which we will now consider may ordinarily be exercised by any individual member of the public, or of that part of the public resident in a particular locality.

The most usual instance of a right, in each member of the public, thus to make use of another's land, exists in the case of a "highway" over private land; this being, in effect, a right of way in gross, in favor of each member of the public.

Though the existence of a highway does not, at common law, affect the ownership of the soil, which remains in the original owner, subject to use by the public for highway purposes, under some state statutes bearing upon the creation of highways, not only the right of user but the ownership, or "fee," as it is generally termed, of the land, is in the public, or in the state or municipality in trust for the public, in which case the rights of user in the public are not rights as to the

1. See *ante*, § 365.

user of another's land, but rather rights incident to ownership.²

— **Creation.** A highway may be created either (1) by "dedication" of the land by the owner to use as a highway; (2) by prescription,—that is, user of the land by the public for highway purposes for the prescriptive period; or (3) by statutory proceedings, involving, if necessary, the taking of the land upon the payment of compensation under the power of eminent domain.

Statutory proceedings are usually, in the case of suburban highways, instituted by owners of land interested in procuring the establishment of the highway; and in cities, by the municipal authorities. All persons interested in the land over or through which the highway is to run are made parties to the proceeding; and it is the ordinary practice, in one proceeding, to determine the damages to be paid to the owners of the land utilized for the highway, and to apportion among the owners of the land to be benefitted thereby the cost of the undertaking. The preliminary question whether the proposed highway is necessary for the public welfare may be determined by the legislature, or delegated to the local authorities, or left to be adjudicated by the tribunal which determines the question of damages.

The question whether, by proceedings of this character, the ownership or "fee" of the land is vested in the public, or merely a right of user, is to be determined by the terms of the statute; and unless this plainly contemplates that the "fee" shall be appropriated, it is generally held that the public acquires a right of user only.³

2. The use of the word "fee" in this connection to designate the ownership, as distinct from the mere right of user, of the land, though sanctioned by almost universal practice, is unfortunate, since the word is properly descrip-

tive of the duration of a right, rather than of its character, and its use erroneously implies that a mere right of user is necessarily less in duration than a fee.

3. 1 Lewis, Eminent Domain, § 449; Elliott, Roads & Streets,

The dedication of land to the public for use as a highway, and the creation of highways by prescription, will be considered in another part of this work.⁴

—**Rights of owner of land.** When the public have a right of passage merely, the owner of the land or "fee" therein may use it in any way not interfering with its use by the public for passage.⁵ He is, in the ordinary case, alone entitled to cut and appropriate the trees,⁶ or herbage,⁷ within the highway limits, and to remove the soil or minerals under the highway.⁸ The municipal authorities may, however, remove trees, earth or stone for the purpose of opening or improving the highway, and by some decisions they may utilize materials so obtained for the purpose of repairing other parts of the highway.⁹

The owner of the land may bring ejectment against one unlawfully inclosing or encroaching within the

§ 254; 2 Dillon, Municipal Corporations, § 589.

4. See *post*, §§ 479, 514.

5. Elliott, Roads & Streets, §§ 259, 876; 15 Am. & Eng. Enc. Law (2nd Ed.) 416; Cloverdale Homes v. Town of Cloverdale, 182 Ala. 419, 47 L. R. A. (N. S.) 607, 62 So. 712; Perley v. Chandler, 6 Mass. 454, 4 Am. Dec. 159; Glencoe v. Reed, 93 Minn. 518, 67 L. R. A. 901, 101 N. W. 956; Daily v. State, 51 Ohio St. 348, 46 Am. St. Rep. 578; Lynch v. Town of Northview, 73 W. Va. 609, 52 L. R. A. (N. S.) 1038, 81 S. E. 833.

6. City of Atlanta v. Holliday, 96 Ga. 546, 23 S. E. 509; Crismon v. Deck, 84 Iowa, 344, 51 N. W. 55; Bigelow v. Whitcomb, 72 N. H. 473, 65 L. R. A. 676, 57 Atl. 680; Weller v. McCormick, 52 N. J. L. 470, 8 L. R. A. 798, 19 Atl. 1101; Dalley v. State, 51 Ohio St. 348,

24 L. R. A. 724, 46 Am. St. Rep. 578, 37 N. E. 710; Sanderson v. Haverstick, 8 Pa. St. 294; Tucker v. Eldred, 6 R. I. 404.

7. Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121; Cole v. Drew, 44 Vt. 49, 8 Am. Rep. 363; People v. Foss, 80 Mich. 559, 45 N. W. 480, 20 Am. St. Rep. 532; Woodruff v. Neal, 28 Conn. 165; 1 Lewis, Eminent Domain, § 853.

8. Town of Suffield v. Hathaway, 44 Conn. 521, 26 Am. Rep. 483; Aurora v. Fox, 78 Ind. 1; Deaton v. Polk County, 9 Iowa, 594; West Covington v. Freking, 8 Bush (Ky.) 121; Glencoe v. Reed, 93 Minn. 518, 67 L. R. A. 901, 10 N. W. 956; Higgins v. Reynolds, 31 N. Y. 151.

9. See Dillon, Mun. Corp., § 1149; 15 Am. & Eng. Encyc. Law (2nd Ed.) 417, 418.

limits of the highway,¹⁰ or trespass against one who uses the land for a purpose not within the scope of its use as a highway,^{10a} or who injures trees or herbage thereon.¹¹

A city street is a highway, but a distinction is frequently asserted between such a highway and an ordinary rural highway, it being said that, while in the latter case the public have merely a right of passage, in the case of a city street there exists, besides this right of passage in individual members of the public, power in the municipal authorities to change the surface, to cut down trees, place sewers and pipes beneath the bed of the street, and in effect to exclude the owner of the land from any use thereof other than that of passage common to all individuals.¹² The cases, however, which assert such a distinction do not usually decide that a use can be made of a city street which

10. *Goodtitle v. Alker*, 1 Burr. 133; *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, 28 Am. Rep. 740; *Postal Telegraph Cable Co. v. Eaton*, 170 Ill. 513, 39 L. R. A. 722, 62 Am. St. Rep. 390, 49 N. E. 365; *Louisville, St. L. & T. Ry. Co. v. Liebfried*, 92 Ky. 407, 17 S. W. 870; *Proprietors of Locks & Canals on Merrimack River v. Nashua & L. R. Co.*, 104 Mass. 1; *Thomas v. Hunt*, 134 Mo. 392, 32 L. R. A. 857, 35 S. W. 581; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Becker v. Lebanon & M. St. Ry. Co.*, 195 Pa. 502, 46 Atl. 1096; *Contra*, *Cincinnati v. White*, 6 Pet. (U. S.) 431, 8 L. Ed. 452; *Becker v. Lebanon & M. St. Ry. Co.*, 195 Pa. 502, 46 Atl. 1096. See the suggestive discussion of the last cited case in an editorial note in 14 Harv. Law Rev. at p. 291.

10a. *Lade v. Shepherd*, 2

Strange 1004; *Burr v. Stevens*, 90 Me. 500, 38 Atl. 547; *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513; *Lewis v. Jones*, 1 Pa. St. 336, 44 Am. Dec. 138.

11. *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498, 8 L. Ed. 477; *Woodruff v. Neal*, 28 Conn. 165; *Blis v. Hall*, 99 Mass. 597; *Bolender v. Southern Michigan Tel. Co.*, 182 Mich. 646, 148 N. W. 697; *Gambel v. Pettijohn*, 116 Mo. 375, 22 S. W. 783; *Andrews v. Youmans*, 78 Wis. 56, 47 N. W. 304.

12. See *Western Railway of Alabama v. Alabama Grand Trunk R. Co.*, 96 Ala. 272, 17 L. R. A. 474, 11 So. 483; *Montgomery v. Santa Ana Westminster Ry. Co.*, 104 Cal. 186, 25 L. R. A. 654, 43 Am. St. Rep. 89, 37 Pac. 786; *Kincaid v. Indianapolis, etc., Gas Co.*, 124 Ind. 577, 8 L. R. A. 602, 19 Am. St. Rep. 113, 24 N. E. 1066; *Chesapeake & Pot. Telephone*

cannot be made of a suburban highway;¹³ and the sounder view seems to be that a suburban highway, like a city street, is subject to all highway uses and improvements which may be necessary, among which are to be included its use for the supply of water, light, or drainage, when these are rendered necessary by the density of population, and that the fact that the highway is within the limits of a city is immaterial, except as this is usually coincident with the necessity for such use.¹⁴

— **Additional servitude.** When the ownership of the land is not acquired by the public, but merely a right of passage, if the land within the highway limits is afterwards used for a purpose, even though of a public nature, which is not within the scope of the highway use for which the land was dedicated or appropriated, it is considered that the land is subjected to an additional burden or "servitude," entitling the owner to compensation as for a new taking of property. So it has been held that the use of the highway for a steam

Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690; Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. 973; McDevitt v. Peoples' Nat. Gas Co., 160 Pa. St. 367, 28 Atl. 948; Duquesne Light Co. v. Duff, 251 Pa. 607, 97 Atl. 82; Elliott, Roads & Streets, § 482 *et seq.*

13. "The only court in which it has been unequivocally adjudicated that a certain use was legitimate in the case of city streets, and not legitimate in the case of country highways, is that of Pennsylvania, in which it has been held that an electric passenger railway is a legitimate use of a city or village street, but not of a country road." 1 Lewis, Eminent Domain, § 118.

14. See Floyd County v. Rome St. R. Co., 77 Ga. 614, 3 S. E. 3; De Kalb Co. Telephone Co. v. Dutton, 228 Ill. 178, 10 L. R. A. (N. S.) 1057, 81 N. E. 838; Lake Shore M. S. R. Co. v. Whiting, 161 Ind. 76, 67 N. E. 933; Cater v. Northwestern Tel. Exch. Co., 60 Minn. 539, 28 L. R. A. 310, 51 Am. St. Rep. 543, 63 N. W. 111; Eels v. American Telephone & Telegraph Co., 143 N. Y. 133, 25 L. R. A. 640, 38 N. E. 202; Palmer v. Larchmont Electric Co., 158 N. Y. 231, 43 L. R. A. 672, 52 N. E. 1092; Callen v. Columbus Edison Elec. Light Co. 66 Ohio St. 166, 58 L. R. A. 782, 64 N. E. 141; Huddleston v. Eugene, 34 Ore. 343, 43 L. R. A. 444, 55 Pac. 868; 1 Lewis, Eminent Domain, § 118.

railway, carrying freight as well as passengers, is not an ordinary highway use, and that the owner of the fee is consequently entitled to compensation therefor.¹⁵ In New York a like view is taken as to a street railway,¹⁶ but the great weight of authority is to the effect that a passenger street railway operated on the surface of the ground is not an additional servitude.¹⁷ In some

15. *Western Railway of Alabama v. Alabama Grand Trunk R. Co.*, 96 Ala. 272, 17 L. R. A. 474, 11 So. 483; *Denver & Rio Grande R. Co. v. Stinemeyer*, 59 Colo. 396, 148 Pac. 860; *Inlay v. Union Branch R. Co.*, 26 Conn. 249; *Florida Southern Ry. Co. v. Brown*, 23 Fla. 104, 1 So. 512; *Harrold Bros. v. Americus*, 142 Ga. 686, 83 S. E. 534; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Mitchell v. Chicago B. & Q. Ry. Co.*, 265 Ill. 300, 106 N. E. 833; *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178; *Kucheman v. Chicago C. & D. R. Co.*, 46 Iowa, 366; *Phipps v. Western M. R. Co.*, 66 Md. 319, 7 Atl. 556; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; *White v. Northwestern North Carolina R. Co.*, 113 N. C. 610, 22 L. R. A. 627, 37 Am. St. Rep. 638, 18 S. E. 330; *Illinois Cent. R. Co. v. Hudson*, 136 Tenn. 1, 188 S. W. 589; 589 ("dummy" line). *Contra*, *Montgomery v. Santa Ana Westminster Ry. Co.*, 104 Cal. 186, 25 L. R. A. 654, 43 Am. St. Rep. 89, 37 Pac. 786; *Moore Mfg. Co. v. Springfield Southwestern Ry. Co.*, 256 Mo. 167, 165 S. W. 305.

The erection of poles and trolley wires to furnish electricity for the running of cars on streets other

than that on which the erections are made was held not to create a new servitude. *Brandt v. Spokane & I. E. R. Co.*, 78 Wash. 214, 52 L. R. A. (N. S.) 760, 138 Pac. 871.

16. *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404; *Peck v. Schenectady Ry. Co.*, 170 N. Y. 298, 63 N. E. 357; *Paige v. Schenectady*, 178 N. Y. 102, 70 N. E. 213. See, for a discussion of this matter, 1 Lewis, *Eminent Domain*, §§ 158-164; editorial note, 8 *Columbia Law Rev.* 575.

17. *Birmingham Traction Co. v. Birmingham Ry. & Electric Co.*, 119 Ala. 137, 43 L. R. A. 233, 24 So. 502; *Finch v. Riverside & A. Ry. Co.*, 87 Cal. 597, 25 Pac. 765; *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 579; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409; *Floyd County v. Rome St. R. Co.*, 77 Ga. 614, 3 S. E. 3; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.*, 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008; *Indiana Union Traction Co. v. Gough*, 54 Ind. App. 438, 102 N. E. 453; *Hodges v. Baltimore Union Passenger Ry. Co.*, 58 Md. 603; *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515; *Newell v. Minneapolis, L. & M. Ry. Co.*, 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839; *Williams v. Meridian Light & Ry.*

states a telegraph or telephone line is regarded as an additional burden on the fee,¹⁸ and in others a contrary view is taken.¹⁹ The use of a street or highway for sewers,²⁰ gas pipes,²¹ or water pipes,²² is a legitimate

Co., 110 Miss. 174, 69 So. 596; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Texas & P. Ry. Co. v. Rosedale St. R. Co.*, 64 Tex. 80.

A like view has been taken even when the street railway was used in part for transporting freight. *Percy v. Lewiston, A. & W. St. Ry.*, 113 Me. 106, 93 Atl. 43.

A subway utilized for travel has likewise been regarded as not constituting an additional servitude. *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 327; *Peabody v. Boston*, 220 Mass. 376, 107 N. E. 952.

18. *Pacific Postal Telegraph & Cable Co. v. Irvine*, 49 Fed. 113; *De Kalb County Telephone Co. v. Dutton*, 228 Ill. 178, 10 L. R. A. (N. S.) 1057, 81 N. E. 838; *Chesapeake & P. Tel. Co., of Baltimore v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690; *Stowers v. Postal Telegraph-Cable Co.*, 68 Miss. 559, 12 L. R. A. 864, 24 Am. St. Rep. 290, 9 So. 356; *Bronson v. Albion Telephone Co.*, 67 Neb. 1111, 60 L. R. A. 426, 93 N. W. 201; *Eels v. American Telephone & Telegraph Co.*, 143 N. Y. 133, 25 L. R. A. 640, 38 N. E. 202; *Western Union Telegraph Co. v. Williams*, 86 Va. 696, 8 L. R. A. 429, 19 Am. St. Rep. 908, 11 S. E. 106; *Krueger v. Wisconsin Tel. Co.* 106 Wis. 96, 50 L. R. A. 298, 81 N. W. 1041.

19. *Hobbs v. Long Distance Tel. & Tel. Co.*, 147 Ala. 393, 7 L.

R. A. (N. S.) 87, 41 So. 1003; *Ma-gee v. Overshiner*, 150 Ind. 127, 40 L. R. A. 370, 65 Am. St. Rep. 358, 49 N. E. 951; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *People v. Eaton*, 100 Mich. 208, 24 L. R. A. 721, 59 N. W. 145; *Julia Building Ass'n. v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398; *Cater v. Northwestern Telephone Exchange Co.*, 60 Minn. 539, 28 L. R. A. 310, 51 Am. St. Rep. 543, 63 N. W. 111; *Hershfield v. Rocky Mountain Bell Telephone Co.*, 12 Mont. 102, 29 Pac. 883; *Carpenter v. Lancaster*, 250 Pa. 541, 95 Atl. 702.

20. *Cone v. City of Hartford*, 28 Conn. 363; *City of Boston v. Richardson*, 13 Allen (Mass.) 146; *Stondinger v. City of Newark*, 28 N. J. Eq. 187, affirmed, 28 N. J. Eq. 446; *In re City of Yonkers*, 117 N. Y. 564, 23 N. E. 661; *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. 274; *Carpenter v. Lancaster*, 250 Pa. 541, 95 Atl. 702; 1 *Lewis Eminent Domain*, § 183.

21. *Dillon, Mun. Corp.*, § 1213; *McDevitt v. Peoples Nat. Gas Co.*, 160 Pa. 367, 28 Atl. 948; *Cheney v. Barker*, 198 Mass. 356, 16 L. R. A. (N. S.) 436, 84 N. E. 492.

22. *Provost v. New Chester Water Co.*, 162 Pa. St. 275, 29 Atl. 914; *Wood v. National Water Works Co.*, 33 Kan. 590, 7 Pac. 233; *City of Quincy v. Bull*, 106 Ill. 337; *Bishop v. North Adams Fire District*, 167 Mass. 364, 45 N. E. 925.

use, for which the owner of the fee cannot recover compensation, unless it is not for the benefit of the community itself, or the members thereof, but is for the benefit of another municipality, or of individuals alone.²³ The maintenance of a market on a highway constitutes an additional servitude,²⁴ as does the erection of a stand pipe to supply water to the community;²⁵ but a well or underground cistern has been regarded as maintainable in a street for the purpose of furnishing water for street sprinkling purposes, this being a street use.²⁶

Some of the later cases are to the effect that the ownership of the "fee" does not involve rights of such practical value as to authorize compensation in case of an additional use of the surface of the land,²⁷ and

23. *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 8 L. R. A. 602, 19 Am. St. Rep. 113.

24. *N. E.* 1066; *Ward v. Triple State Nat. Gas Oil Co.*, 115 Ky. 723, 74 S. W. 709; *Baltimore County Water & Elec. Co. v. Dubreuil*, 105 Md. 424, 66 Atl. 439; *Bloomfield & R. Natural Gas Light Co. v. Calkins*, 62 N. Y. 386; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 27 N. E. 973; *Sterling's Appeal*, 111 Pa. St. 35, 56 Am. Rep. 246, 2 Atl. 105; *Contra*, *Che- ney v. Barker*, 198 Mass. 356, 16 L. R. A. (N. S.) 436, 84 N. E. 492.

24. *Lutterloh v. Town of Cedar Keys*, 15 Fla. 306; *Schopp v. City of St. Louis*, 117 Mo. 131, 20 L. R. A. 783, 22 S. W. 898; *State v. Laverack*, 34 N. J. L. 201.

25. *Barrows v. City of Sycamore*, 150 Ill. 588, 25 L. R. A. 535, 41 Am. St. Rep. 400, 37 N. E. 1096. And so as to a water tank above the surface, *Morrison v.*

Hinkson, 87 Ill. 587, *Davis v. Applepton*, 109 Wis. 580, 85 N. W. 515.

26. *West v. Bancroft*, 32 Vt. 367. *Contra*, *Dubuque v. Mahoney*, 9 Iowa 450, criticized *Dillon*, *Mun. Corp.* § 1156.

27. *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Theobald v. Louisville, N. O. & T. Ry. Co.*, 66 Miss. 279, 4 L. R. A. 735, 14 Am. St. Rep. 564, 6 So. 230; *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 70 L. R. A. 761, 106 Am. St. Rep. 549, 73 N. E. 1108; *White v. Northwestern North Carolina R. Co.*, 113 N. C. 610, 22 L. R. A. 627, 37 Am. St. Rep. 639, 18 S. E. 630; *Blackwell, E. & S. W. R. Co. v. Gist*, 18 Okla. 516, 90 Pac. 889; *McQuaid v. Portland & V. Ry. Co.* 18 Ore. 237, 22 Pac. 899; *Gulf, C. & S. F. R. Co. v. Eddins*, 60 Tex. 656; *Dooley Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31, 33 Pac. 229.

the text books usually uphold this view,²⁸ which has gained strength with the development of the modern doctrine, referred to in the next paragraph, that the abutting owner is, as such, entitled to compensation for interference with his rights of light, air, and access caused by the additional use of the highway,—a doctrine which renders it unnecessary to base his right to compensation on his possible ownership of the fee.

— **Rights of abutting owners.** The owner of land abutting on a highway has sometimes been regarded as having no right to compensation by reason of a new use of the highway, unless he can, as above indicated, recover compensation as owner of the “fee” in the highway, the result being to exclude any recovery by him if the fee is in the public.²⁹ The view is, however, quite usually taken, at the present day, that an abutting owner, as such, has rights of access to his premises by means of the highway, and also rights to enjoy light and air from the open space above the highway, which cannot be destroyed or impaired, to his detriment, except in the use and improvement of the highway for highway purposes, without making compensation to him.³⁰

28. 1 Lewis, *Eminent Domain*, § 128; Randolph, *Eminent Domain*, § 415; Dillon, *Mun. Corp.* §§ 1136, 1279.

29. *Florida Southern Ry. Co. v. Brown*, 23 Fla. 104, 1 So. 512; *Moses v. Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 516; *Davis v. C. & N. W. Ry. Co.*, 46 Iowa 389; *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 8 L. R. A. 453, 24 N. E. 919; *East End St. R. Co. v. Doyle*, 88 Tenn. 747. 9 L. R. A. 100, 13 S. W. 936. See Lewis, *Eminent Domain*, § 156, note 31.

30. *Field v. Barling*, 149 Ill.

556, 41 Am. St. Rep. 311, 37 N. E. 850, 24 L. R. A. 406; *Barrows v. City of Sycamore*, 150 Ill. 588, 25 L. R. A. 535, 41 Am. St. Rep. 400, 37 N. E. 1096; *Decker v. Evansville, S. & N. Ry. Co.*, 133 Ind. 493, 33 N. E. 349; *Chesapeake & P. Tel. Co. of Baltimore v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690; *Spencer v. Metropolitan St. Ry. Co.*, 120 Mo. 154, 22 L. R. A. 668, 23 S. W. 126; *Barnett v. Johnson*, 15 N. J. Eq. 481; *White v. Northwestern North Carolina R. Co.*, 113 N. C. 610, 22 L. R. A. 627, 37 Am. St. Rep. 639, 18 S. E. 330; *McQuaid v. Portland & V. Ry. Co.*, 18 Ore.

These rights are frequently spoken of as "easements" in the highway, or in the land used for the highway, and they are in some respects analogous to easements.³¹

It is on the theory that such rights are impaired that an abutting owner has been held to be entitled to compensation on account of the construction and maintenance of an elevated railway in the street;³² and since the maintenance of a steam railroad in the highway, for the purpose of transporting freight as well as passengers from town to town, is usually regarded as a use of the highway for other than highway purposes, the abutting owners are, it seems, entitled to compensation for the resulting interference with their rights of light, air, and access, irrespective of the ownership of the land within the highway limits.³³ A passenger street railway, operated on the surface of the highways, whether it be a horse, electric, or cable railway, is regarded as

237, 22 Pac. 899; *Johnston v. Old Colony R. Co.*, 18 R. I. 642, 49 Am. St. Rep. 800, 29 Atl. 594; *Frater v. Hamilton County*, 90 Tenn. 661, 19 S. W. 233; *Davis v. Spragg*, 72 W. Va. 672, 48 L. R. A. (N. S.) 173, 79 S. E. 652; 1 *Lewis, Eminent Domain*, §§ 120-123; *Dillon, Mun. Corp.* § 1245.

31. See, as to the character of such rights, 15 *Harv. Law Rev.* at p. 305. And as to the theory on which they may be regarded as arising, see 1 *Lewis, Eminent Domain* (3rd Ed.), § 121 *et seq.*

32. *Story v. New York Elevated R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan Elevated Ry. Co.*, 104 N. Y. 268, 10 N. E. 528; *Bischoff v. New York El. R. Co.*, 138 N. Y. 257, 33 N. E. 1073. See *Aldis v. Union Elevated R. Co.*, 203 Ill. 567, 68 N. E. 95; *Rourke v. Holmes St. Ry. Co.*, — (Mo. App.) —, 117 S. W. 1102.

33. *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122, 16 L. R. A. (N. S.) 874, 127 Am. St. Rep. 100, 95 Pac. 343; *South Carolina R. Co. v. Steiner*, 44 Ga. 546, 560; *Illinois Cent. R. Co. v. Elliott*, 129 Ky. 121, 110 S. W. 817; *Hoffman v. Flint & P. M. R. Co.*, 114 Mich. 316, 72 N. W. 167; *Gustafson v. Hamm*, 56 Minn. 334, 22 L. R. A. 565, 57 N. W. 1054; *Theobald v. Louisville, N. O. & T. Ry. Co.*, 66 Miss. 279, 4 L. R. A. 735, 14 Am. St. Rep. 564, 6 So. 230; *Chicago, R. I. & P. Ry. Co. v. Sturey*, 55 Neb. 137, 75 N. W. 557; *White v. Northwestern North Carolina R. Co.*, 113 N. C. 610, 22 L. R. A. 627, 37 Am. St. Rep. 639, 18 S. E. 330; *Caveness v. Charlotte, R. & S. R. Co.*, 172 N. C. 305, 90 S. E. 244; *Gulf C. & S. F. R. Co. v. Eddins*, 60 Tex. 656. See *Decker v. Evansville, S. & N. Ry. Co.*, 133 Ind. 493, 33 N. E.

a use of the highway for highway purposes, and as consequently not ground for the recovery of damages by the abutting owner.³⁴

Ordinarily, it seems, the construction of a tunnel or subway involves no interference with any of these easements, and the abutting owner has, as such, no right to assert a claim for damages on account thereof,^{34a} but the mode of construction may occasionally be such as to involve interference.^{34b}

The authorities are generally to the effect that an owner of land abutting on a street is not entitled to compensation for impairment of the value of his land by a change of the grade of the street, provided there

249; *Kansas, N. & D. Ry. Co. v. Cuykendall*, 42 Kan. 234, 16 Am. St. Rep. 21 Pac. 1051; *Dillon, Mun. Corp.*, §§ 1250-1257. But see *Montgomery v. Santa Ana Westminster Ry. Co.*, 104 Cal. 186, 25 L. R. A. 654, 43 Am. St. Rep. 89, 37 Pac. 786; *Olney, City of v. Wharf*, 115 Ill. 519, 56 Am. Rep. 178, 5 N. E. 366; *O'Connor v. St. Louis, K. C. & N. R. Co.*, 56 Iowa. 735, 10 N. W. 263; *Henry Gans & Sons Mfg. Co. v. St. Louis, K. & N. W. Ry. Co.*, 113 Mo. 308, 18 L. R. A. 339, 35 Am. St. Rep. 706, 20 S. W. 658; *Sherlock v. Kansas City B. Ry. Co.*, 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629; *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 157.

34. 1 *Lewis, Eminent Domain*, §§ 158-164; *Randolph, Eminent Domain*, §§ 402, 403; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008; *Louisville Ry. Co. v. Foster*, 108 Ky. 743, 50 L. R. A. 813, 57 S. W. 480; *Briggs v. Lewiston & H. R. Co.*, 79 Me. 363, 1 Am. St. Rep. 316, 10 Atl.

47; *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515; *Austin v. Detroit, Y. & A. A. Ry. Co.*, 134 Mich. 149, 2 Ann. Cas. 530, 96 N. W. 35; *Placke v. Union Depot Ry. Co.*, 140 Mo. 634, 41 S. W. 915; *Kirkpatrick v. Piedmont Traction Co.*, 170 N. C. 477, 87 S. E. 232; *Rafferty v. Central Traction Co.*, 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884; *San Antonio Rapid Transit St. Ry. Co. v. Limburger*, 88 Tex. 79, 53 Am. St. Rep. 730, 30 S. W. 533. *Contra*, *Slaughter v. Meridian Light & R. Co.*, 95 Miss. 251, 25 L. R. A. (N. S.) 1265, 48 So. 6; *Jaynes v. Omaha St. Ry. Co.*, 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67, by reason of trolley poles).

34a. *Lincoln Safe Deposit Co.*, 210 N. Y. 34, 103 N. E. 768. See *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 327.

34b. *Colorado Springs v. Stark*, 57 Colo. 384, 140 Pac. 794; *Barnard v. Chicago*, 270 Ill. 27, 110 N. E. 412.

is no actual encroachment upon the land; and the fact that the easements of light, air, or access are thereby affected is immaterial.³⁵

Besides the abutting owner's easements of light, air and access, there are occasional decisions or *dicta* to the effect that he has a right of unobstructed view from and over every part of the highway to and from his property,³⁶ and a number of courts have recognized rights in him to the comfort and satisfaction obtainable from the presence of trees in the highway, with a resulting right of action against persons injuring or destroying the trees, he being sometimes referred to as having an easement in the trees.^{36a} In one state it has been broadly asserted that the abutting owner has a property right in all the advantages and benefits which

35. *Smith v. Corporation of Washington*, 20 How. (U. S.) 135, 15 L. Ed. 858; *Bowden v. Jacksonville*, 52 Fla. 216, 42 So. 394; *Roberts v. City of Chicago*, 26 Ill. 249; *Reilly v. Fort Dodge*, 118 Iowa, 633, 92 N. W. 887; *Calender v. Marsh*, 1 Pick. (Mass.) 417, 430; *City of Pontiac v. Carter*, 32 Mich. 164; *Radeliff's Ex'rs v. City of Brooklyn*, 4 N. Y. 195; *Brand v. Multnomah County*, 38 Ore. 791, 50 L. R. A. 389, 62 Pac. 209, 84 Am. St. Rep. 772, 60 Pac. 390; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Kehrer v. Richmond City*, 81 Va. 745; *Walsh v. Campbellsport*, 123 Wis. 334, 101 N. W. 709; 1 Lewis, *Eminent Domain*, §§ 127-140; 3 Dillon, *Mun. Corp.*, § 1152.

In Ohio the abutting owner may recover compensation for damage to improved property from an unreasonable change of grade. *City of Akron v. Chamberlain Co.*, 34 Ohio St. 328; *Cincinnati v. Whet-*

stone, 47 Ohio St. 196.

36. *First Nat. Bank v. Tyson*, 133 Ala. 459, 59 L. R. A. 399, 91 Am. St. Rep. 46, 32 So. 144; *Williams v. Los Angeles Ry. Co.*, 150 Cal. 592, 89 Pac. 330; *Perry v. Castner*, 124 Iowa, 386, 100 N. W. 84; *McCormick v. Weaver*, 144 Mich. 6, 107 N. W. 314; *Jaynes v. Omaha St. R. Co.*, 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67; *Hallock v. Scheyer*, 33 Hun (N. Y.) 111; *Cobb v. Saxby* [1914] 3 K. B. 822. See *Green v. Thresher*, 255 Pa. 169, 83 Atl. 711, and editorial note, 28 Harv. Law Rev. 499, from which some of the above references have been taken.

36a. *Newland v. Iowa Ry. & Light Co.*, 179 Iowa, 228, 159 N. W. 244; *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 70 L. R. A. 761, 106 Am. St. Rep. 549, 73 N. E. 1108; *Wheeler v. Norfolk-Carolina Telephone & Telegraph Co.*, 172 N. C. 9, 89 S. E. 793; *Norman Milling & Grain Co. v. Beth-*

accrue to him by reason of the location of his land upon the street.³⁷

— **Rights of deviation.** There are a number of decisions and *dicta* to the effect that, if a highway becomes impassable at a certain point, a traveler may deviate on the adjoining land.³⁸ The existence of such a right at common law has been generally assumed; but whether it would be recognized at the present day in England, in the absence of a prescriptive right to deviate, is doubtful.³⁹ Even where the right is recognized, it is restricted to cases of strict necessity,⁴⁰ and the deviation upon neighboring land must be to the smallest possible extent.⁴¹

— **Extinction of highway.** The common-law maxim, "Once a highway, always a highway,"⁴² may be regarded as entirely obsolete in this country, and here a highway may cease to exist through one of several causes.

There are in many states statutory provisions for the "vacation" of a highway, frequently by proceedings upon petition, more or less similar to proceedings

urem, 41 Okla. 735, 51 L. R. A. (N. S.) 1082, 139 Pac. 830.

37. *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 70 L. R. A. 761, 106 Am. St. Rep. 549, 73 N. E. 1108. See 3 Dillon, Mun. Corp. § 1126.

38. *Carey v. Rae*, 58 Cal. 159; *Irwin v. Yeager*, 74 Iowa, 174, 37 N. W. 136; *Campbell v. Race*, 7 Cush. (Mass.) 408, 58 Am. Dec. 728; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Williams v. Safford*, 7 Barb. (N. Y.) 309; *State v. Brown*, 109 N. C. 802, 14 S. E. 98; *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811; *Taylor v. Whitehead*, 2 Doug. (Mich.) 745; *Dawes v. Hawkins*, 8 C. B. N.

S. 848; 2 Wms. Saund., 161 note (12).

39. See the remarks of Black-lurn, J., in *Arnold v. Holbrook*, L. R. 8 Q. B. 96, in which he shows that, in *Duncomb's Case*, Cro. Car. 366, and *Absor v. French*, 2 Show. 28, usually referred to in support of the right, the question was not involved.

40. *Campbell v. Race*, 7 Cush. (Mass.) 408; *State v. Brown*, 109 N. C. 802; *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811.

41. *Holmes v. Seely*, 19 Wend. (N. Y.) 510; *White v. Wiley*, 59 Hun. 618, 13 N. Y. Supp. 205.

42. *Dawes v. Hawkins*, 8 C. B. (N. S.) 848, 858.

for the establishment of a highway.⁴³ The owner of land immediately abutting on the highway thus vacated is, if the highway is a city street, usually regarded as deprived of property by reason of the impairment of his right of access, and so entitled to compensation.⁴⁴ The courts differ as to whether an abutting owner is entitled to compensation in case a part of the highway other than that contiguous to his land is vacated, and even those which recognize a possible right of compensation in such case differ as to the criteria by which to determine whether he suffers substantial injury different from that suffered by members of the public generally, so as to be entitled to compensation in the particular case.^{44a}

Some courts hold that the public rights to use land for a highway may be lost by adverse possession on the part of an individual, they taking the view that the maxim "*Nullum tempus occurrit regi*" is not applicable, since the ownership of the highway is to be regarded as vested in the municipality or *quasi* municipality, rather than in the state.⁴⁵ Other courts, however, deny that a highway can be thus extinguished;⁴⁶ and this

43. 15 Am. & Eng. Law, 396 *et seq.*; Elliott, Roads & Streets, §§ 879-881.

44. 1 Lewis, Eminent Domain, § 200 *et seq.*; 3 Dillon, Mun. Corp., § 1160; 3 McQuillan, Mun. Corp., § 1405; Elliott, Roads and Streets, § 877. See Oler v. Pittsburgh, C., C. & St. L. Ry. Co., 184 Ind. 431, 111 N. E. 619; Jones v. Aurora, 97 Neb. 825, 151 N. W. 958; Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co., 240 Pa. 519, 87 Atl. 968. Compare Chenault v. Collins, 155 Ky. 312, 159 S. W. 834.

44a. See editorial note, 16 Columbia Law Rev. at p. 139; 3 Dillon, Mun. Corp., p. 1842.

45. City of Fort Smith v. McKibbin, 41 Ark. 45, 48 Am. Rep. 19; Inhabitants of Town of Litchfield v. Wilmot, 2 Root (Conn.) 288; Dudley v. Trustees of Frankfort, 12 B. Mon. (Ky.) 612; City of Big Rapids v. Comstock, 65 Mich. 78; Meyer v. City of Lincoln, 33 Neb. 566, 29 Am. St. Rep. 500, 18 L. R. A. 146, 50 N. W. 763; Ostrom v. City of San Antonio, 77 Tex. 345, 14 S. W. 66; Knight v. Heaton, 22 Vt. 480.

46. Reed v. City of Birmingham, 92 Ala. 339, 9 So. 161; Hoadley v. City of San Francisco, 50 Cal. 265; Ulman v. Charles Street Ave. Co., 83 Md. 130; Bice v. Town of Walcott, 64 Minn. 459,

would seem to be the better view, since the municipality, so far as it can be considered as the owner of the highway, is so merely as an agent of the state, and as any adverse acts by an individual constitute an obstruction of the highway, and are consequently a public nuisance, the effect of the opposite view is to validate, by lapse of time, a public nuisance,—a thing which, by the authorities generally, cannot be done.⁴⁷

— **Abandonment.** There are a number of decisions to the effect that the abandonment and consequent extinction of a highway may be shown by nonuser, in conjunction with other circumstances.⁴⁸ It is sometimes said that a highway is not lost by nonuser,⁴⁹ but in this respect the same principle apparently applies as in the case of private easements;⁵⁰ nonuser itself not extinguishing the highway, but being a circumstance to be considered with other circumstances, in determining whether there has been an abandonment thereof.

67 N. W. 69; *City of Vicksburg v. Marshall*, 59 Miss. 563; *Thompson v. Major*, 58 N. H. 242; *Hoboken Land & Improvement Co. v. City of Hoboken*, 36 N. J. Law 540; *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514; *Heddeleton v. Hendicks*, 52 Ohio St. 460; *Com. v. Moorehead*, 118 Pa. St. 344, 4 Am. St. Rep. 599; *Almy v. Church*, 18 R. I. 182, 26 Atl. 58; *Ralston v. Town of Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326; *Yates v. Town of Warren-ton*, 84 Va. 337, 10 Am. St. Rep. 860, 4 S. E. 818.

47. *Reed v. City of Birmingham*, 92 Ala. 339, 9 So. 161; *City of Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; *Wolfe v. Town of Sullivan*, 133 Ind. 331, 32 N. E. 1017; *Territory v. Deegan*, 3 Mont. 82; *Driggs v. Phillips*, 103 N. Y. 77; *Sim-*

mons. v. Cornell, 1 R. I. 519. See 2 Wood, Nuisances, § 936.

48. *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86; *Greist v. Amrhyn*, 80 Conn. 280, 68 Atl. 521; *City of Peoria v. Johnston*, 56 Ill. 45; *People v. Cleveland*, C. C. & St. L. Ry. Co., 269 Ill. 555, 109 N. E. 1064; *Louisville, N. A. & C. Ry. Co. v. Shanklin*, 98 Ind. 573; *Larson v. Fitzgerald*, 87 Iowa, 402, 54 N. W. 441; *Holt v. Sargent*, 15 Gray (Mass.) 97; *Burgwyn v. Lockhart*, 60 N. C. 264; *Elliott, Roads & Streets*, §§ 1172-1177.

49. *Thompson v. Major*, 58 N. H. 242; *Com. v. McNaugher*, 131 Pa. St. 55, 18 Atl. 934; *Galbraith v. Littleich*, 73 Ill. 209; *McCarl v. Clarke County*, 167 Iowa, 14, 148 N. W. 1015.

50. See *ante*, § 377.

The statute occasionally provides that the failure to open a highway for use within a certain time after its establishment by statutory proceedings shall be regarded as an abandonment,⁵¹ and sometimes there is a provision that this shall be the result of a failure to use, for a period named, a highway which has been opened.⁵²

— **Effect of extinction.** When the highway involves merely a right of user by the public, the owner of the “fee,” upon the extinction of the highway, resumes entire dominion over the land, free from any rights in the public.⁵³ Usually, the owner of the fee is the abutting proprietor, and thus the extinction enures to his benefit.⁵⁴ In some jurisdictions there is a statutory provision that the abutting owner shall have the land in such case.⁵⁵

When the “fee” is in the public, there is, by some cases, a reverter of the land to the original owner upon the extinction of the highway, upon the theory that the public, or rather the state, has merely a determinable

51. *Trotter v. Barrett*, 164 Ill. 262, 45 N. E. 149; *Horey v. Village of Haverstraw*, 124 N. Y. 273, 26 N. E. 532; *McClelland v. Miller*, 28 Ohio St. 488; *Pickford v. City of Lynn*, 98 Mass. 491; 15 Am. & Eng. Enc. Law, 406.

52. *McRose v. Bottyer*, 81 Cal. 122, 22 Pac. 393; *Herrick v. Town of Geneva*, 92 Wis. 114, 65 N. W. 1034; *Freeholders of Mercer County v. Pennsylvania R. Co.*, 45 N. J. Law. 82; *Barnes v. Midland Railroad Terminal Co.*, 218 N. Y. 91, 112 N. E. 926.

53. *Harris v. Elliott*, 10 Pet. (U. S.) 25, 9 L. Ed. 333; *Benham v. Potter*, 52 Conn. 248; *Smith v. Horn*, 70 Fla. 484, 70 So. 435; *Waller v. River Forest*, 259 Ill. 223, 102 N. E. 290; *Steenerson v.*

Fontaine, 106 Minn. 225, 119 N. W. 400; *Blain v. Staab*, 10 N. Mex. 743, 65 Pac. 177; *Heard v. Brooklyn*, 60 N. Y. 242; *Lankin v. Terwilliger*, 22 Ore. 97, 29 Pac. 268; *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649.

54. *Thomsen v. McCormick*, 136 Ill. 135; *Harrison v. Augusta Factory*, 73 Ga. 447; *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649; *Healey v. Babbitt*, 14 R. I. 533; *Dickenson v. Arkansas City Imp. Co.*, 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170.

55. 15 Am. & Eng. Enc. Law, 420. See *Scudder v. City of Detroit*, 117 Mich. 77; *Haseltine v. Nuss*, 97 Kan. 228, 155 Pac. 55; *Edwards v. Smith*, 42 Okla. 544, 142 Pac. 302.

fee.⁵⁶ By other decisions, there is a fee simple, and not a mere determinable fee, in the public, and no right of reverter exists.⁵⁷

— **Turnpikes.** Turnpikes are highways, the use of which by a member of the public is conditional upon payment by him of a certain fixed compensation or "toll." Turnpikes are usually, if not always, established by private corporations or associations of individuals, under authority granted by the state,⁵⁸ and the right of way may be acquired under the power of eminent domain, as in the case of any ordinary highway.⁵⁹ The proprietors of the turnpike usually have an easement only in the land for use as a highway,⁶⁰ but may have the ownership or "fee."⁶¹ The turnpike must be kept in repair by the proprietors thereof, and for injuries caused by negligent failure to make repairs they are liable.⁶²

§ 418. Parks, squares, and commons. In connection with the subject of highways, which they resemble as involving rights of user in the individual members of the public, it seems proper to refer to parks, public squares, and commons, though the ownership of land

56. *Gebhardt v. Reeves*, 75 Ill. 301; *Matthieson & Hegeler Zinc Co. v. La Salle*, 117 Ill. 411, 8 N. E. 81; *Plumer v. Johnston*, 63 Mich. 165, 29 N. W. 687; *Board of Education of Van Wert v. Edson*, 18 Ohio St. 221. And see *Fairchild v. City of St. Paul*, 46 Minn. 540, 49 N. W. 325.

57. *Pettingill v. Devin*, 35 Iowa, 344; *Tift v. City of Buffalo*, 82 N. Y. 204.

58. *Com. v. Wilkinson*, 16 Pick. (Mass.) 175, 26 Am. Dec. 654; *Angell, Highways*, § 8; *Elliott, Roads & St. c. 4*.

59. 1 *Lewis, Eminent Domain*,

§ 261; *Randolph, Eminent Domain*, § 42.

60. See *Wright v. Carter*, 27 N. J. Law, 76; *Robbins v. Borman*, 1 Pick. (Mass.) 122; *Turner v. Rising Sun & L. Turnpike Co.*, 71 Ind. 547; *State v. Maine*, 27 Conn. 641, 71 Am. Dec. 89.

61. See *People v. Newburgh & S. Plank Road Co.*, 86 N. Y. 1.

62. 2 *Shearman & R. Negligence*, c. 16; *Elliott, Roads & Streets* §§ 111-116; *Carver v. Detroit & S. Plank-Road Co.*, 61 Mich. 584, 28 N. W. 721; *Baltimore & L. T. Co. v. Cassell*, 66 Md. 419, 59 Am. St. Rep. 175, 7 Atl. 805.

appropriated to these purposes is usually vested in the state or municipality, and consequently the rights exercised therein by the public are but seldom rights in another's land.

The term "park" is ordinarily applied to a tract of land, in or near a town or city, which is subject to state or municipal control, and designed to furnish the public with opportunities for recreation and to obtain fresh air and exercise. The term "square" or "public square" is also used in this connection, without any very precise meaning, but usually with reference to a space in a city, under municipal control, a part or the whole of which is devoted to vegetation of an ornamental or at least agreeable character. Land may be acquired for the purpose of a park or public square by direct purchase,⁶³⁻⁶⁴ by proceedings under the power of eminent domain,⁶⁵ or by dedication of land for the purpose by a private individual.⁶⁶

— **Commons.** The term "common" is sometimes used to describe lands open to use by all the inhabitants of a city or town, and subject to the control of the public authorities. This is the construction usually given to a grant or dedication of land for use as a "common," it being in effect thereby declared that the land shall be open for use by the public, subject to municipal, or, occasionally, state, control.⁶⁷

63-64. *Holt v. City Council of Somerville*, 127 Mass. 408; *People v. Common Council of Detroit*, 28 Mich. 230, 15 Am. Rep. 202.

65. 1 *Lewis, Eminent Domain*, § 271; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *West Chicago Park Com'rs v. Western Union Telegraph Co.*, 103 Ill. 33; *St. Louis County Court v. Griswold*, 58 Mo. 175.

66. See *post*, § 479.

67. See *City of Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, 8 L. Ed. 452; *Den d. Commissioners of Town of Bath v. Boyd*, 23 N. C. 194; *City of Newport v. Taylor*, 16 B. Mon. (Ky.) 699; *White v. Smith*, 37 Mich. 291; *Goode v. City of St. Louis*, 113 Mo. 257, 20 S. W. 1048; *Crawford v. Mobile & G. R. Co.*, 67 Ga. 405; *Sheffield & Tuscumbia St. Ry. Co. v. Moore*, 83 Ala. 294; *Newell v. Town of Hancock*, 67

In the New England colonies the term "common" was applied to a particular class of lands, which belonged, not to the municipality or to individuals, but rather to associations of individuals. This system of holding lands arose from the frequent practice, upon the founding of a town, of reserving a large portion of the territory within the town limits, to be utilized by the settlers in common for pasture, cultivation, the procuring of timber or building stone, and like purposes. Tracts of land thus reserved were called "commons," "common lands," or "general fields," and the persons entitled to share in the benefits thereof were known as "proprietors," in contradistinction to those who, becoming inhabitants of the town at a later period, were not regarded as entitled to such benefits. As time went on, these common lands became reduced in quantity, owing to the extensive allotments of parts thereof by the proprietors to individuals, and those which remained common came gradually, as the numbers of the non-proprietors increased so that they controlled the policy and public opinion of the town, to be regarded as the property of the town, rather than that of the proprietors or their descendants; and so much of the old common lands as at the present day retain their common character are utilized chiefly for park and pasture purposes, for the benefit of all the inhabitants.⁶⁸ There have been a number of decisions in regard to

N. H. 244, 35 Atl. 253; Trustees of Western University v. Robinson, 12 Serg. & R. (Pa.) 29; Carr v. Wallace, 7 Watts (Pa.) 394; Bell v. Ohio & P. R. Co., 25 Pa. St. 161, 64 Am. Dec. 687.

So occasionally, in colonial grants, certain land was given for use as a "common," this being regarded as in effect a gift of the land to the town. Town of Southampton v. Mecox Oyster Bay Co., 12 N. Y. St. Rep. 514; Denton v. Jack-

son, 2 Johns. Ch. (N. Y.) 320.

68. See Johns Hopkins University Studies in Historical & Political Science, Series 1, Nos. II., IX., X., by Prof. H. B. Adams, and Series 4, Nos. XI., XII., by Melville Egleston, Esq.

The same system of commons occasionally existed in New York. See John Hopkins Studies, Series 4, No. I., by Irving Elting, Esq.; Appley v. Trustees of Montauk, 38 Barb. (N. Y.) 275.

these common lands in New England, as, for instance, to determine who constitute the proprietors, in a particular case,⁶⁹ the regularity of their meetings and proceedings,⁷⁰ or the validity of sales or allotments of the lands to individuals.⁷¹ Such questions, however, are of chiefly local interest, and, moreover, have lost their importance to a great extent with the disappearance of the common lands and the proprietary bodies, and no consideration of these matters will be here attempted.

Similar to the New England common lands were the communal lands belonging to the inhabitants of French and Spanish villages in parts of the territory included in the Louisiana purchase. The titles of these communal lands were confirmed in favor of the village inhabitants by act of congress after the cession of the territory to the United States.⁷²

§ 419. Customary rights. In England, persons of a certain locality or of a certain class may have, by immemorial custom, a right to make use of land belonging to an individual. Thus, there may be a custom for the inhabitants of a certain town to dance or play games on a particular piece of land belonging to an in-

69. See *Brackett v. Persons* Unknown, 53 Me. 228, 87 Am. Dec. 548; *Stevens v. Taft*, 3 Gray (Mass.) 487.

70. See *Copp v. Lamb*, 12 Me. 312; *Dolloff v. Hardy*, 26 Me. 545; *Coffin v. Lawrence*, 143 Mass. 110, 9 N. E. 6; *Goulding v. Clark*, 34 N. H. 148; *Woodbridge v. Proprietors of Addison*, 6 Vt. 204.

71. See *Mitchell v. Starbuck*, 10 Mass. 5; *Dolloff v. Hardy*, 26 Me. 545; *Coburn v. Ellenwood*, 4 N. H. 99; *Beach v. Fay*, 46 Vt. 337; *Dall v. Brown*, 5 Cush. (Mass.) 289; *Inhabitants of Glou-*

cester v. Gaffney, 8 Allen (Mass.) 11.

72. *Savignac v. Garrison*, 18 How. (U. S.) 136, 15 L. Ed. 290; *Dent v. Emmeger*, 14 Wall. (U. S.) 308, 20 L. Ed. 838; *Glasgow v. Hortig*, 1 Black (U. S.) 595, 17 L. Ed. 110; *Hebert v. Lavalley*, 27 Ill. 448; *Lavalley v. Strobel*, 89 Ill. 370; *Haps v. Hewitt*, 97 Ill. 498; *Page v. Scheibel*, 11 Mo. 167; *City of St. Louis v. Toney*, 21 Mo. 243; *Carondelet v. City of St. Louis*, 29 Mo. 527; *Glasgow v. Baker*, 85 Mo. 559; *Id.*, 72 Mo. 441.

dividual,⁷³ or to go thereon in order to get water.⁷⁴ So there may be a custom for fishermen to dry nets on certain land,⁷⁵ or for persons in a certain trade (victualers) to erect booths upon certain private land during a fair.⁷⁶ The custom, to be valid, "must have continued from time immemorial, without interruption, and as of right; it must be certain as to the place, and as to the persons; and it must be certain and reasonable as to the subject matter or rights created."⁷⁷

A right cannot be acquired by custom to use particular land on navigable water for a wharf or landing place, since this would in effect exclude the owner from all use of the land, and is unreasonable;⁷⁸ and so there can be no right by custom to maintain a building or other permanent structure on a person's land.⁷⁹ Likewise, a right to take profits from land, as distinct from the mere right to use the land, cannot be established by custom, since the effect of such a custom would be to exhaust the profits.⁸⁰

73. *Fitch v. Rawling*, 2 H. Blackst. 394; *Abbott v. Weekly*, 1 Lev. 176.

74. *Race v. Ward*, 4 El. & Bl. 702.

The public may, it has been decided, acquire a prescriptive right to procure from a spring water for a drinking trough on the highway. *Kiser v. Douglas County*, 70 Wash. 242, 41 L. R. A. (N. S.) 1066, 126 Pac. 622.

75. *Blundell v. Caterall*, 5 Barn. & Ald. 268, 295.

76. *Tyson v. Smith*, 9 Adol. & E. 406.

77. *Leake*, Prop. in Land, 552. See Co. Litt. 110b; *Tyson v. Smith*, 9 Adol. & E. 406; *Goodman v. City of Saltash*, 7 App. Cas. 633.

78. *Talbott v. Grace*, 30 Ind. 389, 95 Am. Dec. 703; *O'Neill v.*

Annett, 27 N. J. L. 290, 72 Am. Dec. 364; *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513; *Pearsall v. Post*, 20 Wend. (N. Y.) 111; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Bethum v. Turner*, 1 Me. 111; *Chambers v. Furray*, 1 Yeates (Pa.) 167; *Cooper v. Smith*, 9 Serg. & R. (Pa.) 25. Compare *Knowles v. Dow*, 22 N. H. 387.

79. *Attorney General v. Tarr*, 148 Mass. 309, 2 L. R. A. 87, 19 N. E. 358. A like view was taken as to an asserted public right to pile wood on an individual's land. *Littlefield v. Maxwell*, 31 Me. 134, 50 Am. Dec. 653.

80. *Smith v. Gatewood*, Cro. Jac. 152; *Id. sub nom. Gateward's Case*, 6 Coke 59b; *Race v. Ward*, 4 El. & Bl. 702; *Hill v. Lord*, 48 Me. 83; *Cobb v. Davenport*, 32 N.

Occasionally in this country it has been decided that rights to use private land cannot thus be created by custom, for the reason that they would tend so to burden land as to interfere with its improvement and alienation, and also because there can be no usage in this country of an immemorial character.⁸¹ In one state, on the other hand, the existence of such customary rights is affirmed,⁸² and in others this is assumed in decisions adverse to the existence of the right in the particular case.⁸³

§ 420. **Rights of fishing.** While the individual members of the public have rights of fishing in waters, the soil below which is the property of the state,⁸⁴ except in those cases in which an exclusive right to fish there has been granted by the state legislature or other sovereign authority,⁸⁵ they have, as a general rule, no

J. Law, 369; Pearsall v. Post, 20 Wend. (N. Y.) 111; Post v. Pearsall, 22 Wend. (N. Y.) 425; Perley v. Langley, 7 N. H. 233; Nudd v. Hobbs, 17 N. H. 524; Smith v. Floyd, 18 Barb. (N. Y.) 522; Waters v. Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; Turner v. Selectmen of Hebron, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951.

81. Graham v. Walker, 78 Conn. 130, 61 Atl. 98, 2 L. R. A. (N. S.) 983, 112 Am. St. Rep. 93, 3 Ann. Cas. 641; Ackerman v. Shelp, 8 N. J. Law, 125; Harris v. Carson, 7 Leigh (Va.) 632; Delaplane v. Crenshaw, 15 Grat. (Va.) 457. See Gray, Perpetuities, §§ 572-586, where the subject of this section is fully dealt with.

82. Sudd v. Hobbs, 17 S. H. 524; Knowles v. Dow, 22 N. H. 387.

83. See cases cited *ante*, notes 78-80.

84. Manchester v. Massachusetts, 139 U. S. 240; Barbaro v. Boyle, 119 Ark. 377, 178 S. W. 378; Sollers v. Sollers, 77 M. 148, 20 L. R. A. 94, 39 Am. St. Rep. 404, 26 Atl. 188; Inhabitants of West Roxbury v Stoddard, 7 Allen (Mass.) 158; Lincoln v. Davis, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103; Arnold v. Mundy, 6 N. J. Law, 1, 10 Am. Dec. 356; Hooker v. Cummings, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; Collins v. Benbury, 25 N. C. 277, 38 Am. Dec. 722; Bell v. Smith, 171 N. C. 116, 87 S. E. 987; Sloan v. Biemiller, 34 Ohio St. 492; Carson v. Blazer, 2 Binn. (Pa.) 475; Legoe v. Chicago Fishing Co., 24 Wash. 175, 64 Pac. 141.

85. See Sollers v. Sollers. 77 Md. 148, 39 Am. St. Rep. 404;

such right in water which covers land belonging to a private undivided.⁸⁶ There is an exception to this rule, however, in the case of the shore of tide waters, that is, the space between high and low water; and although this belongs to an individual, the public may take fish, including shellfish, thereon,⁸⁷ provided they do so without trespassing on the latter's land above high-water mark,⁸⁸ and do not undertake to attach fishing appliances to the shore.⁸⁹

§ 421. Rights of navigation. Every member of the public has the right of navigation in waters capable of such use, without reference to whether the land beneath the water belongs to the public or to individual owners. The rights which individual owners may have in the land below the water or in the shores or banks are

Power v. Tarzewells, 25 Grat. (Va.) 786; *Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Heckman v. Swett*, 107 Cal. 276, 40 Pac. 420; *Fagan v. Armistead*, 33 N. C. 433.

86. *Smith v. Andrews* [1891] 2 Ch. 678; *Johnston v. O'Neill* (1911) App. Cas. 552; *Holyoke Water Power Co. v. Lyman*, 15 Wall. (U. S.) 500, 21 L. Ed. 133; *Beckman v. Kremer*, 43 Ill. 447, 92 Am. Dec. 146; *Waters v. Lilley*, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; *Lembeek v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828; *Baylor v. Decker*, 133 Pa. St. 168; *Winans v. Willetts*, — Mich. —, 163 N. W. 993; *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821, 54 L. R. A. 178, 63 Pac. 239; *State v. Theriault*, 70

Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695. See *New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569, 35 Atl. 323. And compare *Hogg v. Beerman*, 41 Ohio St. 81, 52 Am. Rep. 71; and cases cited *post*, § 421, note 99.

87. *Bagott v. Orr*, 2 Bos. & P. 472; *Shiveley v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *Bickel v. Polk*, 5 Har. (Del.) 325; *Peck v. Lockwood*, 5 Day (Conn.) 22; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Wilson v. Inloes*, 6 Gill. (Md.) 121; *Lakeman v. Burnham*, 7 Gray (Mass.) 437; *Allen v. Allen*, 19 R. I. 114.

88. 3 Kent, Comm. 417; *Bickel v. Polk*, 5 Har. (Del.) 325; *Coolidge v. Williams*, 4 Mass. 140; *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439.

89. *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400; *Matthews v. Treat*, 75 Me. 594; *Locke v.*

subordinate to this right of navigation in the public, and consequently they cannot place any structure or article upon the land below the water which is calculated substantially to interfere with navigation.⁹⁰

"Floatable" streams—that is, streams which, while not capable of navigation by vessels or boats, are capable of use for floating timber to market—are, in this limited sense, navigable, and the rights of private owners of the land thereunder are regarded as, to some extent, subject to the rights of the public to use them for floating timber.⁹¹ Streams are to be regarded as "floatable," it seems, even though they can be thus used only at certain seasons of the year, provided these seasons recur with regularity.⁹² The rights of the public to float timber on such streams are not exclusive of the rights of owners of land under or abutting on the

Motley, 2 Gray (Mass.) 265; Whitaker v. Burhans, 62 Barb. (N. Y.) 237.

90. Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; Yolo County v. City of Sacramento, 36 Cal. 193; Charleston & S. Ry. Co. v. Johnson, 73 Ga. 306; Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525; Brooks v. Cedar Brook & S. C. R. Imp. Co., 82 Me. 17, 7 L. R. A. 460, 17 Am. St. Rep. 459, 19 Atl. 87; Com. v. Chapin, 5 Pick. (Mass.) 199; Smith v. City of Rochester, 92 N. Y. 463; Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep. 71; Barclay Railroad & Coal Co. v. Ingham, 36 Pa. St. 194; Cobb v. Bennett, 75 Pa. St. 326; Volk v. Eldred, 23 Wis. 410; Stevens Point Boom Co. v. Reilly, 46 Wis. 237, 49 N. W. 978.

91. Lewis v. Coffee County, 77 Ala. 190, 54 Am. Rep. 55; Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525; Thunder Bay River

Booming Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584; Shaw v. Oswego Iron Co., 10 Or. 371, 45 Am. Rep. 146; Gatson v. Mace, 33 W. Va. 14, 5 L. R. A. 392, 25 Am. St. Rep. 848, 10 S. E. 60; Olson v. Merrill, 42 Wis. 203; Lebanon Lumber Co. v. Leonard, 68 Ore. 147, 136 Pac. 891; Fortson Shingle Co. v. Skagland, 77 Wash. 8, 137 Pac. 304.

92. Lewis v. Coffee County, 77 Ala. 190, 54 Am. Rep. 55; Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Holden v. Robinson Mfg. Co., 65 Me. 216; Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Smith v. Fonda, 64 Miss. 551, 1 So. 757; Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58; Commissioners of Burke County v. Catawba Lumber Co., 116 N. C. 731, 47 Am. St. Rep.

stream to dam or otherwise utilize the waters thereof, it being sufficient if there is left a reasonable passage for timber.⁹³

Incidental to the right of navigation is the right to anchor one's vessel in the stream for a reasonable time, either adjoining one's own land or elsewhere, in such a way as not unduly to obstruct navigation or to prevent access to the water, for purposes of navigation, by other persons who may own land abutting thereon.⁹⁴ But there is no incidental right of using adjoining land for a mooring or landing place,⁹⁵ or of going thereon for the purpose of towage.⁹⁶ On principle, moreover, it seems,⁹⁷ the fact that the public have a right of navigation over private land should give them no right of hunting;^{97a}

829, 840, 21 S. E. 941, and note; *Haines v. Hall*, 17 Ore. 165.

93. *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Kretschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41; *Foster v. Sears port Spool & Black Co.*, 79 Me. 508, 11 Atl. 273; *A. C. Conn. Co. v. Iittle Suamico Lumber Mfg. Co.*, 74 Wis. 652, 43 N. W. 660.

94. *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. Div. 713; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644; *Rice v. Ruddiman*, 10 Mich. 125; *Delaware River Steamboat Co. v. Burlington & B Steam Ferry Co.*, 81 Pa. St. 103. Compare *Wall v. Pittsburg Harbor Co.*, 152 Pa. St. 427.

95. *Ensminger v. People*, 47 Ill. 384; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644; *Smith v. Atkins*, 22 Ky. L. Rep. 1619, 53 L. R. A. 790, 60 S. W. 930; *State v. Wilson*, 42 Me. 9; *Steamboat Magnolia v. Marshall*, 39

Miss. 109; *Weems S. B. Co. v. People's S. B. Co.*, 214 U. S. 345, 53 L. Ed. 1024.

96. *Ball v. Herbert*, 3 Term R. 253. And see, as to trespasses on the banks while driving logs, or in the construction of booms. *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Hooper v. Hobson*, 57 Me. 273, 99 Am. Dec. 769. Compare *Weise v. Smith*, 3 Or. 445, 450; *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 663, 3 Kent. Comm. 426.

97. See editorial note, 27 Harv. Law Rev. 750.

97a. *Adams v. Pease*, 2 Conn. 481; *Schulte v. Warren*, 218 Ill. 108, 13 L. R. A. (N. S.) 745, 75 N. E. 783; *Sterling v. Jackson*, 69 Mich. 488, 37 Am. St. Rep. 405, 37 N. W. 845; *Hall v. Alford*, 114 Mich. 165, 72 N. W. 137, 38 L. R. A. 205; *State v. Shannon*, 36 Ohio St. 423; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90; *Fitzhardinge v. Purcell*, 77 Law Journ. Ch. Div. 529.

or fishing.⁹⁸ But there are occasional decisions recognizing such a right.⁹⁹

98. *Hartman v. Tresise*, 36 Colo. 146, 4 L. R. A. (N. S.) 872, 84 Pac. 685; *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783; *New England Trout & S. Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569, 35 Atl. 323.

99. As to hunting, see *Forestier v. Johnson*, 164 Cal. 24, 127 Pac. 156; *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N. W. 816. As to fishing, see *Willow River Club v. Wade*, 100 Wis. 86, 42 L. R. A. 305, 76 N. W. 272; *Bodi v. Winous Point Shooting*

Club, 57 Ohio St. 226, 48 N. E. 944 (*semble*); *Winous Point Shooting Club v. Slaughterbeck*, 96 Ohio, 139, 117 N. E. 162 (*semble*.)

The Colonial ordinance in force in Massachusetts and Maine, by which the title to the flats or shore was conferred on the upland owner, expressly reserved the right to every householder in the community to go upon such flats for fishing and fowling. See *Comm. v. Alger*, 7 Cush. (Mass.) 53; *Moore v. Griffin*, 22 Me. 350.

PART FIVE.

THE TRANSFER OF RIGHTS IN LAND.

CHAPTER XVIII.

TRANSFER BY THE GOVERNMENT.

- § 422. The nature of the government title.
- 423. Grants by the United States.
- 424. Grants by the states.
- 425. Spanish and Mexican grants.
- 426. Patents.

§ 422. **The nature of the government title.** All the land in the United States, now owned by individuals, formerly belonged either to the federal government, to an individual state, or to a foreign nationality, which disposed of it to an individual proprietor before that particular territory became a part of this country. These grants of land by foreign states to individuals, made before the incorporation of that particular territory in the United States, are the chief basis of titles in some parts of the country, and it seems proper to briefly sketch the history of the various acquisitions of territory by this nation, in order better to understand the various classes of government grants on which the existing proprietary rights of individuals may be based.

The British claim of dominion over the territory included within the original thirteen colonies was based upon discovery, consummated by possession, the wandering Indian tribes being regarded as having a mere right of occupancy.¹ The dominion and ownership thus acquired was, in some of the colonies, granted by the British crown to individual proprietors or proprietary companies, by whom parts of the land were in turn

1. Johnson's Lessee v. McIntosh, 8 Wheat.(U. S.) 543, 5 L. Ed. 681.

granted to individuals. In others of the colonies the title to the soil remained in the British crown, and grants were made to individuals by the governor of the colony in the name of the king. After the Revolution, the title of the crown to lands still undisposed of passed to the states, and lands belonging to the original proprietaries were in some cases confiscated. Thus it may be said that the title to all land within the original thirteen states is derived, directly or indirectly, from the British crown, with the exception only of considerable bodies of land in the state of New York, the title to which is based on grants by the Dutch government or its representatives, which grants, however, were recognized and confirmed by the British crown upon the conquest of that territory.

The territory west of the Allegheny mountains and east of the Mississippi river, which had been claimed by the French, came, as a result of the French and Indian war, and of the treaty of Paris in 1763, under the exclusive dominion of England. The lands within this territory were, by royal proclamation, set apart as "crown lands." After the separation of the colonies from England, a number of the colonies asserted claims to parts of these crown lands, as being included within their limits under their royal charters. These claims, so far as concerned what was known as the "North-west Territory"—that is, the territory northwest of the Ohio river—were opposed by the other colonies in the negotiations leading up to the Articles of Confederation, and finally the colonies asserting such claims ceded practically all their lands, or their claims thereto, within the limits of such territory, to the confederation. Of the territory south of the Ohio river, the state of Kentucky was formed out of that part of Virginia west of the Allegheny mountains, while the balance of this territory, so far south as the Spanish territory of Florida, was ceded to congress by the respective states claiming it.

In 1803, the United States purchased from France the "Louisiana" territory, which was bounded on the east by the Mississippi river, and on the west by a line which ran, approximately, along the present eastern boundary of Idaho, and through the center of what are now Colorado and New Mexico. This territory extended north to Canada, and south to the Arkansas river and the present northern boundary of Texas. In 1819, the "Florida" purchase was made from Spain, this including the present Florida and parts of Mississippi, Alabama, and Georgia. In 1845, Texas, which had obtained independence from Mexico in 1836, was annexed to the United States. In 1848, as a result of the war with Mexico, that nation ceded to the United States territory included, approximately, within the present limits of California, Nevada, Utah and Arizona, and within parts of Colorado and New Mexico, it extending in effect from the Pacific ocean to the Western limit of the Louisiana purchase; and subsequently, in 1853, a comparatively small portion of territory, adjoining the present Mexican boundary, was purchased from Mexico, in order to settle a question as to the limits of the cession of 1848, this being known as the "Gadsden Purchase." In 1846, by treaty with Great Britain, the territory comprising that now occupied by Washington, Oregon, and Idaho, which had been in dispute between the two countries for many years, was ceded by Great Britain, this country ceding in return all claim to the territory to the North thereof. In 1867 the present territory of Alaska was purchased from Russia.

While by far the greater part of the lands of which either the United States government or individual states have had the ownership and control has been acquired either from a foreign state or by cession from the general government to a state, or *vice versa*, land may be acquired from individual owners, by either the United States or an individual state, by forfeiture, escheat, the exercise of the power of eminent domain, or voluntary transfer.

§ 423. **Grants by the United States.** The territory ceded to the confederation by individual states, and that acquired by the present government from foreign powers, was, for the most part, free from any claims of ownership by individuals, and was therefore open to disposition by the government in such a way as seemed expedient. The land thus owned and controlled by the government, known as “public land,” has been gradually disposed of to individuals and corporations by various methods, intended, and usually adapted, to aid in the settlement and industrial development of the country. The more important methods of disposition which have been adopted will be briefly described.

—— **Public sales.** In the early period of the land system it was the custom to offer lands, as soon as surveyed, at public sale, in accordance with a proclamation by the president, and at a minimum price.² This system of disposing of public lands gave room for much abuse and oppression, it often occurring that the land had been improved by actual settlers, who would be dispossessed by purchasers at these sales, and it gradually fell into disuse. It is now to some extent abolished by statute.³ The amount of land held under title thus acquired from the government is not large.

—— **Pre-emption.** In consequence of the evils resulting from the system of public sales, the “pre-emption” system was instituted, by which one who settled on one hundred and sixty acres of land, improving it and erecting a dwelling thereon, was entitled to purchase the land in preference to any other person. After settling on the land, he was required to file a statement or “entry” in the land office within a certain time, declaring his purpose to claim the right of pre-emption, and also to file proof that he was entitled to the right,

2. See Rev. St. U. S. §§ 2353, 2357-2360. 9. 10; 1 Dembitz, Land Titles, p. 620, note.

3. See 26 U. S. Stat. 1099, §§

and to pay the sum fixed by law as the purchase price. He then received a certificate of entry.⁴ Before making such proof and payment, the claimant was regarded as having merely a privilege to purchase the land, of which he might be deprived by the government by a grant or sale to others.⁵ And such privilege or right of pre-emption could not, by the express provision of the statute, be assigned to another person, though the pre-emptor could transfer his interest after payment and issue of the certificate.⁶ The pre-emption law has now been repealed.⁷

—**Homestead entry.** Since the repeal of the laws allowing public sales and of the pre-emption law, the only system of general application for the acquisition of public lands is under the “homestead” law. By this law, any citizen, or intending citizen, who is an adult or head of a family, who does not own one hundred and sixty acres of land in any state or territory, and who has not previously exercised the homestead right, may make application for the benefit of the law, and this, if followed by *bona fide* occupation and cultivation of the land for five years, entitles him to a certificate and patent for the land, without making any payment other than the land-office fees.⁸

—**Railroad grants.** Great quantities of land have been granted out of the public domain of the United States to aid and stimulate railroad construction through the territory in which the land lay. These grants usually consist of the odd-numbered sections on both sides of the railroad to a certain distance, frequently five miles, and the even-numbered sections, thereby

4. Rev. St. U. S. §§ 2257-2288 v. Craft, 13 Wall. (U. S.) 291,

5. Frisbie v. Whitney, 9 Wall. 20 L. Ed. 562.

(U. S.) 187, 19 L. Ed. 668; Yosemite Valley Case, 15 Wall. (U. 7. Act March 3, 1891 (26 Stat. 1097).

S.) 77, 21 L. Ed. 82.

8. Rev. St. U. S. §§ 2289, 2302.

6. Rev. St. U. S. § 2263; Myers

presumably increased in value, the government thereafter holds at an increased price. In many cases these grants to aid in the building of railroads have been made to the state in which the railroad was to be built, instead of to the corporation building it. In such cases the state takes merely the legal title, in trust for the railroad.⁹

These grants to the railroads are subject to any previous rights which may have been acquired by others in the lands granted, under the pre-emption, homestead, or other laws. To compensate for any loss to the railroad corporation through such causes, the statute making the grant usually provides for "indemnity lands" at a greater distance from the railroad, these being lands which the railroad company is authorized to take in lieu of those in its original grant already taken up by others.¹⁰ A railroad grant almost invariably takes effect so soon as the survey or location of the proposed railroad through the public land has been approved by the land office, and the title to the alternate sections, as named in the act constituting the grant, then vests in the railroad company as of the date of the grant.¹¹

—Grants to states. Congress has, at various times and for divers purposes, granted parts of the land to states. Among the most important of these grants are

9. *Rice v. Minnesota & N. W. R. Co.*, 1 Black (U. S.) 358, 360, 17 L. Ed. 147; *Wolsey v. Chapman*, 101 U. S. 755, 25 L. Ed. 915; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 60, 22 L. Ed. 554.

10. *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Broder v. Natoma Water & Mining Co.*, 101 U. S. 274, 25 L. Ed. 790; *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, 28 L. Ed. 1109; *Sioux City &*

Iowa Falls Town Lot & Land Co. v. Griffey, 143 U. S. 32, 36 L. Ed. 64.

11. *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. Ed. 201; *Sioux City & Iowa Falls Town Lot & Land Co. v. Griffey*, 143 U. S. 32, 36 L. Ed. 64; *Curtner v. United States*, 149 U. S. 672, 37 L. Ed. 893; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 28 L. Ed. 872.

those for educational purposes. Usually, section sixteen in every township, and sometimes also section thirty-two, has been granted to the state or territory for the support of schools; besides which, grants have been made for state universities, agricultural colleges, and similar purposes.

To each state, also, in which there were then public lands, five hundred thousand acres were, by act of congress, granted for internal improvements, and this grant extends to each new state as it is admitted.¹²

By the "swamp land" grant of 1850, all swamp and overflowed lands unfit for cultivation on that account were granted to the several states in which they were situated, subject to certain restrictions, for the purpose of aiding in the reclamation of such lands.¹³

— **Townsites.** The statutes of the United States specify three methods by which public lands may be acquired for townsites: (1) The president may reserve land for townsite purposes on harbors or rivers, or at other possible centers of population, and lots therein may be sold at public outcry. (2) Persons desiring to found a city or town on public land may locate a townsite not over six hundred and forty acres in extent, and lay off lots therein, and the president may then authorize the sale of such lots at a minimum price of ten dollars per lot. (3) Public land which has actually been settled upon and occupied as a townsite may be entered in the office as a townsite by the municipal authorities thereof, or by the county judge.¹⁴

— **Mineral lands.** Lands belonging to the United States which contain valuable deposits of minerals have usually been excepted from the operation of general laws for the acquisition of land by individuals, such as the pre-emption and homestead laws. For many years,

12. Act Sept. 8, 1841 (Rev. St. U. S. § 2378).

13. Rev. St. U. S. § 2479.

14. Rev. St. §§ 2380-2389; 2 Copp, Pub. Land Laws (1890) 1010-1013.

mineral lands were merely leased by the government for the purpose of working. After the discoveries of precious metals in the western territory, the mineral deposits on the public lands were worked by the immigrants under mining regulations established by themselves, and without any permission from the government, and the courts adopted the fiction that the first appropriator, in accordance with the local mining regulations, had a license from the government to work the mines.¹⁵ It was not until 1866 that congress passed an act providing for the acquisition of mineral lands within the public domain by individuals at nominal prices. This statute adopted the essential features of the local miners' regulations in regard to the acquisition or "location" of claims, and all legislation by congress on the subject has recognized the validity of such regulations, as well as of state statutes, when not in conflict with the acts of congress.¹⁶

The statutes on the subject of the acquisition of claims make a distinction between mineral deposits in "lodes" or "veins," these being equivalent terms, and "placer" deposits. A "lode" or "vein," as the terms are used in the statute, is a "line or aggregation of metal imbedded in quartz or other rock in place," while the term "placer" is applied to ground which "contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place,—that is, not fixed in rock,—but which are in a loose state, and may, in most cases, be collected by washing or amalgamation without milling."¹⁷

Any citizen or intending citizen, upon discovering a vein or lode of minerals on public land, may "locate" a claim thereto by marking the limits of his claim on

15. *Sparrow v. Strong*, 3 Wall. (U. S.) 97, 18 L. Ed. 49; 1 *Bar-ringer & Adams, Mines & Min-ing*, 196.

16. The United States statutes

on the subject are to be found in Rev. St. §§ 2318, 2352.

17. *Mr. Justice Field in United States v. Iron Silver Min. Co.*, 128 U. S. 673, 32 L. Ed. 571.

the ground, and in some states, by local requirements, by posting notice of the claim, and recording a certificate of the location.¹⁸ The extent of the claim is, in the case of a lode or vein, limited by the United States statute to fifteen hundred feet in the direction in which the lode or vein runs, and three hundred feet on each side of the vein; the boundaries running in the direction of the vein being known as "side" lines, and those running across the vein as "end" lines. The locator is entitled to any ore within the space marked by these surface lines extended downward vertically, and may follow the vein across his side lines, even though, in so doing, he takes ore from beneath the surface claim of another, but he cannot follow the vein across his end lines.

A placer claim or location is limited to one hundred and sixty acres in case the location is made by an association of not less than eight *bona fide* locators, and to twenty acres in the case of a location by an individual.

In order that one who has located a claim may continue to hold it, he must do work or make improvements thereon to the value of at least one hundred dollars in each year, and, in case of his failure so to do, the claim is forfeited, and open to location by another person.¹⁹

§ 424. **Grants by the states.** Of the lands within the original thirteen colonies, the larger part had, at the time of the American Revolution, been granted to individuals or to associations, to hold in private ownership, and their rights, except in so far as the lands were confiscated for disloyalty, were not affected by the transfer of the sovereignty to the state. Those lands, however, which had not been granted away by the crown, passed to the respective state governments as successors to the crown, and as representatives of the

18. Barringer & Adams, Mines & Mining, c. 7. ringer & Adams, Mines & Mining c. 9.

19. Rev. St. U. S. § 2324; Bar-

public. Such lands, the title to which was thus vested in any of the original states, have been disposed of either by special legislative grants, or in accordance with a regular statutory system, established for the purpose, providing for their survey and sale to persons making formal application to the state authorities.

The territory ceded by certain states to the general government was, to some extent, incumbered by grants previously made to individuals by the ceding state, and these grants were usually, by the agreement for cession, recognized by the United States. Of the lands of which the title thus became vested in the states, the most important were those under tidal and navigable waters, over which the state governments have always exercised control, and which they have, as a general rule, not granted away to individuals, the policy of the states, however, differing among themselves in this regard.²⁰

Within the territory ceded to the United States by foreign governments, the states formed therefrom have no rights to vacant lands except as these may have been granted to them by the United States government. Such grants have, however, as above stated, been made to a very considerable extent, and the lands so granted to the states they have disposed of to individuals and corporations in various ways.

The land under navigable waters within the limits of the territory ceded to the United States, either by one of the states or by a foreign country, passed to the United States for the benefit of the whole people, and in trust for the several states to be ultimately created out of such territory, and, upon the admission of any part of such territory as a state, such lands pass *ipso facto* to the state government, subject, however, to any grants of rights therein which may have been made for appropriate purposes by the United States government

20. *Martin v. Waddell's Lessee*, 38 L. Ed. 331.

16 Pet. (U. S.) 367, 10 L. Ed. 997; See *ante*, §§ 300, 301.

Shiveley v. Bowlby, 152 U. S. 1,

while holding the country as a territory. Consequently, the new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions, and they may accordingly grant rights therein to individuals, as it may seem most expedient, subject only to the paramount rights of navigation and commerce.²¹

The vacant lands which belonged to the state of Texas, lying within its limits, never became part of the public domain of the United States, there being an express provision to that effect in the resolutions passed by congress for its admission as a state.²² These lands have been gradually disposed of, usually by locations under "land certificates," these certificates having been issued for various purposes, as to encourage settlement, to reward participants in the War of Independence, or their heirs, and to promote the construction of railroads.²³

The systems and regulations adopted by the various states in disposing of their public lands have been of the most diverse character. Usually, however, a warrant is issued, either to one entitled as a beneficiary by some legislative act, or in consideration of the payment of a sum fixed by law, this warrant authorizing him to "locate" or "enter" a certain number of acres in the public domain. The holder of the warrant then selects his land, and files with a designated official a description of the land, this being known as the "entry." The land so applied for is then usually surveyed by the public surveyor, and, after such survey, and his compliance with all the other requirements of the statute, the applicant is entitled to a "patent" or grant from the state.²⁴

21. *Shiveley v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331.

22. 5 U. S. Stat. 797.

23. The mode of disposal of

Texas lands is clearly stated in 1 Dembitz, Land Titles, 561 *et seq.*

24. See 2 Minor, Institutes,

898; 1 Dembitz, Land Titles, 500;

§ 425. **Spanish and Mexican Grants.** Within the territory ceded to the United States by France, Spain, and Mexico, there existed, at the time of the cession, private rights based upon grants previously made by the nation having dominion therein, and these grants the United States government was, either by express stipulation in the treaty to that effect, or by provisions preserving rights of property, required to recognize.

Though the Louisiana territory was purchased from France, most of the grants made therein before its cession to the United States were made by the Spanish, and not by the French, government, the territory having passed from the former to the latter but a short time previously. The grants made within the limits of the Florida purchase previous to the treaty of cession were expressly recognized in that treaty.

Before the cession of territory by Mexico to the United States, numerous grants had been made by that government from the time of its acquisition of independence from Spain, early in the nineteenth century. Grants made before that period were by the Spanish crown, acting through the governor or viceroy.

In the performance of its treaty obligations to recognize these prior existing grants of land in the ceded territory, this government has adopted the policy of requiring all persons claiming under grants made previous to the particular cession in question to submit their claims to examination either by commissioners named for the purpose, or by the federal courts, and the claims thus submitted have been the subject of many adjudications, frequently of an adverse character.

Lands comprised within the limits of the present state of Texas have been, in succession, the subject of grant by the Spanish government, the Mexican government, the Mexican state of Coahuila and Texas, the republic of Texas, and the present state of Texas.²⁵

23 Am. & Eng. Encyc. Law (1st Ed.) 53 *et seq.*

25. See Republic of Texas v. Thorn, 3 Tex. 505; Norton v.

Grants made by the previous sovereignties have always been recognized by the present state of Texas.

§ 426. **Patents.** A patent is a document issued by the government to one to whom it has transferred or agreed to transfer land, in order to vest in the transferee the complete legal title, or to furnish evidence of the transfer. Patents are regularly issued by the United States government, and also by the state governments, to persons who have, by the proper proceedings, established their right to the ownership of land previously belonging to the United States or the state. The patent is, in form, a conveyance of the land, and must, when issued by the United States, be signed in the name of the president, and sealed with the seal of the general land office, and countersigned by the recorder.²⁶ A state patent must usually be signed by the governor, and sealed with the state seal.²⁷

A patent is necessary to pass a perfect title to public land in all cases except when the legislative branch of the government has made a grant taking effect *in praesenti*.²⁸ Consequently, when no such previous grant has been made, the patent constitutes, and is necessary for, the transfer of the legal title.²⁹ When, on the other hand, there has been a previous grant taking effect *in praesenti*, the purpose of the issue of the patent is not to transfer the title, but to furnish evidence of the transfer, or to show compliance with

Mitchell, 13 Tex. 51; Jones v. Muisbach, 26 Tex. 237.

26. McGarrahan v. New Idria Min. Co., 96 U. S. 316, 24 L. Ed. 630. See Rev. St. U. S. § 450.

27. See State v. Morgan, 52 Ark. 150, 12 S. W. 243; Exum v. Brister, 35 Miss. 391; Hulick v. Scovil, 9 Ill. 159; Jarrett v. Stevens, 36 W. Va. 445, 15 S. E. 445.

28. Wilcox v. Jackson, 13 Pet. (U. S.) 498, 10 L. Ed. 264; Car-

ter v. Ruddy, 166 U. S. 495, 41 L. Ed. 1091.

29. McGarrahan v. New Idria Min. Co., 96 U. S. 316, 24 L. Ed. 630; Langdon v. Sherwood, 124 U. S. 74, 31 L. Ed. 344; City of Brownsville v. Basse, 36 Tex. 500; Roads v. Symmes, 1 Ohio, 281, 13 Am. Dec. 621; Carter v. Ruddy, 166 U. S. 495, 41 L. Ed. 1091; Wood v. Pittman, 113 Ala. 212, 20 So. 972.

the conditions thereof, obviating, in any legal controversy, the necessity of other proof of title.³⁰

Even when there has been no legislative grant of the land, the government, upon the payment of the purchase price of land by an individual, and other compliance with the statutory requirements, thereafter holds the legal title, as any other vendor of land who has received the purchase money, in trust for the vendee.³¹ But this mere equitable title will not support an action of ejectment at common law, and for that purpose the legal title must be acquired by the issue of a patent.³² In many of the states, however, it is provided by statute that certificates issued by the United States land office, showing the making of final proof and payment, and so entitling the holder to a patent, shall be *prima facie* evidence of title sufficient to support an action of ejectment.³³ But a distinction is made in this respect between receipts issued by the land office after final proof, and receipts issued merely to show that an application or "filing" has been made, and the latter will not, even under these statutes, support ejectment.³⁴ When there has been a grant taking effect *in praesenti*,

30. *Morrow v. Whitney*, 95 U. S. 551, 24 L. Ed. 456; *Wright v. Roseberry*, 121 U. S. 488, 30 L. Ed. 1039; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. Ed. 999; *Kernan v. Griffith*, 27 Cal. 89; *Lee v. Summers*, 2 Ore. 267.

31. *Carroll v. Safford*, 3 How. (U. S.) 441, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210, 18 L. Ed. 339; *Hussman v. Durham*, 165 U. S. 144, 41 L. Ed. 664; *Brill v. Stiles*, 35 Ill. 305, 85 Am. Dec. 364; *Arnold v. Grimes*, 2 Iowa, 1.

32. *Hooper v. Scheimer*, 23 How. (U. S.) 235, 16 L. Ed. 452; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, 20 L. Ed. 534; *Langdon*

v. Sherwood, 124 U. S. 74, 41 L. Ed. 1091; *Seward's Lessee v. Hicks*, 1 Har. & McH. (Md.) 22.

33. See *Balsz v. Liebenow* (Ariz.) 36 Pac. 209; *Surginer v. Paddock*, 31 Ark. 528; *Case v. Edgeworth*, 87 Ala. 203; *Whittaker v. Pendola*, 78 Cal. 296, 20 Pac. 680; *Davis v. Freeland's Lessee*, 32 Miss. 645; *Pierce v. Frace*, 2 Wash. St. 81, 26 Pac. 192, 807; *McLane v. Bovee*, 35 Wis. 27.

34. *Balsz v. Liebenow* (Ariz.) 36 Pac. 209; *Hemphill v. Davis*, 38 Cal. 577; *Dale v. Hunneman*, 12 Neb. 221, 10 N. W. 711; *Adams v. Couch*, 1 Okl. 17.

the grantee may, even without the aid of any statute, bring ejectment, as having the legal title, though a patent has not been issued to him.³⁵

A patent is, as evidence of title, conclusive in a court of law as against collateral attack, unless it is invalid on its face for insufficiency of language or execution, or unless it is void for want of power to issue it, as when the land had been previously granted, or was reserved from sale.³⁶ In equity, however, a patent, valid on its face, can, as against others than *bona fide* purchasers of the land for value, be attacked, for fraud in its procurement or mistake in its issuance, either by the government or by a person otherwise entitled to the land;³⁷ and if the patent has been issued to one other than the person entitled thereto, he may procure a decree establishing a constructive trust in his favor, and requiring the patentee to make a conveyance to

35. *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. Ed. 999; *Nothern Pac. R. Co. v. Cannon* (C. C.) 46 Fed. 224; *Southern Pac. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032; *Northern Pac. R. Co. v. Majors*, 5 Mont. 111, 2 Pac. 322.

36. *Field v. Seabury*, 19 How. (U. S.) 323, 15 L. Ed. 650; *Sherman v. Buick*, 93 U. S. 209, 23 L. Ed. 849; *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, 27 L. Ed. 226; *Wright v. Roseberry*, 121 U. S. 488, 30 L. Ed. 1039; *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 35 L. Ed. 238; *State v. Morgan*, 52 Ark. 150, 12 S. W. 243; *Moore v. Wilkinson*, 13 Cal. 488; *Langenour v. Shanklin*, 57 Cal. 70; *Bledsoe's Devisees v. Wells*, 4 Bibb. (Ky.) 329; *State v. Sioux City & P. R. Co.*, 7 Neb. 357; *Jackson v. Hart*, 12 Johns.

(N. Y.) 77, 7 Am. Dec. 280; *Webster v. Clear*, 49 Ohio St. 392, 31 N. E. 744; *Norvell v. Camm*, 6 Munf. (Va.) 233, 8 Am. Dec. 742; *Jarrett v. Stevens*, 36 W. Va. 445, 15 S. E. 177.

37. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Sparks v. Pierce*, 115 U. S. 408, 29 L. Ed. 428; *Sanford v. Sanford*, 139 U. S. 642, 35 L. Ed. 290; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 31 L. Ed. 747; *United States v. Missouri, K. & T. Ry. Co.*, 141 U. S. 358, 35 L. Ed. 766; *United States v. Marshall Silver Min. Co.*, 129 U. S. 579, 32 L. Ed. 734; *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 31 L. Ed. 182; *Jackson v. Lawton*, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311; *Romain v. Lewis*, 39 Mich. 233.; *Norvell v. Camm*, 6 Munf. (Va.)

him.³⁸ The issuance of a patent, however, raises the presumption that it was validly issued, and one seeking to set it aside must sustain his averments in that regard by clear proof.³⁹

A patent, when issued, dates back, as against intervening claimants, to the time when the equitable title vested in the patentee by payments of the purchase price, or otherwise.⁴⁰

238, 8 Am. Dec. 742; *State v. Bachelder*, 5 Minn. 223 Gil. 178), 80 Am. Dec. 410.

38. *Stark v. Starrs*, 6 Wall. (U. S.) 412, 18 L. Ed. 928; *Widdicombe v. Childers*, 124 U. S. 400, 31 L. Ed. 427; *Cornelius v. Kessel*, 128 U. S. 456, 32 L. Ed. 482; *Bernier v. Bernier*, 147 U. S. 242, 37 L. Ed. 152.

39. *Maxwell Land-Grant Case*, 121 U. S. 325, 30 L. Ed. 949;

Schnee v. Schnee, 23 Wis. 377, 99 Am. Dec. 183; *City of Mobile v. Eslava*, 9 Port. (Ala.) 577; 33 Am. Dec. 325.

40. *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, 20 L. Ed. 534; *Hussman v. Durham*, 165 U. S. 144, 41 L. Ed. 664; *Waters v. Bush*, 42 Iowa, 255; *Reynolds v. Plymouth County*, 55 Iowa, 90; *Waterman v. Smith*, 13 Cal. 419. See *post*, § 377, note 76.

CHAPTER XIX.

VOLUNTARY TRANSFER INTER VIVOS.

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- 465. Effect of execution—Return or cancellation.

§ 427. Conveyances at common law—Feoffment.

The transfer of land by “livery of seisin,” which has already been briefly described,¹ was ordinarily known as a “feoffment,” and the terms were, it seems, used interchangeably.² The person making the transfer was known as the “feoffor,” and the transferee as the feoffee.” The livery was ordinarily accompanied by a “charter of feoffment,” declaring the limitations of the estate or estates vested in the feoffee, but the livery of seisin was alone necessary until the passage of the Statute of Frauds, which in effect declared that all estates created by livery of seisin only, or by parol, and not put in writing and signed by the parties so making and creating the same, or their agents, should be estates at will merely.³ This mode of transfer was available only in the case of estates accompanied by seisin, that is, estates of freehold in possession, and was not available for the transfer of rights in incorporeal things.⁴

Since a feoffment operated on the possession alone, any person having possession of land, even though, as in the case of a tenant for years, not legally seised, could, by feoffment to a stranger, create in the latter an estate of any *quantum*; and so one having seisin as of an estate for life could create in another a greater estate. Since the effect of such a transfer of seisin was

1. *Ante*, § 14.
 2. Challis, Real Prop. (3rd Ed.) 362.
 3. 29 Car. II. c. 3, § 1. See Co. Litt. 48; 2 Blackst. Comm. 313;

Challis, Real Prop. 370. ;
 4. Sheppard's Touchstone, 228; Williams, Real Prop. 31: 2 Blackst. Comm. 314. See *ante*, § 16.

to operate wrongfully upon the interest of the owner of the reversion or remainder, it was termed a "tortious" conveyance.⁵

Transfer by feoffment is now in effect obsolete, though occasionally the theory of such a transfer may be resorted to for the purpose of upholding a conveyance otherwise invalid or ineffective to carry out the evident purpose of the parties.⁶ In many states the statutes expressly dispense with the necessity of livery of seisin for the conveyance of real property.⁷

— **Fines and recoveries.** Fines and recoveries were collusive actions brought for the purpose of effecting a transfer of interests in land not otherwise transferable. They have been abolished by statute in England, and in no state of this country are they, it is believed, in practical use.⁸ They were for many years utilized for the purpose of barring estates tail, and thereby evading the statute *De Donis Conditionalibus*,⁹ but they were appropriate and necessary for other purposes, the most important of which was the transfer of land by a married woman, she not being competent to make an ordinary conveyance.

— **Grant.** A grant was, at common law, made use of for the transfer of such interests in land as, from their nature, were incapable of transfer by feoffment, that is, of which there could be no seisin, including all rights in another's land, or other incorporeal things real, and also estates in remainder or reversion upon a free hold estate.¹⁰ A grant always involved a "deed,"

5. Co. Litt. § 611, and Butler's note; Co. Litt. 251a, 330b; Challis, Real Prop. 371.

6. Witham v. Brooner, 63 Ill. 344; Ware v. Richardson, 3 Md. 505; Rogers v. Sisters of Charity 97 Md. 556; Hunt v. Hunt, 14 Pick. (Mass.) 374; Carr v. Richardson, 157 Mass. 576, 32 N. E. 958; Eckman v. Eckman, 68 Pa.

St. 460.

7. 1 Stimson's Am. St. Law, § 1470.

8. These proceedings are explained in 2 Blackst. Comm. 348.

9. *Ante*, § 28.

10. Co. Litt. 9b, 49a, 172a; 2 Blackst. Comm. 317; 2 Sanders, Uses & Trusts (5th Ed.) 29. See *ante*, § 16.

that is, a writing under seal, since no other form of writing had, at common law, any legal effect.¹¹

At common law the lord's right to the services of the tenant, the "seignory," could not be transferred to another without "attornment" by the tenant, that is, acceptance of the new lord. The same principle applied in the case of the grant of a reversion, it not being valid unless the tenant attorned to the grantee.¹² The necessity of attornment was, as before stated, abolished in England by 4 Anne, c. 16 § 9, and is no longer recognized in this country.¹³

— **Lease.** A lease is a conveyance of an estate for life, for years, or at will, by one who has a greater estate. At common law, if the estate conveyed was for life, livery of seisin was required,¹⁴ but if for years or at will merely, an oral lease without livery was sufficient.¹⁵ By the Statute of Frauds, a writing was rendered necessary for the creation of an estate for years, excepting certain leases not exceeding three years from the making thereof.¹⁶ But, even at common law, a lease for years of an incorporeal thing was invalid unless in writing and under seal, since such a thing lay in grant for all purposes, and no other method of transfer thereof was recognized.¹⁵ The form and requisites of a lease have been previously considered, in connection with the subject of estates for years.^{17a}

— **Release.** A conveyance by release is a conveyance of an estate or interest in land to one who has possession of the land or a vested estate therein. It

11. Co. Litt. 172a; Sheppard's Touchstone, 229; 1 Hayes, Conveyancing (5th Ed.) 25; 2 Sanders, Uses & Trusts (5th Ed.) 41.

12. Litt. §§ 551, 567, 568; Co. Litt. 309a, Butler's note.

13. See ante, §§ 53 (a).

14. 2 Blackst. Comm. 318.

15. Sheppard's Touchstone, 267;

2 Platt, Leases, 1.

16. 29 Car. II. c. 3, §§ 1, 2.

17. Co. Litt. 85a; Tottel v. Howell, Noy, 54; 14 Vin. Abr. tit. "Grant" (Ga.); Sheppard's Touchstone, 267; Somerset v. Fogwell, 5 Barn. & C. 875; Bird v. Higginson, 2 Adol. & E. 696.

17a. Ante, § 42.

was utilized, at common law, in cases in which the person to whom the conveyance was to be made was already in possession, so that no livery of seisin could be given unless he should first quit possession, which would have involved an idle multiplication of ceremonies.¹⁸ A release may be made to the tenant of a life estate by the owner of the reversion or remainder thereon, whether the life estate be one created by act of the parties,¹⁹ or one created by act of the law, such as as estate of dower or curtesy,²⁰ the life estate being enlarged by the release to a fee simple or fee tail. A release may also be made by the owner of the reversion to the tenant of an estate for years or at will,²¹ but not to a tenant at sufferance.²² Releases thus made by a reversioner or remainderman to the particular tenants are said by the common law writers to enure by way of enlargement of the estate (*enlarger l'estate*).²³ A mere *interesse termini*, that is, the right of a lessee who has not yet entered under his lease, does not entitle him to take a release by way of enlargement,²⁴ it being necessary that the lessee be in actual possession, or in legal possession by force of the Statute of Uses.²⁵ A release, in order to enlarge the particular estate to one of inheritance, must, at common law, contain the word "heirs," as in the case of a conveyance between strangers.²⁶

A release may also be made, not by way of enlargement of an estate, but by way of passing an estate (*mitter l'estate*), as when one joint tenant or coparcener releases his estate to his cotenant. In this case, words of inheritance have never been required, since the person to whom the release is made is regarded as already seised of the freehold, and the release is merely a

18. 2 Pollock & Maitland, Hist. Eng. Law, 90.

19. Co. Litt. 273b.

20. 2 Sanders, Uses & Trusts (5th Ed.) 73.

21. Litt §§ 460, 465.

22. Co. Litt. 270b.

23. Litt. § 465; Challis, Real Prop. 409.

24. Litt. § 459; Co. Litt. 270a.

25. See *ante*, § 100.

26. Litt. § 465; Co. Litt. 273b.

discharge from the claim of another seised under the same title.²⁷ A release was never regarded as sufficient to pass the interest of one tenant in common to another, since they are regarded as having distinct freeholds.²⁸

A third mode of operation of a release is by way of "extinguishment" of an interest in another's land, as when the owner of a rent, a right of profit, or an easement, releases his rights to the owner of the land subject thereto.²⁹ The only other modes of operation of release at common law occurred in the case of a release by one disseised, of all his right or claim in favor of the disseisor, or of his heir or feoffee, this being known as a "release by way of passing the right" (*mitter le droit*).³⁰

A release must, at common law, be by deed, that is, by writing under seal.³¹

Strictly speaking, at the present day, as at common law, a release cannot be made to one having neither possession of the land nor a vested estate therein,³² but a conveyance purporting to be a release will almost invariably be upheld as a conveyance by bargain and sale or grant.³³

— **Assignment and surrender.** The term "assignment" in connection with the law of land, is commonly applied to the transfer of a chattel interest.³⁴ At com-

27. Co. Litt. 273b, and Butler's note.

28. 4 Cruise, Dig. tit. 32, c. 6, § 25; 2 Preston, Abstracts, 77.

29. Litt. § 480; Co. Litt. 280a.

30. Litt. § 466; 4 Cruise, Dig. tit. 32, c. 6, § 26.

31. Co. Litt. 264b; 2 Pollock & Maitland, Hist. Eng. Law, 91.

32. Runyon v. Smith, (C. C.) 18 Fed. 579; Branham v. City of San Jose, 24 Cal. 585; Warren v. Childs, 11 Mass. 222. Compare Sessions v. Reynolds, 7 Smedes &

M. (Miss.) 130.

33. Baker v. Whiting, 3 Sumn. 475, Fed. Cas. No. 787; Conn's Heirs v. Manifee, 2 A. K. Marsh (Ky.) 396, 12 Am. Dec. 417; Pray v. Pierce, 7 Mass. 381, 5 Am. Dec. 59; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497; Lynch v. Livingston, 6 N. Y. 422; Hall's Lessee v. Ashby, 9 Ohio 96, 34 Am. Dec. 424. See Ely v. Stannard, 44 Conn. 528.

34. 2 Blackst. Comm. 326; 4 Cruise, Dig. tit. 32, c. 6 § 15.

mon law, an assignment of such an interest in land, as distinguished from an interest in an incorporeal thing, might be made without writing,³⁵ but by the Statute of Frauds³⁶ a writing signed by the assignor, or by his agent authorized in writing, is required. The question of the right of a tenant to make an assignment of his leasehold interest, and that of when a transfer by him constitutes an assignment and when a sublease, have been previously considered.³⁷

That class of conveyance known as surrender, involving the transfer of a particular estate to the reversioner or remainderman, though recognized at common law, is frequently the subject of adjudication at the present day, and will be most conveniently discussed in a subsequent section apart from the other common law conveyances.³⁸

— **Exchange.** An exchange is a mutual conveyance of equal interests in distinct pieces of land. At common law, if both pieces of land lay in the same county, the exchange might be oral, while, if situated in different counties, a deed was required.³⁹ But, by the Statute of Frauds, a writing is necessary on the exchange of freeholds or of terms for years other than certain terms for three years or less.⁴⁰ No livery of seisin was necessary at common law, but each party to the exchange was required to enter while both were alive.⁴¹

A common-law exchange could not be effected unless the estates of the respective parties were of the same legal *quantum*,—that is, an estate in fee simple could be

35. 4 Cruise, Dig. tit. 32, c. 6, § 20.

36. 29 Car. 2, c. 3, § 3. As to the various state statutes bearing on the form of an assignment, see 1 Tiffany, Landlord & Ten. § 154.

37. *Ante*, §§ 54, 55.

38. *Post*, § 431.

39. Litt. §§ 62, 63; Co. Litt. 50a.

40. 29 Car. II. c. 3, §§ 1-3; Co. Litt. 50a, Butler's note. See Dowling v. McKenney, 124 Mass. 478; Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36; Rice v. Peet, 15 Johns. (N. Y.) 503.

41. Co. Litt. 50b.

exchanged only for an estate of the same character, an estate for twenty years only for an estate for twenty years, and so on.⁴² The word "exchange" was required to be used, and no other expression would supply its place.⁴³ A common-law exchange, answering to the foregoing requirements, probably never occurs in modern practice.

§ 428. **Conveyances operating under the Statute of Uses.** The Statute of Uses, as has been previously explained, gave rise to two entirely new methods of transferring legal estates in land, to-wit, the conveyance by "bargain and sale," and that by "covenant to stand seised;" the former being based upon a use raised in the intended transferee by the payment of a pecuniary consideration, usually merely nominal, and the latter being based on the declaration of a use in favor of one related by blood or marriage, the statute executing the use in both cases.⁴⁴ One effect of this statute was to enable the owner of land, by a mere contract of sale and the payment to him of a pecuniary consideration, to vest the legal title in another, without any writing or ceremony whatever, and with absolute secrecy, and to prevent such secret conveyances by bargain and sale a statute was passed in the same year, called the "Statute of Enrollments,"⁴⁵ requiring all bargains and sales of freehold interests, in order to be valid, to be made by deed, that is, writing under seal, enrolled in court or with certain officials. The statute did not apply to conveyances by covenant to stand seised.

42. Litt. §§ 64, 65; Co. Litt. 51a; 2 Blackst. Comm. 323; Anonymous, 3 Salk. 157; Windsor v. Collinson, 32 Ore. 297; Long v. Fuller, 21 Wis. 121.

43. Co. Litt. 51b; 2 Blackst. Comm. 323; Eton College v. Winchester, 3 Wils. 468; Cass v. Thompson, 1 N. H. 65, 8 Am. Dec.

36; Dean v. Shelly, 57 Pa. St. 426, 98 Am. Dec. 235; Windsor v. Collinson, 32 Or. 297.

44. See *ante*, § 100.

45. 27 Hen. VIII. c. 16 (A. D. 1535). See 2 Sanders, Uses & Trusts (5th Ed.) 64; Digby, Hist. Law Real Prop. (4th Ed.) 364.

This statute is probably not in force in any state.⁴⁶ Clandestine conveyances by bargain and sale being thus prevented by the Statute of Enrollments, conveyancers, soon after the statute, devised the conveyance by "lease and release," taking advantage of the fact that the statute required the enrollment of bargains and sales of "freehold" interests only. This conveyance, as before explained, consisted of a bargain and sale of a leasehold interest to the intended grantee, which vested him with the legal possession, and this was followed by a deed of release of the reversion remaining in the former owner.⁴⁷

A conveyance by covenant to stand seised is usually said to be based upon the consideration of blood or marriage.^{47a} But in such case the word consideration is used, not in its technical sense of the equivalent for a promise, but in the sense of motive or inducement for the agreement to stand seised. "The exception in favor of those related by blood or marriage had in truth nothing to do with the doctrine of consideration and was established in the interest of the

46. See *Givan v. Tout*, 7 Blackf. (Ind.) 210; *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76; *Chandler v. Chandler*, 55 Cal. 267; *Givan v. Doe*, 7 Blackf. (Ind.) 210; opinion of Justices, 3 Binn. (Pa.) 595. Compare *Underwood v. Campbell*, 14 N. H. 393.

47. 1 Hayes, Conveyancing, (5th Ed.) 76. See *ante*. § 100.

47a. That a consideration of blood or marriage is necessary, see *post*. this section, notes 49-51, 63. In Massachusetts the view has been asserted that a covenant to stand seised may be supported by a pecuniary consideration. *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494; *Ricker v. Brown*, 183 Mass. 424, 67 N. E. 353. See

Gray, Perpetuities, § 57. The same view is adopted in *Jackson v. Dunsbaugh*, 1 Johns. Cas. 92. It is asserted in support of this view that previous to the statute of enrollments a covenant to stand seised could be supported by a pecuniary consideration, and that after that statute the contrary view was adopted merely to prevent the statute being nullified by regarding conveyances which were in their nature deeds of bargain and sale as covenants to stand seised. But covenants to stand seised appear not to have been recognized previous to the Statute of Enrollments. Professor Ames says that *Sharington v. Strotton*, Plowd. 298 (*anno*

great English families."⁴⁸ What degree of relationship is sufficient to support a conveyance of this character appears to have been but little discussed, and no restriction in this regard has been asserted, a covenant to stand seised in favor of a nephew or cousin being regarded as valid,⁴⁹ as is no doubt one in favor of a grandchild.⁵⁰ As regards connection by marriage, it would seem to be necessary that the beneficiary be the wife, or perhaps the husband, of one who is within the necessary degree of blood relationship, so that such a conveyance by A to his daughter-in-law or to his cousin's wife would be valid, but not such a conveyance by one of the latter to A.⁵¹ This is by reason of the fact that this form of conveyance was upheld merely to enable one to perpetuate and make provision for his or her own family, and while a conveyance to the wife of one's relative might conduce to this end, a conveyance to a relative of one's wife could not so operate.

The valuable consideration necessary to support a conveyance by bargain and sale is either money or money's worth.⁵² It involves ordinarily the idea of a benefit to the grantor, but presumably a mere detriment to the grantee would be sufficient for this purpose as it is to support an executory contract. A mere promise on the part of the grantee, as to pay money⁵³ or to support the grantor⁵⁴ is sufficient, and a

1565) "was the first case of this kind." See 21 Harv. Law Rev. at p. 269, Lectures on Legal History, p. 241.

48. Prof. J. B. Ames in 21 Harv. Law Rev. at p. 269, Lectures on Legal History, p. 241.

49. Sugden's Gilbert on Uses, 93; Sheppard's Touchstone, 511.

50. See Hansom v. Buckner, 4 Dana (Ky.) 251; Stovall v. Barnett, 4 Litt. (Ky.) 207.

51. See the full discussion by White, J., in Thompson v. Thompson, 17 Ohio St. 649. That a

covenant to stand seised in favor of a son in law or daughter in law is valid see also, Gale v. Coburn, 18 Pick. (Mass.) 397; Bell v. Scammon, 15 N. H. 381, 41 Am. Dec. 706; *Contra*, Corwin v. Corwin, 9 Barb. 219 6 N. Y. 342.

52. 2 Preston, Conveyancing, 373; Jackson v. Pike, 9 Cow. (N. Y.) 69; Redmond v. Cass, 226 Ill. 120.

53. 2 Sanders, Uses & Trusts (5th Ed.) 56.

mere condition subsequent in the conveyance, calling for the performance of some act by the grantee, has apparently been so regarded,⁵⁵ as has a reservation of a rent, of either substantial or nominal value.⁵⁶ Marriage is also a valuable consideration, in the sense that a bargain and sale to one in consideration of his intended marriage with one of the grantor's family is valid.⁵⁷

§ 429. Conveyances employed in the United States.

In most of the states of this country there are statutory provisions authorizing the transfer of land by simple forms of conveyance,⁵⁸ which, in their operation, much resemble the common-law "grant," except that they are not confined to incorporeal things. The same purpose of simplification of conveyancing has in England been attained by a statute providing that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant, as well as in livery.⁵⁹ Conveyances by way of bargain and sale have, however, been in frequent use in this country,⁶⁰ and, even in states where there are statutory provisions of the character referred to, the words "bargain and sell" are ordinarily used in a conveyance. In such states, in fact, it is difficult, and for most, if not all, purposes, unimportant, to say

54. *Young v. Ringo*, 1 T. B. Mon. (Ky.) 30; *Spalding v. Halenbeck*, 30 Barb. (N. Y.) 292.

55. *Stanley v. Bracebridge*, 1 Leon. 6; *Exum v. Canty*, 34 Miss. 533; *Castleton v. Langdon*, 19 Vt. 210.

56. *Barker v. Keate*, 2 Mod. 253.

57. *Sugden's Gilbert on Uses*, 91; *Arnold v. Estis*, 92 N. C. 162; *Thompson v. Thompson*, 17 Ohio St. 649.

58. 1 *Stimson's Am. St. Law*, § 1480-1482. And see particularly

the thorough discussion of the local law of the different states in this regard by Professor John R. Rood, in 4 *Mich. Law Rev.* 109.

59. "Real-Property Act," St. 8 & 9 Vict. c. 106, § 2 (A. D. 1845).

60. See *Pascault v. Cochran* (C. C.) 34 Fed. 358; *Givan v. Tout*, 7 Blackf. (Ind.) 210; *Nelson v. Davis*, 35 Ind. 474; *Chiles v. Conley's Heirs*, 2 Dana (Ky.) 21; *Sanders v. Hartzog*, 6 Rich. (S. C.) 479; *Holland v. Rogers*, 33 Ark. 251; *Stewart v. Stewart*, 171 Ala. 485, 54 So. 604; *Bronston's Adm'r*

whether a particular conveyance operates by force of the Statute of Uses or under the local statute. In order, however, that a conveyance be regarded as taking effect by way of bargain and sale, it must, as was before stated, be supported by a valuable consideration, either actual or expressed.⁶¹

Conveyances by way of covenant to stand seised have been recognized in this country,⁶² but, since a consideration of blood or marriage is necessary,⁶³ there is but little opportunity for their employment. Even when the proper consideration does exist, a conveyance in form under the local statute, or by way of bargain and sale, with a recital of a pecuniary consideration, would usually be employed.

Conveyances by lease and release have never been employed to any extent in this country, since the Statute of Enrollments, which constituted the reason for their use in England, is not in force here.

§ 430. Quitclaim deeds. There is, in this country, a well-recognized class of conveyances, known as "quit-

v. Bronston's Heirs, 141 Ky. 639, 133 S. W. 584.

61. Corwin v. Corwin, 6 N. Y. 342, 57 Am. Dec. 453; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Lambert v. Smith, 9 Ore. 185; Den d. Jackson v. Hampton, 30 N. C. 457; Gault v. Hall, 26 Me. 561; Boardman v. Dean, 34 Pa. St. 252.

That the recital of the considerations is conclusive for the purpose of supporting the conveyance as a bargain and sale, see *post*, § 438, note 75.

62. Murray v. Kerney, 115 Md. 514, 38 L. R. A. (N. S.) 937, 81 Atl. 6; Merrill v. Publishers' Paper Co., 77 N. H. 285, 90 Atl. 786; Jackson v. Swart, 20 Johns.

(N. Y.) 85; Ward v. Wooten, 75 N. C. 413; Sprague v. Woods, 4 Watts & S. (Pa.) 192; Fisher v. Strickler, 10 Pa. St. 348, 51 Am. Dec. 488; Watson v. Watson, 24 S. C. 228, 58 Am. Rep. 247; Barry v. Shelby, 4 Hayw. (Tenn.) 229.

63. Rollins v. Riley, 44 N. H. 9; Jackson v. Caldwell, 1 Cow. (N. Y.) 622; Gault v. Hall, 26 Me. 561; Thompson v. Thompson, 17 Ohio St. 649; Doe d. Cobb v. Hines, 44 N. C. 343, 59 Am. Dec. 559; Eckman v. Eckman, 68 Pa. St. 460; 2 Sanders, Uses & Trusts 5th Ed. 98; *Contra* in Massachusetts. See *ante*, this section, note 47a.

64. See, as to the early use of the word "quitclaim," 2 Pollock & Maitland, Hist. Eng. Law, 91.

claim deeds," which are to some extent a development of the common-law release, and which have acquired their name from one of the words ordinarily used in the latter instrument.⁶⁴ Such a conveyance purports merely to convey whatever title to the particular land the grantor may have, and its use excludes any implication that he has a good title, or any title at all.⁶⁵ Accordingly, as a general rule, it contains no covenants for title, and its employment is, in some states, regarded as in itself notice to the purchaser of possible defects in the title, so that he cannot claim to occupy the position of a *bona fide* purchaser.⁶⁶ Such a conveyance, moreover, is not regarded as transferring an after acquired title on the principle of estoppel.⁶⁷ A quitclaim deed, however, is sufficient in itself to pass the grantor's existing title to the same extent as a deed of grant or bargain and sale,⁶⁸ and its validity is not, like the common-law release, dependent upon the existence of an estate or interest in the grantee.⁶⁹ The question whether a conveyance is a mere quitclaim is determined by a construction of the instrument as a whole, with reference to the circumstances under

65. *City & County of San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; *Kerr v. Freeman*, 33 Miss. 292; *Emmel v. Headlee* (Mo.) 7 S. W. 22; *Coe v. Persons Unknown*, 43 Me. 432; *Garrett v. Christopher*, 74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67.

66. See *post*, § 567(m).

67. *Post*, § 545(b).

Since a government patent, when issued, relates back to the date of the entry, it enures to the benefit of one to whom the patentee has, since the entry, conveyed the land, even though by a "quitclaim" purporting to convey merely such title as he has. *Crane v. Salmon*, 41 Cal. 63; *Welch v.*

Dutton, 79 Ill. 466; *Callahan v. Davis*, 90 Mo. 78, 2 S. W. 216; *Landes v. Brant*, 10 How. (U. S.) 372, 13 L. Ed. 460; *French's Lessee v. Spencer*, 21 How. (U. S.) 228, 16 L. Ed. 97.

68. *Bradbury v. Davis*, 5 Colo. 265; *Kyle v. Kavanaugh*, 103 Mass. 356; *Grant v. Bennett*, 96 Ill. 513; *Wilson v. Albert*, 89 Mo. 537, 1 S. W. 209; *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130. So by statute in some states. See *Hoffman v. Harrington*, 28 Mich. 90; *Kerr v. Freeman*, 33 Miss. 292.

69. *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. 47; *Kerr v. Freeman*, 33 Miss. 292.

which it was given.⁷⁰ It may be said, however, that the cases do not appear to be entirely consistent as to the criteria controlling in the matter.⁷¹

§ 431. Surrender. That character of conveyance known as "surrender" was fully recognized at common law and might accordingly have been properly discussed in the previous section dealing with conveyances at common law. In view however of the practical importance of the law of surrender it has appeared to be expedient to devote a separate section thereto.

"Surrender" has been defined as a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them."⁷² Unfortunately, this technical meaning of the word, as referring to the transfer of an estate, has been somewhat obscured by its frequent use in an untechnical sense, as referring to the relinquishment or yielding up, not of an estate, but of the physical possession of the premises, as when the lessee covenants to "surrender" the premises in good condition at the end of the term, and the courts frequently fail clearly to distinguish between such a surrender of possession and a surrender, properly so called, of an estate for life or years. Quite frequently, in using

70. See *United States v. California & Oregon Land Co.*, 148 U. S. 31, 37 L. Ed. 354; *Derrick v. Brown*, 66 Ala. 162; *Reynolds v. Shaver*, 59 Ark. 299; *Morrison v. Wilson*, 30 Cal. 344; *Wightman v. Spofford*, 56 Iowa, 145; *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304; *Nichols v. Schmitton*, 107 Tex. 54, 174 S. W. 283; *Cook v. Smith*, 107 Tex. 119, 174 S. W. 1094; *Baldwin v. Drew*, --- (Tex. Civ.) ---, 180 S. W. 614;

Cummings v. Dearborn, 56 Vt. 441.

71. See *post*, § 567(m).

That the word "quitclaim" is used does not in itself show that the conveyance is legally a quitclaim deed. *Hitt v. Caney Fork Gulf Coal Co.*, 124 Tenn. 93, 139 S. W. 693; *Garrett v. Christopher*, 74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67.

72. *Co. Litt.* 337b. See 2 Platt, *Leases*, 499; *Comyn. Landl. & Ten.* 336.

the term even in its technical sense, a surrender "of the lease" is spoken of, but this must be understood as merely an elliptical expression signifying a surrender of the estate created by the lease.

The courts occasionally refer to the "rescission" or "cancellation" of the lease by the parties to the tenancy, without apparently recognizing that a termination of the tenancy as a result of an agreement of the parties, made subsequently to its creation, necessarily involves the divesting of a leasehold estate out of the lessee, or his assignee, and a revesting thereof in the landlord.⁷³ After an estate, whether in fee simple or for life or for years, has been conveyed, the grantor and grantee in the conveyance cannot effect a reconveyance of the estate to the former by undertaking to "rescind" or "cancel" the original conveyance.⁷⁴ The parties to a contract can rescind or cancel the contract, that is, they can make a new contract by which each agrees to forego his rights under the previous contract, but the mere making of a new contract can never transfer property rights even to a person in whom they were formerly vested. Any rescission or cancellation, so called, of a lease, by the parties thereto, must consequently, in order to terminate the tenancy, constitute in legal effect a surrender, and must satisfy the requirements existing with reference to such a mode of conveyance.^{74a}

In order that a surrender may be effected, the estate surrendered must be no greater in *quantum* than the estate of the surrenderee, since otherwise it cannot merge therein.⁷⁵ And furthermore it must

73. See *Silva v. Bair*, 141 Cal. 599, 75 Pac. 162; *Alschuler v. Schiff*, 164 Ill. 298, 45 N. E. 424; *Evans v. McKanna*, 89 Iowa 362, 8 Am. St. Rep. 390, 56 N. W. 527; *Andre v. Graebner*, 126 Mich. 116, 85 N. W. 464; *Geddis v. Folliott*, 16 S. D. 610,

94 N. W. 431; *Snyder v. Harding*, 34 Wash. 286, 75 Pac. 812.

74. *Post*, § 465.

74a. *Post*, this section, note 80.

75. 3 *Preston, Conveyancing*, 166 *et seq.*

immediately precede the latter estate as regards the right of possession, with no vested estate intervening.⁷⁶ Consequently if A leases to B for years and B leases to C, the subtenant C cannot surrender to A, and if property is devised to A for life, with remainder to B for life, with remainder to C in fee, A cannot, though B can, surrender to C.

— **Express surrender.** Surrender may be either “express” or “by operation of law.” At common law an express surrender, in the ordinary case, could be made orally,⁷⁷ but this was changed by the provision of the English Statute of Frauds that a surrender, if not by act and operation of law, must be in writing, signed by the surrenderor or his agent, and there are in most of the states statutes to a similar effect.⁷⁸

Before the Statute of Frauds the cancellation of an instrument of lease was regarded as equivalent to an oral surrender, and valid as such,⁷⁹ but this is no longer the case.⁸⁰ As elsewhere stated,⁸¹ the cancellation of an instrument of conveyance, after its delivery, does not have the effect of revesting in the maker the estate conveyed thereby, and this is as true of a conveyance by way of lease for a term of years as of a conveyance in fee simple.

While the words “surrender, grant and yield up” are ordinarily used in a formal instrument intended to take effect as a surrender, no particular words are necessary, it being sufficient that an intention to transfer the leasehold interest to the reversioner clearly appears.⁸² Accordingly, an instrument in form a lease

76. Except when an estate for years is interposed between two freehold estates. *Id.* 107, and *ante*, § 34.

77. *Co. Litt.* 338a; *Sheppard's Touchstone* 300.

78. See 2 *Tiffany, Landlord & Ten.*, § 189a.

79. *Magennis v. Mac Cullogh*,

Gilb. Eq. Cas. 235.

80. *Roe d. Berkley v. Archbishop of York*, 6 *East* 86; *Doe d. Courtail v. Thomas*, 9 *Barn. & C.* 288; *Rowan v. Lytle*, 11 *Wend. (N. Y.)* 616.

81. *Post*, § 465.

82. *Farmer v. Rogers*, 2 *Wils.* 26; *Shepard v. Spaulding*, 4

of the premises by the tenant to the landlord has been regarded as sufficient as a surrender,⁸³ as has what was in terms an "agreement" for the relinquishment of the leasehold, it being intended to take effect as a surrender.⁸⁴ Apparently, in England, where a mortgage transfers the legal estate to the mortgagee, a mortgage of the leasehold by the tenant to his landlord would take effect as a surrender,⁸⁵ but such a result could not follow in any jurisdiction where a mortgage does not transfer the legal title.⁸⁶

— **Surrender by operation of law.** A surrender by "act and operation of law," which is expressly excepted from the Statute of Frauds, is a surrender which the law infers from certain acts by the parties as being inconsistent with the continued distinct existence of the two former estates. Occasionally the theory appears to be asserted that surrender by operation of law takes place because the acts of the parties show an intention or agreement that the leasehold estate shall be surrendered,⁸⁷ but it is somewhat difficult to regard a surrender as taking place by operation of law when it results from the agreement or intention

Metc. (Mass.) 416; Greider's Appeal, 5 Pa. St. 422, 47 Am. Dec. 413.

83. Loyd v. Langford, 2 Mod. 174; Smith v. Mapleback, 1 Term R. 441; Shepard v. Spaulding, 45 Mass. (4 Metc.) 416.

84. Harris v. Hancock, 91 N. Y. 340; Allen v. Jaquish, 21 Wend. (N. Y.) 628.

85. See Cottee v. Richardson, 7 Exch. 143.

86. See Breese v. Bange, 2 E. D. Smith N. Y.) 474.

87. See *c. g.* Beall v. White, 94 U. S. 382, 24 L. Ed. 173; Brewer v. National Union Build-

ing Ass'n, 106 Ill. 221, 46 N. E. 752; Talbot v. Whipple, 14 Allen (Mass.) 177; Tobener v. Miller, 68 Mo. App. 569; Meeker v. Spalsbury, 66 N. J. Law 60, 48 Atl. 1026; Home Coupon Exchange Co. v. Goldfarb, (N. J. Eq.) 74 At. 143; O'Neill v. Pearse, 88 N. J. L. 733, 96 Atl. 1102, affirming 87 N. J. L. 382, 94 Atl. 312; Bedford v. Terhune, 30 N. Y. 453, 86 Atl. 394; Hart v. Pratt, 19 Wash. 560, 53 Pac. 711.

And see cases cited this section, *post* note 93.

of the parties, even though this is shown by acts rather than by words.⁸⁸

A surrender by operation of law occurs when the tenant accepts from the reversioner a new lease, to begin immediately, or at any time during the existence of the previous lease; this result being based on the theory that, by such acceptance, the tenant is estopped to deny the validity of such new lease, which nevertheless cannot be valid unless the first lease is terminated.⁸⁹ The new lease must, it seems, be sufficient to pass an interest according to the intention and contract of the parties,⁹⁰ but the fact that the new lease is oral is immaterial if an oral lease is sufficient to create the interest intended to be created.⁹¹ Since the surrender in such case is by operation of law, it might be considered as taking place even contrary to the intention of the parties.⁹²

88. So in *Felker v. Richardson*, 67 N. H. 509, 32 Atl. 830, it is said, per Carpenter, J., "A surrender by agreement, whether express or implied, is the act, not of the law, but of the parties. To constitute a surrender by operation of law, overt acts of both parties inconsistent with the continuance of the term are essential." But see Professor Aigler's note in 15 Mich. Law Rev. 659, and the article there referred to in 5 Irish Jurist, 117, also Editorial note 28 Harv. Law Rev. 313.

89. *Lyon v. Reed*, 13 Mees. & W. 285; *Otis v. McMillan*, 70 Ala. 46; *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369; *Flagg v. Dow*, 99 Mass. 18; *Bowman v. Wright*, 65 Neb. 661. 91 N. W. 580; *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400; *Edwards v. Hale*, 37 W. Va. 193, 16 S. E. 487.

Acceptance by the tenant from the landlord of an interest other than an estate for years, if in-

consistent with the former tenancy, has likewise been regarded as effecting a surrender by operation of law, as when "a lessee for years accepts a grant of a rent, common, estovers, herbage, or the like, for life or years, out of the same lands." Bac. Abr., Leases (S.) 2, 1. See 2 Tiffany, Landlord & Ten. § 190 b (2).

90. *Doe d. Biddulph v. Poole*, 11 Q. B. 713; *Zick v. London United Tramways Ltd.*, (1908) 2 K. B. 126; *Schiefflin v. Carpenter*, 15 Wend. (N. Y.) 400; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120.

91. Comyn's Dig. "Surrender," (T1); *Fenner v. Blake*, (1900), 1 Q. B. 426; *Evans v. McKanna*, 89 Iowa, 362, 48 Am. St. Rep. 390. 56 N. W. 527; *Schiefflin v. Carpenter*, 15 Wend. (N. Y.) 400; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120.

92. See *Lyon v. Reed*, 13 Mees. & W. 285; *Brown v. Cairns*, 107

Occasionally, however, a different view has been taken, that the new lease merely raises a presumption of surrender, capable of rebuttal by evidence that the intention was otherwise.⁹³

The question has occasionally arisen whether an assignee of the lessee, by reason of his recognition by the landlord as tenant of the premises, can be regarded as holding under a new lease, so as to effect a surrender of the estate created by the original lease, and consequently to put an end to the liability of the original lessee on account of rent. The cases are generally to the effect that the mere acceptance of rent from the assignee does not involve a new lease, so as to effect a surrender,⁹⁴ and it is difficult to see how any other view could be adopted. The assignee is bound to pay the rent, and the acceptance of payment from him involves merely the recognition of a liability already existing.⁹⁵

A second mode of surrender by operation of law, and one which frequently occurs, results from the re-

Iowa, 727, 77 N. W. 478; Enyeart v. Davis, 17 Neb. 228, 22 N. W. 449.

93. *Flagg v. Dow*, 99 Mass. 18 (*semble*); *Thomas v. Zumbalen*, 43 Mo. 471; *Brown v. Linn Woolen Co.*, 114 Me. 266, 95 Atl. 1037; *Smith v. Kerr*, 108 N. Y. 31, 2 Am. St. Rep. 362, 15 N. E. 70. See Editorial note 22 Harv. Law Rev. 55.

94. *Bonetti v. Treat*, 91 Cal. 233, 13 L. R. A. 418, 27 Pac. 612; *Triest & Co. v. Goldstone*, 173 Cal. 240, 159 Pac. 715; *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 7 Am. St. Rep. 248; *Harris v. Heachman*, 62 Iowa, 411, 17 N. W. 592; *Brewer v. Dyer*, 7 Cush.

(Mass.) 337; *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220, 82 N. W. 893; *Rees v. Lowry*, 57 Minn. 381, 59 N. W. 310; *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443; *Bouscaren v. Brown*, 40 Neb. 722, 42 Am. St. Rep. 692, 59 N. W. 385; *Creveling v. De Hart*, 54 N. J. Law 338, 23 At. 611; *Laughran v. Smith*, 75 N. Y. 205; *Frank v. McGuire*, 42 Pa. 77; *Adams v. Burke*, 21 R. I. 126, 42 At. 515; *Granite Bldg. Corp. v. Rubin*, 40 R. J. 208, 100 Atl. 310; *Johnson v. Norman*, 98 Wash. 331, 167 Pac. 923. And cases cited *ante*, § 407, note 59c.

95 There are cases however which regard the original lessee as relieved from liability in such case. See *ante*, § 407, note 59d.

linquishment of possession by the tenant and the resumption of possession by the landlord.⁹⁶ The theory of such surrender would seem to be that the reversion of possession in the landlord to the exclusion of the tenant, by the action of both parties, being inconsistent with the continuance of an outstanding leasehold in the tenant, both are estopped to assert that the relation of landlord and tenant still exists. It is immaterial whether such change of possession is the result of agreement. The tenant may relinquish possession to the landlord in accordance with an agreement to that effect,⁹⁷ but more frequently the change of possession occurs as a result of the abandonment of the premises by the tenant and the subsequent resumption of the possession thereof by the landlord.

The question frequently arises whether there has been such a resumption of possession by the landlord, upon the abandonment of the premises by the tenant, as to give rise to a surrender by operation of law, relieving the tenant from liability under the lease. This appears to depend, in each case, on whether the landlord has taken possession with the intention of occupying and controlling the premises as his own, to

96. *Grimman v Legge*, 8 Barn. & C. 324; *Dodd v. Acklom*, 6 Man. & G. 672; *Shahan v. Herzberg*, 73 Ala. 59; *Williams v. Jones*, 1 Bush (Ky.) 621; *Lamar v. McNamee*, 10 Gill & J. (Md.) 116, 32 Am. Dec. 152; *Talbot v. Whipple*, 14 Allen, (Mass.) 177; *Prior v. Kiso*, 81 Mo. 241; *Elguiter v. Drishaus*, 44 Neb. 378, 63 N. W. 19; *Dennls v. Miller*, 68 N. J. Law 320, 53 Atl. 394; *Elliott v. Aiken*, 45 N. H. 30; *Hart v. Pratt*, 19 Wash. 560, 53 Pac. 711.

97. There is such an agreement, it appears, if the landlord demands possession of the prem-

ises and the tenant accedes to such demand. See *e. g.* *Kean v. Rogers*, 146 Iowa, 559, 123 N. W. 978; *Conkling v. Tuttle*, 52 Mich. 630, 18 N. W. 391; *Smith v. Pendergast*, 26 Minn. 318, 3 N. W. 978; *Frankel v. Sternau*, 92 Ohio St. 197, 110 N. E. 747; *Patchin's Ex'r v. Dickerman*, 31 Vt. 666; *Eimerman v. Nathan*, 116 Wis. 124, 92 N. W. 550 (*semble*); *Boyd v. Gore*, 143 Wis. 531, 128 N. W. 68; Compare *Whittaker v. Barker*, 1 Crompt & M. 113; *Lamar v. McNamee*, 10 Gill & J. (Md.) 116, 32 Am. Dec. 152; *Felker v. Richardson*, 67 N. H. 509, 32 Atl. 830.

the exclusion of the tenant in case the latter desires to return,⁹⁸ and this is ordinarily a question of fact.⁹⁹

That the landlord, after the tenant's abandonment, entered and cared for the premises,¹ or that he made repairs,² has been regarded as not in itself involving such a resumption of possession. When the tenant, upon abandoning the premises, sends the key to the landlord or leaves it at his residence or place of business, the fact that the landlord fails to return it to the tenant does not necessarily show a resumption of exclusive possession of the premises for this purpose,³ though the

98. *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145; *Duffy v. Day*, 42 Mo. App. 638; *Meeker v. Spalsbury*, 66 N. J. Law 60, 48 Atl. 1026; *Hargrove v. Bourne*, 47 Okla. 484, 150 Pac. 121.

99. *Hays v. Goldman*, 71 Ark. 251, 72 S. W. 563; *Carson v. Arvantes*, 10 Colo. App. 582, 50 Pac. 1080; *Okie v. Pearson*, 23 App. D. C. 170; *Brewer v. National Bldg. Ass'n*, 166 Ill. 221, 46 N. E. 752; *Armour Packing Co. v. Des Moines Park Co.*, 116 Iowa, 723, 93 Am. St. Rep. 270, 89 N. W. 196; *Sander v. Holstein Commission Co.*, 118 Mo. App. 29, 121 Mo. App. 293; *Hargrove v. Bourne*, 47 Okla. 484, 150 Pac. 121; *White v. Berry*, 24 R. I. 74, 52 Atl. 682; *Kneeland v. Schmidt*, 78 Wis. 345, 11 L. R. A. 498, 47 N. W. 438.

1. *Joslin v. McLean*, 99 Mich. 480, 58 N. W. 467; *Duffy v. Day*, 42 Mo. App. 638; *Rucker v. Mason*,—Okla.,—161 Pac. 195; *Milling v. Becker*, 96 Pa. 182.

2. *Cook v. Anderson*, 85 Ala. 99, 4 So. 713; *Brewer v. National Union Bldg. Ass'n* 166 Ill. 221, 46 N. E. 752; *Sessinghaus v.*

Knocke, 127 Mo. App. 300, 105 S. W. 283; *Haynes v. Aldrich*, 133 N. Y. 287, 16 L. R. A. 183, 28 Am. St. Rep. 636, 31 N. E. 94; *Breuckman v. Twibill*, 89 Pa. 58; *Smith v. Hunt*, 32 R. I. 326, 79 Atl. 826.

3. *Oaster v. Henderson*, 2 Q. B. Div. 575; *Fehringer v. Wagner*, *Stockbridge Trading Co.*, 61 Colo. 359, 157 Pac. 1071; *Ledsinger v. Burke*, 113 Ga., 74, 38 S. E. 313; *Tolle v. Orth*, 75 Ind. 298, 39 Am. Rep. 147; *Martin v. Stearns*, 52 Iowa, 345, 35 Am. Rep. 278, 3 N. W. 92; *Withers v. Larrabee*, 48 Me. 570 *Joslin v. McLean*, 99 Mich. 480, 58 N. W. 467; *Lucy v. Wilkins*, 33 Minn. 441, 23 N. W. 861; *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *Bumiller v. Walker*, 95 Ohio 344, L. R. A. 1918B, 96, 116 N. E. 797; *Bowen v. Clarke*, 22 Ore. 566, 29 Am. St. Rep. 625, 30 Pac. 430; *Auer v. Penn*, 99 Pa. 370, 44 Am. Rep. 114; *John B. Webster Co. v. Grossman*, 33 S. D. 383, 146 N. W. 565, (acceptance of Key by Janitor); *Chandler v. Hinds*, 135 Wis. 43, 115 N. W. 339.

That the landlord, for the pur-

acceptance and retention of the key, combined with other circumstances, may have this effect.⁴ The attempt of the landlord to lease the premises to a third person,⁵ or even his actual making of such a lease, to take effect immediately in possession, does not, in a number of jurisdictions, show such an assumption of control over the premises as to give rise to a surrender, relieving the former tenant from further liability under the previous lease,⁶ especially in case the landlord, before making the second lease, notifies the former tenant that he is about to make such a lease on the latter's account, that is, that his purpose is to reduce, but not necessarily to extinguish, the latter's liability for rent.⁷ By other cases it is held that such reletting

pose of making repairs, obtained the key from the tenant, was held not to relieve the tenant, he having been notified that he would still be held liable. *Smith v. Hunt*, 32 R. I. 326, 79 Atl. 823.

4. *Phene v. Popplewell*, 12 C. B. N. S. 334; *Brewer v. National Union Bldg. Ass'n* 166 Ill. 221, 46 N. E. 752; *Hesseltine v. Seavey*, 16 Me. 212; *Buckingham Apartment House Co. v. Dafeo*, 78 Minn. 268, 80 N. W. 974; *Fink v. Browe Co.*, (N. J. Ch.) 99 Atl. 926; *Bowen v. Clarke*, 22 Ore. 566, 29 Am. St. Rep. 625, 30 Pac. 430.

5. *Walls v. Atcheson*, 3 Bing. 462; *Joslin v. McLean*, 99 Mich. 48, 58 N. W. 467; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671, 38 Pac. 1072; *O'Neil v. Pearse*, 88 N. J. L. 733, 96 Atl. 1102 aff'g 87 N. J. L. 382, 94 Atl. 312; *Haynes v. Aldrich*, 133 N. Y. 287, 16 L. R. A. 183, 28 Am. St. Rep. 636, 31 N. E. 94; *Lane v. Nelson*, 167 Pa. 602, 31 Atl. 864. In *Meagher v. Eilers Music House*, 84 Ore.

33, 164 Pac. 373, the decision to this effect was to some extent based on the fact that the second lease expressly reserved a right in the original tenant to resume possession.

6. *Humiston, Keeling & Co. v. Wheeler*, 175 Ill. 514, 51 N. E. 893; *Martin v. Stearns*, 52 Iowa, 345, 3 N. W. 92; *H. S. Chase & Co. v. Evans*, 178 Iowa, 885, 160 N. W. 346; *Scheelky v. Koch*, 119 N. C. 80, 25 S. E. 713; *Bumiller v. Walker*, 95 Ohio, 344, L. R. A. 1918B, 96, 116 N. E. 797; *Bowen v. Clarke*, 22 Ore. 566, 29 Am. St. Rep. 625, 30 Pac. 430; *Auer v. Penn*, 99 Pa. 370, 44 Am. Rep. 114; *Auer v. Hoffmann*, 132 Wis. 620, 112 N. W. 1090.

7. See *Williamson v. Crossett*, 62 Ark. 393; *Renard v. Renard*,—Cal.—165 Pac. 694; *Rehkopf v. Wirz*, 31 Cal. App. 695, 161 Pac. 285; *Brown v. Cairns*, 107 Iowa, 727, 77 N. W. 478; *Kean v. Rogers*, 146 Iowa, 559, 123 N. W. 754; *Oldewurtel v. Wiesenfeld*, 97 Md. 165, 54 Atl. 969; *Alsup v.*

necessarily brings to an end the tenancy previously existing,⁸ and in favor of this view is the fact that the contrary view appears to involve a right of possession in two distinct persons under two distinct leases at one and the same time.⁹

A third mode of surrender by operation of law occurs in the case of a new lease by the landlord to a third person, accompanied by the former tenant's relinquishment of possession in favor of such person.¹⁰ And it is apparently on this principle, or on a principle akin thereto, that a surrender by operation of law has occasionally been regarded as taking place when the landlord accepted as his tenant a sublessee of the original tenant.¹¹

Banks, 68 Miss. 664, 13 L. R. A. 598, 24 Am. St. Rep. 294, 9 So. 895; McGinn v. B. H. Gladding Dry Goods Co., 40 R. I. 348, 101 Atl. 129.

8. Oastler v. Henderson, 2 Q. B. Div. 575; Welcome v. Hess, 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369; Rice v. Dudley, 65 Ala. 68; Haycock v. Johnston, 97 Minn. 289, 114 Am. St. Rep. 715, 106 N. W. 304; Gray v. Kaufman Dairy & Ice Cream Co., 162 N. Y. 388, 49 L. R. A. 580, 76 Am. St. Rep. 327, 56 N. E. 903; Pelton v. Place 71 Vt. 430, 46 Atl. 63.

9. See 2 Tiffany, Landlord & Ten. p. 1340, 14 Mich. Law Rev. 82; 15 Id. 559.

In Whitcomb v. Brant. 100 Atl. 175, it was held by the New Jersey Court of Errors and Appeals that a lessor making a new lease, upon abandonment by the first lessee, at a higher rent than that reserved in the first lease, was not liable for the excess to the first lessee, although he had refused to consent to a

surrender. The case is criticized, 30 Harv. Law Rev. 766.

10. Nickells v. Atherstone, 10 Q. B. 944; Morgan v. McCollister, 110 Ala. 319, 20 So. 54; Triest & Co. v. Goldstone, 173 Cal. 240, 159 Pac. 715; Williams v. Vanderbilt, 145 Ill. 238, 21 L. R. A. 489, 36 Am. St. Rep. 486, 34 N. E. 476; Rogers v. Dockstader, 90 Kan. 189, 133 Pac. 717; Kinsay v. Minnick, 43 Md. 112; Amory v. Kannoffsky, 117 Mass. 351, 19 Am. Rep. 416; Gallop v. Murphy, 160 Mo. App. 1, 141 S. W. 438; Washoe County Bank v. Campbell, 41 Nev. 153, 67 Pac. 643; *In re Sherwoods*, 210 Fed. 754.

As to the effect of the invalidity of the new lease, see editorial note 28 Harv. Law Rev. 313, Commenting on Johnson v. Northern Trust Co., 265 Ill. 263, 106 N. E. 814. Compare 2 Tiffany, Landlord & Ten. p. 1347.

11. Dills v. Stobie, 81 Ill. 202 (*semble*); Stimmel v. Waters, 2 Bush (Ky.) 282; Amory v. Kannoffsky, 117 Mass. 351, 19 Am. Rep.

— **Effect of surrender.** A surrender by a particular tenant has the effect of extinguishing his estate,¹² and if he is a tenant under a lease it terminates all future liability under the covenants,¹³ the most ordinary application of this principle occurring in the case of a covenant to pay rent, which ceases to be effective after a surrender.¹⁴ A surrender does not, however, operate to the prejudice of a third person.¹⁵ For instance, the interest of a subtenant is not affected by the surrender of the estate of the head tenant,¹⁶ nor is a lien on the estate surrendered affected by the surrender.¹⁷

§ 432. Conveyances failing to take effect in the manner intended. A conveyance which is intended to take effect as a certain class of conveyance, if not valid for that purpose, will, if possible, be construed as a conveyance of another character, in order that it may

416; *Snyder v. Parker*, 75 Mo. App. 529; *Thomas v. Cook*, 2 Barn & Ald. 119. See 2 *Tiffany. Landlord & Ten.* § 154.

12. *Co. Litt* 338b; *Terstegge v. First German Mut. Benev. Soc.* 92 Ind. 82, 47 Am. Rep. 135; *Deane v. Caldwell*, 127 Mass. 242; *Harris v. Hiscock*, 91 N. Y. 340; *Appeal of Greider*, 5 Pa. 422, 47 Am. Dec. 413.

13. *Platt, Covenants*, 585; *American Bonding Co. v. Pueblo Inv. Co.*, 150 Fed. 17, 9 L. R. A. (N. S.) 557; *Deane v. Caldwell*, 127 Mass. 242; *Snowhill v. Reed*, 49 N. J. L. 292, 60 Am. Rep. 615, 10 Atl. 737.

14. *Ante*, § 413, note 66.

15. *Co. Litt* 338b.

16. *Mellor v. Watkins*, L. R. 9 Q. B. 400; *Mitchell v. Young*, 80 Ark. 411, 7 L. R. A. (N. S.), 221, 17 Am. St. Rep. 89, 97 S. W.

454; *Buttner v. Kasser*, 19 Cal. App. 755, 127 Pac. 811; *McKenzie v. Lexington*, 4 Dana (Ky.) 129; *Eten v. Luyster*, 60 N. Y. 252; *Krider v. Ramsay*, 79 N. C. 354; *Hessel v. Johnson*, 129 Pa. 173, 5 L. R. A. 851, 15 Am. St. Rep. 716, 18 Atl. 754; *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. 948.

So it has been held that although the surrender of the estate of the head tenant prevents the recovery from the subtenant of rent afterwards accruing (*ante* § 413, note 69a) the surrenderee is still bound by a covenant entered into by the original lessor. *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910; *Standard Oil Co. v. Slye*, 164 Cal. 435, 129 Pac. 589.

17. *Farnum v. Hefner*, 79 Cal. 575, 12 Am. St. Rep. 174, 21 Pac.

take effect.¹⁸ This important rule has been applied in numerous connections. For instance, a conveyance intended to take effect as a bargain and sale, but which is void as such for want of a pecuniary consideration, will take effect as a covenant to stand seised, if a consideration of blood or marriage exists;¹⁹ and, as before stated, a conveyance in words of release, void as such for want of an estate or possession in the releasee, will be supported as a conveyance by bargain and sale, or otherwise.²⁰ This principle has also been adopted to support limitations of future estates which could not be supported unless the conveyance were regarded as operating under the Statute of Uses.²¹

II. FORM AND ESSENTIALS OF A CONVEYANCE.

§ 433. **General considerations.** All conveyances of freehold or leasehold interests in lands, other than certain leases for three years or less, must, by the Statute of Frauds, be in writing.²² In most, if not all, the states of this country there are statutes to the same general effect.²³ These statutes, however, as before stated, do not interfere with surrenders by operation of law.²⁴ And even in the case of an at-

955; *Dobschuetz v. Holliday*, 82 Ill. 371; *Firth v. Rowe*, 53 N. J. Eq. 520, 32 Atl. 1064; *Allen v. Brown*, 60 Barb. (N. Y.) 39.

18. *Norton Deeds*, 46, citing the numerous English cases. *Goodtitle v. Bailey*, Cowp. 600; *Roe d. Wilkinson v. Tranmer*, Willes, 682; *Foster's Lessee v. Dennison*, 9 Ohio, 121; *Hunt v. Hunt*, 14 Pick. (Mass.) 374; *Lambert v. Smith*, 9 Ore. 185, 191. See *Gray. Perpetuities* § 65.

19. *Crossing v. Scudamore*, 2 Lev. 9, 1 Mod. 175; *Horton v. Sledge*, 29 Ala. 478; *Bank of*

United States v. Housman, 6 Paige (N. Y.) 526; *Eckman v. Eckman*, 68 Pa. St. 460.

20. See *ante*, note 33.

21. *Roe d. Wilkinson v. Tranmer*, 2 Wils. 75, Willes, 682; *Ward v. Wooten*, 75 N. C. 413; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Merrill v. Publishers Paper Co.*, 77 N. H. 285, 90 Atl. 786; *Rembert v. Vetoe*, 89 S. C. 198, 71 S. E. 959.

22. 29 Car. II c. 3, p. 1-3.

23. 1 *Stimson's Am. St. Law*, §§ 1560, 4143.

24. See *ante*, § 431.

tempted oral conveyance, the intended grantee, by making improvements upon the property, may create an equity in himself entitling him to a valid written conveyance.²⁵

At common law, all written conveyances of land, as well as most other written instruments, were in the form of deeds, that is, of instruments under seal, and a deed was either a "deed of indenture" or a "deed poll." A deed of indenture was a deed made between two or more persons, while a deed poll was made by one person only.²⁶ These terms are thus used in England at the present day, and they are occasionally so used in this country.

A carefully drawn conveyance usually consists of the following parts: At the commencement the names of the parties are stated,²⁷ and the date is sometimes here given, though it is frequently placed at the end. Next come the recitals, if there are any, these being statements of fact, explanatory of the transaction. A statement of the consideration and of its payment and receipt then follow,²⁸ and, after this, the operative words of conveyance,²⁹ with a description of the land conveyed,³⁰ and any exception therefrom.³¹ The parts thus far enumerated constitute what is known as "the premises." The premises are followed by the "*habendum*" which limits the estate to be taken by the grantee, and is usually introduced by the words "to

25. *Post*, § 547.

26. Co. Litt. 229a. The word "indenture" originated in the fact that two copies of the deed were usually written on the same piece of parchment, with some word or letters written between them, through which the parchment was cut in an indented or waiving line. The words "deed poll" refer to a deed "polled" or shaven at the top. Subse-

quently, conveyancers adopted the practice, which still, it seems, prevails in England, of cutting all deeds between two or more parties in a waving line at the top. 2 Blackst. Comm. 296; Williams, Real Prop. (18th Ed.) 150.

27. *Post*, § 434.

28. *Post*, § 438.

29. *Post*, § 435.

30. *Post*, §§ 441-448.

31. *Post*, § 436.

have and to hold.”³² Any declaration of trust which is sought to be made is here inserted. The “*reddendum*” or reservation³³ then follows, after that the statement of any condition or power affecting the grant, and then the covenant or covenants of title.³⁴ The conclusion usually consists of a formal reference to the execution, and the signatures and seals of the parties are then placed by them at the foot of the instrument.³⁵ There is also, almost invariably, a certificate by an officer that the conveyance was acknowledged by the grantors.³⁶

Though a well-drawn conveyance usually contains all or most of these parts above referred to, a conveyance containing merely the names of the parties and words of conveyance, with a description of the land, if duly executed, is sufficient to vest at least an estate for life in the grantee.³⁷

§ 434. Designation of the parties. A conveyance should designate with certainty the name of the grantor, and this should regularly be done at the commencement. It is sufficient, however, if the name as given is sufficient to enable the grantor to be identified, and the fact that his name as it appears in the instrument differs from his actual name, or from the name signed thereto, does not invalidate the conveyance.³⁸ A conveyance in terms by the “heirs” of a person deceased is sufficient, since they are capable of identification.³⁹

32. *Post*, § 437.

33. *Post*, § 436.

34. *Post*, §§ 449-456.

35. *Post*, §§ 457, 458.

36. *Post*, § 460.

37. *Co. Litt.* 7a; 4 *Kent's Comm.* 461.

38. *Comyn's Dig.* “Fait” (E 3); *Erskine v. Davis*, 25 *Ill.* 251; *Nicodemus v. Young*, 90 *Iowa*, 423, 57 *N. W.* 906; *Bierer v. Fretz*, 32 *Kan.* 329, 4 *Pac.* 284; *Wakefield v. Brown*, 38 *Minn.*

361, 8 *Am. St. Rep.* 671, 37 *N. W.* 788; *Houx v. Batteen*, 68 *Mo.* 64; *Rupert v. Penner*, 35 *Neb.* 587, 17 *L. R. A.* 824, 53 *N. W.* 598; *David v. Williamsburg City Fire Ins. Co.*, 83 *N. Y.* 265, 38 *Am. Rep.* 418; *Jenkins v. Jenkins*, 148 *Pa. St.* 216, 23 *Atl.* 985; *Chapman v. Tyson*, 39 *Wash.* 523, 81 *Pac.* 1066.

39. *Blaisdell v. Morse*, 75 *Me.* 542.

It has generally been held that, when two or more persons join in the execution of a conveyance, only such as are named in the body of the instrument will be regarded as parties thereto. This rule has usually been applied in the cases of conveyances by a husband, the joinder in the execution of which by the wife has been regarded as insufficient to release her dower, or otherwise divest her rights;⁴⁰ but the rule has also been applied in the case of another person joining in the execution of a conveyance which does not name him as a party.⁴¹ In a number of jurisdictions, however, the rule referred to has been repudiated, more usually,⁴² but not exclusively,⁴³ in connection with the question

40. *Agricultural Bank of Mississippi v. Rice*, 4 How. (U. S.) 225, 11 L. Ed. 949; *Batchelor v. Brereton*, 112 U. S. 396, 28 L. Ed. 748; *Harrison v. Simons*, 55 Ala. 510; *Cordano v. Wright*, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; *Cox v. Wells*, 7 Blackf. (Ind.) 410, 43 Am. Dec. 98; *Prather v. McDowell*, 8 Bush (Ky.) 46; *Beverly v. Waller*, 115 Ky. 600, 103 Am. St. Rep. 342, 74 S. W. 264; *Payne v. Parker*, 10 Me., 178, 25 Am. Dec. 221; *Stevens v. Owen*, 25 Me., 94; *Lothrop v. Foster*, 51 Me. 367; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Leavitt v. Lamprey*, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; *Greenough v. Turner*, 11 Gray (Mass.) 334; *Merrill v. Nelson*, 18 Minn. 366; *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65, 26 S. W. 1068; *Laughlin v. Fream*, 14 W. Va. 322.

41. *Harrison v. Simons*, 55 Ala. 510; *Parsons v. Justice*, 163 Ky. 737, 174 S. W. 725; (Compare *Hargis v. Ditmore*, 86 Ky. 653, 7 S. W. 141); *Peabody v. Hewitt*,

52 Me. 33, 83 Am. Dec. 486; *Marx & Sons v. Jordan*, 84 Miss. 334, 105 Am. St. Rep. 457, 36 So. 386; See *Batchelor v. Brereton*, 112 U. S. 396, 28 L. Ed. 748; *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65, 26 S. W. 1068.

42. *Ingoldsby v. Juan*, 12 Cal. 564; *Johnson v. Montgomery*, 51 Ill. 185; *Armstrong v. Stovall*, 26 Miss. 275; *Elliot v. Sleeper*, 2 N. H. 525; *Burge v. Smith*, 27 N. H. 332; *Woodward v. Leaver*, 38 N. H. 29. And see *Isler v. Isler*, 110 Miss. 419, 70 So. 455.

A husband's authentication of his wife's deed by his joinder in the execution, has occasionally been regarded as sufficient under the statute, though he was not named in the instrument. *Dentzel v. Waldie*, 30 Cal. 138; *Pease v. Bridge*, 49 Conn. 58.

43. *Sterling v. Park*, 129 Ga. 309, 13 L. R. A. (N. S.) 298, 121 Am. St. Rep. 224, 12 A. & E. Ann. Cas. 201, 58 S. E. 828; *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166. See *Hargis v. Ditmore*, 86 Ky. 653, 7 S. W. 141.

of the release of dower, it being considered that the signature alone serves not only to identify the signer as a grantor in the conveyance, but also to indicate an intention to join therein for the purpose of passing his or her interest. The requirement that the grantor's name be inserted appears, as is suggested in some of the cases last cited, to have been based on the necessity of having some means for his identification,^{43a} at a time when but few people wrote, and a writing was ordinarily authenticated by sealing alone.

The grantee or grantees must be named in the conveyance, or means for their identification furnished thereby.⁴⁴ It does not affect the validity of the conveyance that the name of the grantee, as inserted therein, is not that ordinarily borne by him, but one given to or assumed by him for the occasion is sufficient.⁴⁵ A conveyance however to an absolutely fictitious person is a nullity.⁴⁶

A conveyance to a person deceased is a nullity,⁴⁷ and a conveyance to the "estate" of one deceased has

43a. Perkins, Conveyancing, § 36; Sheppard's Touchstone, 233.

44. Wood v. Boyd, 28 Ark. 75; Wunderlin v. Cadogan, 50 Cal. 613. McGrew v. Lamb, 60 Colo, 462, 154 Pac. 91; Simmons v. Spratt, 20 Fla., 495; Chase v. Palmer, 29 Ill. 306; Clarke v. Butts, 73 Minn. 361, 76 N. W. 199; Henniges v. Paschke, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350; Hardin v. Hardin, 32 S. C. 599, 11 S. E. 102; Lund v. Thackery, 18 S. Dak. 113, 99 N. W. 856; Wright v. Lancaster, 48 Tex. 250.

45. Wilson v. White, 84 Cal. 239, 24 Pac. 114; Scanlan v. Grimmer, 71 Minn. 351, 70 Am. St. Rep. 326, 74 N. W. 146; Thomas v. Wyatt, 31 Mo. 188,

77 Am. Dec. 640; Chapman v. Tyson, 39 Wash. 523, 81 Pac. 1066; Staak v. Sigelkow, 12 Wis. 234. But in Barr v. Schroeder, 32 Cal. 609 it appears to be assumed that a mistake in the grantee's name invalidated the conveyance.

46. David v. Williamsburg Fire Ins. Co., 83 N. Y. 265, 38 Am. Rep. 418; Muskingum Valley Turnpike Co. v. Ward, 13 Ohio 120, 42 Am. Dec. 191; Weihl v. Robertson, 97 Tenn. 458, 37 S. W. 274.

47. Lewis v. McGee 1 H. K. Marsh. (Ky.) 199; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; Morgan v. Hazlehurst Lodge, 53 Miss. 665; Neal v. Nelson, 117 N. C. 393, 53 Am. St. Rep. 590.

likewise been so regarded.⁴⁸ A conveyance to the "heirs" of one deceased is valid, since their identity is capable of immediate establishment.⁴⁹

It is immaterial in what part of the conveyance the grantee's name or identity is made to appear,⁵⁰ but if a person is named as grantee in the premises, another person not named therein, but named in the *habendum*, cannot take an estate under the conveyance otherwise than by way of remainder.⁵¹

— **Uncertain grantee.** Occasionally a conveyance is made in terms to the heirs of a particular person, which person is still alive. There is obviously no room for objection to the validity of such a conveyance

23 S. E. 428. But when a consideration is paid, an equity has occasionally been recognized as existing in favor of the heirs. *Hutto v. Hutto*, 66 Fla. 504, 63 So.; *Johnson v. John L. Roper Lumber Co.*, 168 N. C. 226, 84 S. E. 289.

In *City Bank v. Plank*, 141 Wis. 653, it was held that a conveyance in terms to a person deceased was valid, on the theory that by the use of the name of deceased it was intended to designate his executor, the inference being very strong that when the parties to a transaction know that a person named is dead, they intend, in using his name, to designate a living person..

48. *Simmons v. Spratt*, 20 Fla. 495, 8 So. 123; *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130, But see *Arnett v. Fairmont Trust Co.*, 70 W. Va. 296, 73 S. E. 930, where a bequest to the "estate" of one deceased was regarded as passing the property to the personal representative.

49. *Shaw v. Loud*, 12 Mass. 447; *Hoover v. Malen*, 83 Ind. 195; *Boone v. Moore*, 14 Mo. 421; *Gearheart v. Tharp*, 9 B. Mon. (Ky.) 31.

50. *Spyve v. Topham*, 3 East 115; *Richey v. Sinclair*, 167 Ill. 184, 47 N. E. 364; *Berry v. Billings*, 44 Me. 416, 69 Am. Dec. 107; *Bay v. Posner*, 78 Md. 42; *Irwin v. Longworth*, 20 Ohio, 581; *Henniges v. Paschke*, 9 N. Dak. 489, 81 Am. St. Rep. 588; *Co. Litt.* 7a; *Sheppard's Touchstone*, 75; 2 *Preston, Conveyancing*, 435.

51. *Norton, Deeds*, 287; *Sheppard's Touchstone* (*Preston's Ed.*) 237; *Samme's Case*, 13 Coke, 54; *Husted v. Rollins*, Iowa, 137 N. W. 462, 42 L. R. A. (N. S.) 379; *Blair v. Osborne*, 84 N. C. 417; *Moore v. City of Waco*, 85 Tex. 206; *Adams v. Dunklee*, 19 Vt. 382; *Cox v. Douglass*, 20 W. Va. 175; *Weekly v. Weekly*, W. Va. 83, S. E. 1005. *Contra*, to the effect that one not named in premises may take otherwise than by way of remainder, see *McLeod v. Tarrant*, 39 S. C. 271, 17

if the word "heirs" is in the particular case intended as a designation of ascertained persons, the living children, for instance, of the person named.⁵² But it has been decided in a number of cases that if the word "heirs" is in such case used in its technical sense, and the attempted conveyance to the heirs is not by way of remainder, it is invalid for lack of any ascertained grantee.⁵³ And it has been decided that, for the same reason, a conveyance, not by way of remainder, to unborn children of a particular person, is invalid.⁵⁴ The validity of such a conveyance when by way of contingent remainder, has on the other hand been freely recognized.⁵⁵

At common law, that is, before the Statute of Uses, such a conveyance to persons not ascertained or not in being was valid only if by way of contingent remainder, since otherwise there was no person to whom the livery of seisin could be made,⁵⁶ and this distinction between a conveyance by way of remainder and not by way of remainder was applied even in the

S. E. 773 (McIver, C. J. dissenting).

52. *Tharp v. Yarbrough*, 79 Ga. 382, 11 Am. St. Rep. 439; *Seymour v. Bowles*, 172 Ill. 520, 50 N. E. 122; *Tinder v. Tinder*, 131 Ind. 381, 30 N. E. 1077; *Heath v. Hewitt*, 127 N. Y. 166; 13 L. R. A. 46, 24 Am. St. Rep. 438; *Huss v. Stephens*, 51 Pa. St. 282; *Robertson v. Wampler*, 104 Va. 380, 51 S. E. 835.

53. *Duffield v. Duffield* 268 Ill. 29, 108 N. E. 673; *Tinder v. Tinder*, 131 Ind. 381, 30 N. E. 1077; *Booker v. Tarwater*, 138 Ind. 385, 37 N. E. 979; *Hall v. Leonard*, 1 Pick. (Mass.) 27; *Morris v. Stephens*, 46 Pa. St. 200. But see *Bailey v. Willis*, 56 Tex. 212.

54. *Davis v. Hollingsworth*, 113

Ga. 210, 84 Am. St. Rep. 233, 38 S. E. 827; *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835; *Morris v. Caudle*, 178 Ill. 9, 44 L. R. A. 489, 69 Am. St. Rep. 282, 52 N. E. 1036; *Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254; *Dupree v. Dupree*, 45 N. C. 164, 59 Am. Dec. 590; *Newsom v. Thompson*, 2 Ired. L. (24 N. Car.) 277; *Lillard v. Ruckers*, 9 Yerg. (Tenn.) 64.

55. *Co. Litt*, 378a; *Norton. Deeds*, 319; *Boraston's Case*, 3 Co. Rep. 20a; *Sharman v. Jackson*, 30 Ga. 224; *Mudge v. Hammill*, 21 R. I. 283, 79 Am. St. Rep. 802, 43 Atl. 544. See cases cited *ante*, § 136 (b).

56. *Ante*, § 156.

case of a conveyance by grant,⁵⁷ in analogy, presumably, to the case of a conveyance by livery, since there was nothing in the nature of a common-law grant to suggest such a distinction. Consequently the modern decisions, in recognizing this distinction, are supported by the common law authorities. It is somewhat difficult, however, to see why the validity of a conveyance in favor of the heirs or unborn children of A should, at the present day, be dependent on whether, by the same instrument, a particular estate is created in favor of B; and such a conveyance might, it is submitted, well be sustained, without any particular estate, as creating an executory interest, valid by force of the Statute of Uses, or local state statute,⁵⁸ to mature into an estate upon the ascertainment or coming into existence of the grantees named. A devise to unascertained or non existent persons, if not offending the Rule against Perpetuities, is perfectly valid,⁵⁹ and there would appear to be no sufficient reason for applying a different rule in this regard to a conveyance *inter vivos*. The language of some of the cases, above cited, would seem to suggest that the asserted invalidity of a conveyance to unascertained or non existent persons is based on the theory that a conveyance by deed is necessarily a bilateral transaction, and that consequently the grantee must be in existence at the time of the delivery of the instrument in order that there be an acceptance thereof.⁶⁰ Even the courts, however, which profess to recognize the necessity of the acceptance of a conveyance, in effect admit that a conveyance is perfectly valid although the grantee is an infant, mentally and legally incapable of acceptance,⁶¹ and if the impossibility of acceptance dispenses with its necessity when such impossibility arises from per-

57. Perkins, §§ 52, 53; Shepard's Touchstone, 235; Bacon's Abridgment, Grant (C.).

58. *Ante*, §§ 156-158.

59. *Ante*, § 160.

60. *Post*, § 463.

61. *Post*, § 463, note 18.

sonal incapacity, such impossibility might well have the same effect when arising from the uncertainty or non existence of the person whose acceptance is otherwise required.

A conveyance to a corporation not yet formed has been regarded as invalid for lack of an existent and ascertained grantee.⁶² But, it is submitted, such a conveyance might, apart from the Rule against Perpetuities, be supported as creating an executory interest, to become vested upon the formation of the corporation. In so far, however, as the conveyance might be intended to operate in favor of a corporation to be formed at a future time, however remote, it would be invalid under the Rule against Perpetuities.

A conveyance to the inhabitants of a certain district or municipal division has been regarded as invalid, on the ground that there is a lack of reasonable certainty in the grantee,⁶³ and a like view has been taken of a conveyance to the owners of the building adjoining the land conveyed on the west side thereof.⁶⁴

—**Name of grantee left blank.** At the common law, a deed, that is, an instrument under seal, if delivered with a blank therein as to an essential part, is void, although this blank be afterwards filled by one having parol authority from the maker of the deed so to do; this conclusion being ordinarily based on the theory that an authority to execute and deliver an instrument under seal must itself be under seal.⁶⁵ Applying the rule referred to, it has been held, in several states, that a conveyance under seal, which is

62. *Phelan v. San Francisco*, 6 Cal. 531; *Harriman v. Southam*, 16 Ind. 190; *Douthitt v. Stinson*, 63 Mo. 268; *Utah Optical Co. v. Keith*, 18 Utah, 464; *Russell v. Topping* 5 McLean, 194, Fed. Cas. 12163.

63. *Hunt v. Tolles*, 75 Vt. 48,

52 Atl. 1042; Co. Litt. 3a.

64. *Schaidt v. Blaul*, 66 Md. 141, 6 Atl. 669.

65. *Sheppard's Touchstone*, 54; *Comyn's Dig. "Fait" (A 1)*; *Hiblewhite v. McMorine*, 6 Mees. & W. 200.

sought to be delivered with the name of the grantee left blank, is invalid, although the blank is afterwards filled up by another person acting under authority from the grantor, if that authority was not under seal.⁶⁶ In other states, it has been held, without reference to the question of a seal, that an authority subsequently to insert the grantee's name must be in writing.⁶⁷ In still other states there are decisions to the effect that the name of the grantee, if left blank, may be inserted under an oral authority, or an authority merely inferred from the circumstances of the case,⁶⁸ these de-

66. *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549; *Burns v. Lynde*, 6 Allen (Mass.) 305; *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366; *Davenport v. Sleight*, 19 N. C. 381; *Rollins v. Ebbs*, 137 N. C. 355, 2 Ann. Cas. 327, 49 S. E. 341; *Preston v. Hull*, 23 Gratt. (Va.) 600.

67. *Adamson v. Hartman*, 40 Ark. 58; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Whitaker v. Miller*, 83 Ill. 381; *Mickey v. Barton*, 194 Ill. 446, 62 N. E. 802; *Ayres v. Probasco*, 14 Kan. 175; *Lund v. Thackery*, 18 S. D. 113, 99 N. W. 856. See *Lindsley v. Lamb*, 34 Mich. 509.

68. *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Hall v. Kary*, 133 Iowa 465, 119 Am. St. Rep. 639, 110 N. W. 930; *Bank v. Fleming*, 63 Kan. 139, 65 Pac. 213; *Guthrie v. Field*, 85 Kan. 58, 37 L. R. A. (N. S.) 326, 116 Pac. 217 (*dictum*); *Inhabitants of South Berwick v. Huntress*, 53 Me. 90; *Board of Education of Minneapolis v. Hughes*, 118 Minn. 404, 41 L. R. A. (N. S.) 637, 136 N. W. 1095; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Thummel v. Holden*, 149 Mo. 677, 51

S. W. 404; *Hemmenway v. Mullock*, 56 How. Pr. (N. Y.) 38; *Cribben v. Deal*, 21 Ore 211, 28 Am. St. Rep. 746, 27 Pac. 1046; *Threadgill v. Butler*, 60 Tex. 599; *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Schintz v. McManamy*, 33 Wis. 299; *Friend v. Yahr*, 126 Wis. 291, 1 L. R. A. (N. S.) 891, 110 Am. St. Rep. 924, 104 N. W. 997.

The tendency is to presume authority for this purpose in the person to whom the instrument is handed by the grantor. *Creveling v. Banta*, 138 Iowa. 47, 115 N. W. 598; *Barras v. Barras*, 191 Mich. 473, 158 N. W. 192; *Board of Education v. Hughes*, 118 Minn. 404, 41 L. R. A. (N. S.) 637, 136 N. W. 1095; *Montgomery v. Dresher*, 90 Neb. 632, 38 L. R. A. (N. S.) 423, 134 N. W. 251; *Lamar v. Simpson*, 1 Rich. Eq. (S. C.) 71, 42 Am. Dec. 345; *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081; *Friend v. Yahr* 126 Wis. 291, 104 N. W. 997, 1 L. R. A. (N. S.) 891, 110 Am. St. Rep. 924, 104 N. W. 997.

cisions ordinarily referring to the common law requirement of an authority under seal as technical and unreasonable. These decisions do not however meet the difficulty presented by the statutes in force in a number of states requiring a conveyance to be signed by the grantor or by an agent "authorized in writing." In the presence of such a statute it is difficult to understand how such an essential part of the conveyance as the designation of the grantee can be the act of an agent without written authority. And especially is this the case when the oral authority is one to insert, not the particular name which was inserted, but any name which it might thereafter become desirable to insert. Nor do these decisions appear to meet the difficulty, hereafter referred to,⁶⁹ arising from the requirement of delivery.

In case one to whom the instrument is entrusted, with authority to insert the name of the grantee, inserts such name and then hands the completed instrument to the grantee named, the question arises, when, if ever, is the instrument to be regarded as having been delivered. Was delivery effected by the action of the grantor in handing the instrument to the agent, or was it effected by the action of the agent in handling

When the instrument must be executed by the grantor, and cannot be executed through an agent, as in some states is the case in a conveyance by a married woman, blanks in the conveyance cannot be filled by a third person acting under oral, or even sealed, authority. *Drury v. Foster*, 2 Wall. (U. S.) 24 17 L. Ed. 780.

69. *Post*, § 461, note 57.

In *Creveling v. Banta*, 138 Iowa 47, 115 N. W. 598, Ladd, C. J. remarked as follows: "What was evidently feared by Dillon J., in

Simms v. Hervey, 19 Iowa, 273, 297, if this rule were adopted has transpired, and deeds or mortgages to land are now "float-ed" almost as readily as commercial paper, and the name of the grantee inserted when it (*sic*) finds an owner who concluding to retain the land elects to insert his name as grantee. The practice, while not conserving a single laudable purpose, has proven an efficient help in the perpetration of fraud and the concealment of property from the pursuit of creditors."

the instrument to the grantee. The former view appears to be excluded by the difficulty of conceiving of the legal delivery as a conveyance of an instrument which lacks the name of a grantee. Such an instrument is necessarily incapable of legal operation, and to assert that such an instrument has been delivered, that is, that an intention has been indicated that it shall immediately be legally operative,⁷⁰ appears to involve an absolute incompatibility of ideas. In accord with this latter view are the occasional decisions or judicial statements that the grantee's name must be inserted by the agent before he "delivers" the instrument, or before he delivers it to the grantee,⁷¹ this evidently involving the view that it is the physical transfer by the agent, and not the transfer to the agent, which operates as delivery. On the other hand there are decisions that an agent to whom the instrument is handed, with authority to insert such name as he may choose as that of the grantee, may insert his own name, and thereby render the instrument operative in his favor,⁷² and these do not accord with the view that the instrument cannot be delivered until the grantee's name is inserted,

70. *Post*, § 461.

71. *Allen v. Withrow*, 110 L. S. 119, 28 L. Ed. 90; *Osby v. Reynolds*, 260 Ill. 576, 103 N. E. 556; *Carr v. McColgan*, 100 Md. 462, 476, 60 Atl. 606; *Derry v. Fielder*, 216 Mo. 176, 115 S. W. 412; *Chauncey v. Arnold*, 24 N. Y. 330; *Cribben v. Deal*, 21 Ore. 211, 28 Am. St. Rep. 746, 27 Pac. 1046; *Telschow v. Quiggle*, 74 Ore. 105, 145 Pac. 11; *Duncan v. Hodges*, 4 McCord (S. C.) 239, 17 Am. Dec. 734. See *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. 492.

In *Halvorsen v. Mullin*, 179 Iowa 293, 156 N. W. 289, the view is expressed that the man-

ual transfer of the instrument to the agent involves in effect a delivery conditioned upon the filling of the blank (see *post*, § 462), so that the instrument is to be regarded, so soon as the blank is filled, as having been delivered at the time of such transfer. This does not, however, obviate the difficulty involved in the idea of even the conditional delivery of a conveyance lacking a grantee.

72. *Burk v. Johnson*, 146 Fed. 209; *Augustine v. Schmitz*, 145 Iowa 591, 124 N. W. 607; *Einstein v. Holladay-Koltz Land & Lumber Co.*, 132 Mo. App. 82, 111 S. W. 859.

or with the view that the delivery is to be regarded as made by the agent on behalf of the grantor. The conception of a conveyance becoming operative by reason of a delivery made by the grantee as agent of the grantor is an almost impossible one. Furthermore, if the one who is given authority to fill the blank is also the grantor's agent for the purpose of making delivery of the instrument when completed, he should, it is submitted, have formal written authority for this purpose, a power of attorney, as it is ordinarily termed, the delivery being a part of the execution of the instrument.⁷³

Even though a merely oral authority to insert the name of the grantee, and to make delivery of the instrument when thus completed, be regarded as insufficient, a view which, though not in accord with the weight of authority in this country, is conceived to be the sounder on principle, nevertheless an instrument completed and delivered under such an insufficient authority might in some cases be supported on the theory of estoppel, in favor either of the person whose name is inserted in the instrument,⁷⁴ or in favor of a *bona fide* purchaser from him for value.⁷⁵ One claiming under a conveyance has frequently no means of determining whether the grantee's name was inserted before or after its execution, and unless he is to be protected on the principle of estoppel, there is little safety in purchasing property in any jurisdiction where the validity of an oral authority to insert the grantee's name is denied.

73. *Post*, § 461, notes 53-58.

74. *Quinn v. Brown*, 71 Iowa 376, 34 N. W. 13; *McCleery v. Wakefield*, 76 Iowa, 529, 2 L. R. A. 529, 41 N. W. 210; *State v. Matthews*, 44 Kan. 596, 10 L. R. A. 308, 25 Pac. 36; *Phelps v. Sullivan*, 140 Mass. 36, 54 Am. Rep. 442, 2 N. E. 121; *Pence v. Arbuckle*, 22 Minn. 417; *Garland*

v. Wells, 15 Neb. 298, 18 N. W.

132. See *El Dorado Exchange Nat. Bank v. Fleming*, 63 Kan. 139, 65 Pac. 213, and *post*, this section, note 77.

75. *Swartz v. Ballou*, 47 Iowa, Hall v. Kary, 133 Iowa, 468, 119 Am. St. Rep. 639, 110 N. W. 930; *Ragsdale v. Robinson*, 48 Tex. 379.

In case a blank as to the name of the grantee is filled by a person who has no authority for the purpose, either oral or in writing, or it is filled in a manner contrary to the directions of the grantor, the conveyance is, it is agreed, invalid as regards a person who is aware of the circumstances of the transaction.⁷⁶ As regards an innocent grantee or purchaser, on the other hand, it might frequently be valid, on the ground of estoppel⁷⁷ provided at least he pays value.⁷⁸ If the grantor chooses to place in the hands of another person an instrument duly signed and sealed by him, but which is otherwise in an incomplete state, and such other exceeds his authority in making the instrument apparently complete, the grantor, and not an innocent purchaser, should be the one to suffer on account thereof. The grantor should be estopped, in such case, to deny that the instrument is his act and deed.⁷⁹

When the grantor, instead of handing the blank instrument to another, retains it, and it later leaves his custody without his consent, the question whether it is effective in the hands of a *bona fide* purchaser would seem to depend primarily upon whether the con-

76. *Ayers v. Probasco*, 14 Kan. 175; *Arguello v. Bours*, 67 Cal. 447, 8 Pac. 49; *Lund v. Thackery*, 18 S. D. 113, 99 N. W. 856; *Schintz v. McMenamy*, 33 Wis. 299.

77. *Creveling v. Banta*, 138 Iowa, 47, 115 N. W. 598; *Augustine v. Schmitz*, 145 Iowa, 591, 124 N. W. 617; *State v. Matthews*, 44 Kan. 596, 10 L. R. A. 308, 25 Pac. 36; *Guthrie v. Field*, 85 Kan. 58, 116 Pac. 217, 37 L. R. A. (N. S.) 326; *Pence v. Arbuckle*, 22 Minn. 417; *Garland v. Wells*, 15 Neb. 298, 18 N. W. 132; *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081. But see *Barden v. Grace*, 167 Ala. 453, 52

So. 425; *Vica Valley & C. R. v. Mansfield*, 84 Cal. 560, 24 Pac. 145; *Whitaker v. Miller*, 83 Ill. 381; *Thummel v. Holden*, 149 Mo. 677, 51 S. W. 404; *Westlake v. Dunn*, 184 Mass. 260, 100 Am. St. Rep. 557, 68 N. E. 212; *Telschow v. Quiggle*, 74 Ore. 105, 145 Pac. 11; *Swan v. N. B. Australian Co.*, 2 Hurlst. & Colt. 175.

78. In *Van Dyke v. Van Dyke*, 119 Ga. 47 S. E. 192, 830, in which the conveyance was regarded as invalid there appears to have been no consideration paid.

79. See the admirable discussion in *Ewart, Estoppel*, 449, *et seq.* But the cases referred to

duct of the grantor was, in the particular case, lacking in reasonable care.⁸⁰

— **Substitution of other grantee.** The question of the validity of a conveyance, the name of the grantee in which was inserted after it left the grantor's hands, in a space left blank for this purpose, was discussed above.⁸¹ A question of a somewhat analogous nature concerns the validity of a conveyance, when the name of the grantee was inserted after delivery, not in a space originally left blank for the purpose, but by way of substitution for another name which appeared in the instrument at the time of delivery. Occasionally a purchaser of land, with a view to the saving of expense and trouble, upon reselling the land to another, merely erases his own name and inserts that of the purchaser, so that, when the instrument is recorded, the title appears to have passed direct from his vendor to the last purchaser. Such an alteration, even if made with the consent of both the grantor and grantee, and in the presence of both, cannot operate, it would seem, to divest the title vested by the delivery in the original grantee,⁸² and the fact that the grantor purports to make a second delivery after the alteration cannot well change the result. To divest one's title to land something more is necessary than a conveyance by his grantor to a third person. It has been said that if the original grantee himself procures the change to be made he cannot thereafter claim title in himself,⁸³ but this is

in the latter portion of note 77 *supra* are opposed to any such notion of estoppel.

80. See 4 Wigmore, Evidence, § 2419; Van Amringe v. Morton 4 Whart. (Pa.) 382; Telschow v. Quiggle, 74 Ore. 105, 145 Pac. 11.

81. *Ante*, this section, notes 65-80.

82. Gibbs v. Potter, 166 Ind.

471, 9 App. Cas. 481, 77 N. E. 942; Carr v. Frye, 225 Mass. 531, 114 N. E. 745.

83. Abbott v. Abbott, 189 Ill. 488, 82 Am. St. Rep. 472, 59 N. E. 958. The statement appears to have been uncalled for, as the court found that the change was made before delivery.

so, it is submitted, only in so far as the elements of an estoppel are present.⁸⁴

The substitution of another name as that of the grantee, without the grantor's consent, can obviously not operate to vest title in the person whose name is so substituted.⁸⁵ One conveying to A cannot, without his consent, be made to convey to B. And likewise the substitution of another name as that of the grantee, without the consent of the original grantee, cannot have such an effect, of divesting the title of the original grantee.⁸⁶

§ 435. **Words of conveyance.** Though particular words are appropriate to particular classes of conveyances, it is not necessary that these particular words be used, and the conveyance is valid, provided it contains any words signifying an intention to transfer the land or the grantor's interest therein.⁸⁷ The phrase "give, grant, bargain, and sell" is frequently employed, and is no doubt sufficient for any class of conveyance, in view of the rule before referred to, that a conveyance will be upheld if possible, though it cannot operate as intended. It is necessary, however, that

84. See *Goodwin v. Norton*, 92 Me. 532, 43 Atl. 111.

85. *Hollis v. Harris*, 96 Ala. 288; *Wagle v. Iowa State Bank*, Iowa 156 N. W. 991; *Wilds v. Bogan*, 55 Ind. 331 (*semble*); *Perry v. Hackney*, 142 N. C. 368, 115 Am. St. Rep. 741, 9 Ann. Cas. 244, 55 S. E. 289; *Goodwin v. Norton*, 92 Me. 532, 43 Atl. 111.

86. *John v. Hatfield*, 84 Ind. 75 (*semble*); *Hill v. Nisbet*, 58 Ga. 586 (*semble*); *Clark v. Cresswell*, 112 Md. 339, 21 Ann. Cas. 338, 76 Atl. 579; *Simpkins v. Windsor*, 21 Ore. 382, 28 Pac. 72 (*semble*).

87. *Shove v. Pincke*, 5 Term. R. 124; *Peters v. McLaren*, 218 Fed. 410, 134 C. C. A. 198; *San Francisco & O. R. Co. v. City of Oakland*, 43 Cal. 502; *Yeager v. Farnsworth*, 163 Iowa, 537; 145 N. W. 87; *Howe v. Warnack*, 4 Bibb. (Ky.) 234; *Gordon v. Haywood*, 2 N. H. 402; *Hutchins v. Carleton*, 19 N. H. 487; *Jackson v. Root*, 18 Johns. (N. Y.) 60; *Lynch v. Livingston*, 6 N. Y. 422; *Folk v. Varn*, 9 Rich. Eq. (S. C.) 303; *Evenson v. Webster*, 3 S. D. 382, 44 Am. St. Rep. 802, 53 N. W. 747; *Hanks v. Folsom*, 11 Lea (Tenn.) 555.

the conveyance contain words showing an intention to transfer the grantor's interest,⁸⁸ and the words "sign over,"⁸⁹ and "warrant and defend" have been held to be insufficient,⁹⁰ as have the words "does will."^{91,92}

§ 436. **Exceptions and reservations.** The purpose and effect of an exception in a conveyance is to except or exclude from the operation of the conveyance some part of the thing or things covered by the general words of description therein, as when one conveys a piece of land, excepting a certain part thereof, or the houses thereon, it being properly always a thing actually existent.⁹³ A reservation in a conveyance, as defined by the common-law writers, is a clause by which the grantor of the land creates, in favor of himself, some new thing "issuing out of" the land, and not previously in existence, such as a rent, or some other service of a feudal or *quasi* feudal character.⁹⁴

The expressions "reserve" and "reservation" have been applied, in a somewhat untechnical sense, in connection with a clause in a conveyance by which the

88. Webb v. Mullins, 78 Ala. 111; Bell v. McDuffie, 71 Ga. 264; Davis v. Davis, 43 Ind. 561; Brown v. Manter, 21 N. H. 528, 53 Am. Dec. 223; Weinrich v. Wolf, 24 W. Va. 299; Freudenberger Oil Co. v. Simmons, 75 W. Va. 337, Ann. Cas. 1918A 873, 83 S. E. 995.

89. McKinney v. Settles, 31 Mo. 541.

90. Hummelman v. Mounts, 87 Ind. 178.

91-92. Caldwell v. Caldwell, 140 Ga. 736, 79 S. E. 853.

93. Co. Litt. 21a; Sheppard's Touchstone, 77 *et seq.*; Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co. (C. C.), 13 Fed. 646; Spencer v. Wabash

R. Co., 132 Iowa, 129, 109 N. W. 453; Brown v. Anderson, 88 Ky. 577, 11 S. W. 607; Snoddy v. Bolen, 122 Mo. 479, 24 L. R. A. 507, 24 S. W. 142, 25 S. W. 932; Edwards v. Brusha, 18 Okla. 234, 90 Pac. 727. See Truett v. Adams, 66 Cal. 218, 5 Pac. 96; Brown v. Allen, 43 Me. 590; King v. Wells, 94 N. C. 344; Woodcock v. Estey, 43 Vt. 515.

An exception in a covenant of title is not necessarily an exception or reservation for the purposes of the conveyance. Wendall v. Fisher, 187 Mass. 81, 72 N. E. 322; Towns v. Brown, (Ky.) 114 S. W. 773.

94. Co. Litt. 47a; Sheppard's Touchstone, 80; Doe d. Douglas

grantor retains a power of disposition over the land conveyed,⁹⁵ by which he is given a right to repurchase the property,⁹⁶ by which he retains the right to recover damages for past injuries to the property conveyed,⁹⁷ and by which he retains a limited estate in the land,⁹⁸ and perhaps in other cases of stipulations in behalf of the grantor. Such cases evidently do not fall within the common-law definition of a reservation, but the use of the expression in these connections is highly convenient, and appears, in the ordinary case, to be free from objection.

— **As creating easement.** The nature of an exception and of a reservation being, at common law, such as above described, neither was strictly appropriate for the creation, on the conveyance of land, of an easement or right of profit in the land in favor of the grantor, and, accordingly, the English courts have decided that such an attempted exception or reservation must be construed as a grant back of an easement by the grantee of the land.⁹⁹ In this country, however, a different view has been taken, and such a right has almost invariably been regarded as the proper subject of a reservation,¹ and sometimes even of an ex-

v. Lock, 3 Adol. & El. 743; Durham & S. Ry. Co. v. Walker, 2 Q. B. 940.

95. See Varner v. Rice, 44 Ark. 236; Bouton v. Doty, 69 Conn. 531, 37 Atl. 1064; Horn v. Broyles, (Tenn. Ch.) 62 S. W. 297; Van Ohlen's Appeal, 70 Pa. 57.

96. Saddler v. Taylor, 49 W. Va. 104, 38 S. E. 583.

97. Richardson v. Palmer, 38 N. H. 212; Shepard v. Manhattan Ry. Co. 169 N. Y. 160, 62 N. E. 151; Maurer v. Friedman, 197 N. Y. 248, 90 N. E. 814.

98. Wood v. Logue, 167 Iowa

436 Ann. Cas. 1917B, 116, 149 N. W. 613; Vessey v. Dwyer, 116 Minn. 245, 133 N. W. 613; Merrill v. Publishers' Paper Co. 77 N. H. 285; 90 Atl. 786; *In re* Dixon, 156 N. C. 26, 72 S. E. 71; Rembert v. Vetoe, 89 S. C. 198, 71 S. E. 959.

99. Durham & S. Ry. Co. v. Walker, 2 Q. B. 940; Wickham v. Hawker, 7 M. & W. 63; Corporation of London v. Riggs, 13 Ch. Div. 798.

1. Chappell v. New York, N. H. & H. R. Co., 62 Conn. 195, 17 L. R. A. 420, 24 Atl. 997; Haggerty v. Lee, 50 N. J. Eq.

ception.² The view that a right of use or profit may be created by reservation seems to involve but a slight extension of the common law conception of a reservation, and it is more or less justified by the fact that in this country the conveyance is usually executed by the grantor alone, so that the effect of regarding a stipulation for such a right in favor of the grantor as a grant back, as is done in England, would usually result in rendering it invalid. But to describe such a stipulation as an exception involves a complete departure from the common law view of the nature of an exception, as being in effect merely a part of the description of what is conveyed.

In so far as the courts thus recognize the possibility of utilizing an exception as well as a reservation for the purpose of creating an easement, it being conceded that the particular expression used, whether "except" or "reserve" has little weight in this connection,³ it was to be anticipated that the determination, in any particular case, whether there is the reservation of an easement, or the exception of an easement, would be attended with considerable difficulty. In some decisions, upon the assumption that the word "heirs" is necessary for the creation of an easement in perpetuity, if it is by means of a reservation, while not necessary if it is by means of an exception,⁴ the absence of such word has been regarded as showing that the language used in the particular case was intended to operate as an exception and not a reservation,⁵ a view which

464, 26 Atl. 537; *Claffin v. Boston & A. R. Co.*, 157 Mass. 489, 20 L. R. A. 638, 32 N. E. 659; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974; *Kister v. Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608. See cases cited *post*, this section, notes 5-8.

2. *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307; *Ring v. Walker*, 87 Me. 550, 33 Atl. 174;

Claffin v. Boston & A. R. Co., 157 Mass. 489, 20 L. R. A. 638, 32 N. E. 659; *Bridger v. Pierson*, 45 N. Y. 601. See *ante*, § 362.

3. *Post*, this section, note 8.

4. *Ante*, § 362.

5. *Winthrop v. Fairbanks*, 41 Me. 307; *Hall v. Hall*, 106 Me. 389, 76 Atl. 705; *White v. N. Y. & N. E. R. Co.*, 156 Mass. 181, 30 N. E. 612; *Hamlin v. Rail-*

involves an imputation of intention to the person using the words which is seldom, if ever, in accord with his actual intention. Some courts, on the other hand, regard as an exception a clause undertaking to create in favor of the grantor of the land an easement corresponding to a preexisting *quasi* easement, on the theory that in that case there is a retention by the grantor of a thing actually existent, while if the easement sought to be created does not correspond to a preexisting *quasi* easement, the clause is to be regarded as a reservation, as undertaking the creation of a thing not before existent.⁶ This latter distinction, though ingenious and readily capable of practical application, appears to be without any foundation in principle. As heretofore explained,⁷ a *quasi* easement is said to exist when the owner of land uses part of his land for the benefit of another part, but this is merely a form of expression, and a *quasi* easement is not in itself a right recognized by the law. One uses part of his land for the benefit of another part by right of ownership, and not by reason of the existence of a *quasi* easement. Consequently an "exception" of an easement corresponding to a preexisting *quasi* easement involves the creation of a new and distinct legal right to the same extent as a "reservation" of an easement not corresponding to a use previously made of the land conveyed.

As above stated, in construing language creating, or attempting to create, rights in the land granted in favor of the grantor, the courts ignore the terms used, such as "except" and "reserve," and ordinarily consider it to constitute an exception or a reservation, according to the nature of the rights sought to be cre-

road Co., 160 Mass. 459, 36 N. E. 200; Lipsky v. Heller, 199 Mass. 310, 85 N. E. 453; Smith's Ex'cr v. Jones, 86 Vt. 258, 84 Atl. 866 (*semble*).

6. Hall v. Hall, 106 Me. 389,

76 Atl. 705 (*semble*); Claffin v. Boston & M. R. R., 157 Mass. 401; Foster v. Smith, 211 Mass. 411, 98 N. E. 693; Smith's Execut. v. Jones, 86 Vt. 258, 84 Atl. 866.

7. *Ante*, § 363 (b).

ated.⁸ Accordingly, applying what seems the proper distinction between an exception and a reservation, language which seeks to create rights in favor of the grantor in a certain part of the land will be regarded as constituting a reservation or an exception, accordingly as an easement in such part is created, or the ownership of such part is retained.⁹ And in case the conveyance provides that the grantor shall have rights as to timber on the land, the court will consider merely whether the intention is that the grantor shall retain the ownership of the timber, or shall have only a right to come on the land to take timber, and will regard the provision as an exception or a reservation accordingly.¹⁰ And a stipulation as to minerals may be either a reservation of a right to take minerals, or an exception of the minerals in place.¹¹

8. *Webb v. Jones*, 163 Ala. 637, 50 So. 887; *Van Slyke v. Arrowhead Reservoir & Power Co.*, 155 Cal. 675, 102 Pac. 816; *Zimmerman v. Kirchner*, 151 Iowa 483, 131 N. W. 756; *McIntire v. Lauckner*, 108 Me. 443, 81 Atl. 784; *Claflin v. B. & A. R. Co.*, 157 Mass. 489, 20 L. R. A. 639, 32 N. E. 659; *Martin v. Cook*, 102 Mich. 267, 60 N. W. 679; *Smith v. Furbush*, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398; *Hagerty v. Lee*, 54 N. J. L. 580, 20 L. R. A. 631, 25 Atl. 319; *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433; *Riefler & Sons v. Wayne Storage Water Power Co.*, 232 Pa. 282, 81 Atl. 300; *Coal Creek Min. Co. v. Heck*, 15 Lea (Tenn.) 497; *Watkins v. Tucker*, 84 Tex. 428, 19 S. W. 570; *Bradley v. Virginia Ry. & Power Co.*, 118 Va. 233, 87 S. E. 721; *Studebaker v. Beek*, 83 Wash.

260, 145 Pac. 225; *Jones v. Hoffman*, 149 Wis. 30 134 N. W. 1046.

9. *Barnes v. Burt*, 38 Conn. 541; *Wellman v. Churchill*, 92 Me. 193, 42 Atl. 352; *Winston v. Johnson*, 42 Minn. 398, 45 N. W. 958; *Jones v. De Lassus*, 84 Mo. 541; *Langdon v. New York*, 6 Abb. N. Cas. 314, 93 N. Y. 129; *Towne v. Salentine*, 92 Wis. 404, 66 N. W. 395; *Prichard v. Lewis*, 125 Wis. 604, 1 L. R. A. (N. S.) 565, 110 Am. St. Rep. 873, 104 N. W. 989.

10. *Van Slyke v. Arrowhead Reservoir & Power Co.*, 155 Cal. 675, 102 Pac. 816; *Knotts v. Hydrick*, 12 Rich. L. (S. C.) 317; *Rich v. Zeilsdorff*, 22 Wis. 544, 99 Am. Dec. 81.

11. *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433; *Snoddy v. Bolen*, 122 Mo. 479, 24 L. R. A. 507, 24 S. W. 142, 25 S. W. 932; *Barrett v. Kansas & Texas Coal*

— **Reservation in favor of third person.** At common law a reservation of rent cannot, by the use of particular language, be made to operate in favor of a person other than the lessor or grantor.¹² This rule has been said to be based on the consideration that, since the rent reserved is a return or compensation for the land granted, the one who grants the land is the only person entitled to the benefit of the reservation, and it was also said that a reservation of rent in favor of a stranger would involve the danger of maintenance.¹³ A like view, that a reservation must be in favor of the grantor, has been asserted in connection with the reservation of an easement or right of profit,¹⁴ but there are to be found occasional *dicta* or decisions to the effect that an easement may be reserved in favor of a person other than the grantor.¹⁵

Co., 70 Kan. 649, 79 Pac. 150; Preston v. White, 57 W. Va. 278, 50 S. E. 236; Whitaker v. Brown, 46 Pa. St. 197.

12. Litt. § 346; Co. Litt. 143b, 213b. See 1 Tiffany, Landlord & Ten., § 170.

13. Gilbert, Rents 54.

14. Washburn, Easements 34; Jackson v. Snodgrass, 140 Ala. 365, 37 So. 246; Illinois Central R. Co., v. Indiana Cent. R. Co. 85 Ill. 211; Stone v. Stone, 141 Iowa 438, 20 L. R. A. (N. S.) 221, 18 Ann. Cas. 799, 119 N. W. 712; Beinlein v. Johns. 102 Ky. 570, 44 S. W. 128; Herbert v. Pue, 72 Md. 307, 20 Atl. 182; Murphy v. Lee, 144 Mass. 371, 11 N. E. 550; Haverhill Sav. Bank v. Griffin, 184 Mass. 419, 68 N. E. 839; Borst v. Empie, 5 N. Y. 33; Beardslee v. New Berlin L. & P. Co., 207 N. Y. 34, 100 N. E. 434; Edwards v. Brusha, 18 Okla. 234, 90 Pac. 727; Young's

Petition, 11 R. I. 636; Brace v. Van Eps, 21 S. D. 65, 109 N. W. 147; Strasson v. Montgomery, 32 Wis. 52.

15. Lynch v. White, 85 Conn. 545, 84 Atl. 326 (*semble*); White-law v. Rodney, 212 Mo. 540, 111 S. W. 560; Litchfield v. Boogher, 238 Mo. 472, 142 S. W. 302; City Club of Auburn v. McGeer, 198 N. Y. 160, 91 N. E. 539 (*semble*); Gibbons v. Ebding, 70 Ohio St. 298, 101 Am. St. Rep. 900, 71 N. E. 720; Duross v. Singer, 224 Pa. 573, 73 Atl. 951. See Barkhausen v. Chicago, M. & St. P. R. Co., 142 Wis. 292, 124 N. W. 649, 125 N. W. 680.

And a reservation of highway rights in favor of the public in no way a party to the conveyance, has been assumed to be valid. Sullivan v. Eddy, 154 Ill. 199, 40 N. E. 482; Edwards v. Brusha, 18 Okla. 234, 90 Pac. 727; Tuttle v. Walker, 46 Me.

If one conveying land to A undertakes by the same instrument to create an easement in the land in favor of B, there is, it would appear, not a reservation of an easement in favor of B but a grant thereof to him, that is, by one and the same instrument, the grantor undertakes to convey land to one person and an easement in the land to another. To this there would seem to be no objection on principle, provided the execution by him of the instrument is such as is required for the purpose of the grant of an easement, and provided further the courts can regard the words of reservation, as they do words of covenant,¹⁶ as equivalent to words of grant for this purpose, which, it would seem, in order to effectuate the intention of the parties, they may well do.¹⁷ It can hardly be questioned that a testator might create an easement in favor of one devisee over land devised to another by words of reservation, as well as by words of grant.¹⁸

There are several cases to the effect that an attempted reservation in favor of a third person may indirectly operate in his favor by excluding a part of the land from the operation of the conveyance, and so preventing the transferee from asserting any rights therein as against such person,¹⁹ to the effect, in other words, that if the grantor undertakes to reserve an easement in favor of a third person in a particular part of the land, that part of the land is excepted from the conveyance, and the grantee can consequently not as-

280. See *Elliot v. Small*, 35 Minn. 396, 59 Am. Rep. 329, 29 N. W. 158.

16. *Ante*, § 361.

17. As in England words of reservation of an easement are construed as operating by way of re-grant from the transferee of the land. See *Doe v. Lock*, 2 Ad. & El. 743; *Wickham v. Hawker* 7 Mees. & W. 63; *Durham & Sunderland Ry. Co. v.*

Walker, 2 Q. B. 940. *Ante*, this section, note 99.

18. There was no question suggested as to the validity of such a reservation in *Wiley v. Ball*, 72 W. Va. 685, 79 S. E. 659.

19. *Bridger v. Pierson*, 45 N. Y. 601; *Bessom v. Freto*, 13 Mek. (Mass.) 523; *Hodge v. Boothby*, 48 Me. 68; *Martin v. Cook*, 102 Mich. 267, 60 N. W. 679.

sert any claim thereto as against such third person, or any other person, who may happen to be utilizing the land. It is, nevertheless, difficult to see how an attempted reservation of an easement can thus take effect as an exception, how, for instance, a reservation of a right of way thirty feet wide in favor of a third person can be regarded as an exception of a strip of land thirty feet wide.²⁰ Regarding it merely as a matter of construction, such a view would seem to violate the recognized rule²¹ that words of exception or reservation are to be construed in favor of the grantee rather than of the grantor. Apparently opposed to the cases referred to are several decisions that the fact that the grantor in a conveyance of land undertakes to reserve a strip of the land in favor of the public for use as a highway does not prevent the "fee" in such strip, that is, the ownership thereof, from passing under the conveyance.^{21a} When there is in terms an exception or reservation of an easement in favor of a third person, which easement is already existent, the exception or reservation, so called, is not effective as such, since the rights of such person are independent of whether the owner of the land refers to such rights in his conveyance of the land. Consequently the statement, occasionally found, that the reservation of an existing easement in favor of a

20. In *Young Petitioner*, 11 R. I. 636, it was held that a clause undertaking to vest in a third person a right to take timber could not be upheld as an exception, and was void.

21. *Wiley v. Sirdorus*, 41 Iowa 224; *Wellman v. Churchill*, 92 Me. 193, 42 Atl. 352; *Derby v. Hall*, 2 Gray (Mass.) 236; *Bolio v. Marvin*, 130 Mich. 82, 89 N. W. 563; *Duryea v. New York*, 62 N. Y. 592; *Towns v.*

Brown,—Ky.)—114 S. W. 773; *Massey v. Warren*, 52 N. C. 143; *Klaer v. Ridgway*, 86 Pa. St. 529.

21a. *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482; *Edwards v. Brusha*, 18 Okla. 234, 90 Pac. 727; *Cincinnati v. Newell*, 7 Ohio St. 37; *Bolio v. Marvin*, 130 Mich. 82, 89 N. W. 563; *Elliot v. Small*, 35 Minn. 396, 59 Am. Rep. 329, 29 N. W. 158; *Tuttle v. Walker*, 46 Me. 280.

third person constitutes an exception²² is, it is submitted, somewhat lacking in accuracy. In so far as the language of the conveyance may be construed as excepting a part of the land, when there was previously merely an easement in a third person in such part,²³ the language does operate as an exception, but it does not operate in favor of such third person, since he merely retains the easement which he previously had. Likewise the language operates as an exception in favor of the grantor when it in terms excepts an ascertained part, and erroneously states that such part has been sold or conveyed to another.²⁴

As above stated,^{24a} the language of reservation is not infrequently employed for the purpose of creating in the grantor a less estate than that conveyed, as when one conveys an estate in fee simple "reserving" an estate for his life. Such a clause is not a reservation, according to the common-law conception of the term, but it has occasionally been referred to as such for the purpose of the general rule that a reservation can operate only in favor of the grantor, with the result that in a conveyance in fee simple, for instance, an attempted "reservation" of a life estate in favor of a member of the grantor's family other than himself has been regarded as invalid.^{24b} It may be questioned,

22. *Stockwell v. Coullard*, 129 Mass. 231; *Wood v. Boyd*, 145 Mass. 176, 13 N. E. 476; *State v. Wilson*, 42 Me. 9; *Richardson v. Palmer*, 38 N. H. 212; *Bridger v. Pierson*, 45 N. Y. 601; *Beardsley v. New Berlin Light & Power Co.*, 207 N. Y. 34, 100 N. E. 434; *Bartlett v. Barrows*, 22 R. I. 642, 49 Atl. 31.

23. *Reynolds v. Gaertner*, 117 Mich. 532; *Hall v. Wabash R. Co.*, 133 Iowa 714, 110 N. W. 1039; *Munn v. Worrall*, 53 N. Y. 44; *Umscheid v. Scholz*, 84 Tex. 265, 16 S. W. 1065 (high-
2 R. P.—27

way); *Contra. Derby v. Hall*, 2 Gray (Mass.) 236; *Gould v. Howe*, 131 Ill. 490, 23 N. E. 602; *Richardson v. Palmer*, 38 N. H. 212. See note 20 Harv. Law Rev. at p. 574.

24. *Ambs v. Chicago, St. P., M. & O. Ry. Co.*, 44 Minn. 266, 46 N. W. 321; *Roberts v. Robertson*, 53 Vt. 690. See *Stone v. Stone*, 141 Iowa 438, 119 N. W. 712, 20 L. R. A. (N. S.) 221, 18 Ann. Cas. 797.

24a. *Ante*, this section, note 98.

24b. *White v. City of Marion*,

however, whether such words of reservation might not occasionally be construed as words of grant, vesting in the third person named a life estate, with remainder in fee simple. The tendency has been to regard such an attempted reservation of a limited estate in favor of a third person as what the courts denominate an "exception" of the estate named in favor of the grantor himself.^{24c}

— **Sufficiency of exception.** An exception must be of part of the thing granted,²⁵ and must not be as extensive as such thing, so as to be repugnant thereto.²⁶ Nor is it valid if the subject thereof was previously specifically granted, as when, after granting twenty houses, one of such houses is sought to be excepted.²⁷ There may be an exception, as before indicated, not only of a particular piece of land measured horizontally, but also of houses or other fixtures on the land conveyed,²⁸ or of timber growing thereon,²⁹ or of minerals therein.³⁰

139 Iowa, 479, 117 N. W. 254; Martin v. Cock, 102 Mich. 267, 60 N. W. 679; Burchaid v. Walther, 58 Neb. 539, 78 N. W. 1061; *In re Dixon*, 156 N. C. 26, 72 S. E. 71.

24c. See the first three cases cited in last preceding note.

25. Sheppard's Touchstone, 78; Hall v. Hall, 106 Me. 389, 76 Atl. 705; Moore v. Lord, 50 Miss. 229; Cornell v. Todd, 2 Denio (N. Y.) 130.

26. Dorrell v. Collins Cro. Eliz. 6; Shoenberger v. Lyon, 7 Watts & S. C. (Pa.) 184; Young's Petition, 11 R. I. 636; Puckett v. McDaniell, 96 Tex. 94, 70 S. W. 739. See Bassett v. Budlong, 77 Mich. 338, 18 Am. St. Rep. 404, 43 N. W. 984; Foster v. Runk, 109 Pa. St. 291, 58 Am. Rep. 720, 2 Atl. 25; Koenigheim v.

Miles, 67 Tex. 113, 2 S. W. 81; Adams v. Warner, 23 Vt. 395.

27. Sheppard's Touchstone 78; 4 Kent's Comm. 468; Sprague v. Snow, 4 Pick. (Mass.) 54.

28. Marshall v. Niles, 8 Conn. 369; Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co. (C. C.) 13 Fed. Sep. 646; Sanborn v. Hoyt, 24 Me. 118 *Ante* § 273.

It has been said however that an exception of a house will *prima facie* include not only the house but the land under it. Webster v. Potter, 105 Mass. 414.

29. Sheppard's Touchstone, 78; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Howard v. Lincoln, 13 Me. 122; Putnam v. Tuttle, 10 Gray (Mass.) 48. See *ante*, § 261.

30. Snoddy v. Bolen, 122 Mo.

The part or thing excepted, it is said, must be described with such certainty that it may be identified, and an exception has not infrequently been held to be void for lack of such certainty.³¹ But this requirement of certainty is, by a number of cases, subject to an important qualification, to the effect that there is sufficient certainty if the exact location of the excepted part is left to the election of the grantor,³² or, it seems, is capable of subsequent ascertainment otherwise.³³ The effect of the invalidity of an exception out of the land conveyed, by reason of its indefiniteness, is that the whole tract passes by the conveyance as if no exception had been attempted.³⁴

479, 24 S. W. 142, 25 S. W. 932; Sloan v. Lawrence Furnace Co., 29 Ohio St. 568; Whitaker v. Brown, 46 Pa. St. 197. See *ante* § 253, note 19.

31. Bromberg v. Smee, 130 Ala. 601, 30 So. 483; Mooney v. Cooledge, 30 Ark. 640; Nunnery v. Ford, 92 Miss. 263, 45 Co. 722; Andrews v. Todd, 50 N. H. 565; Den d. Waugh v. Richardson, 30 N. C. 470; Stambaugh v. Hollabaugh, 10 Serg. & R. (Pa.) 357; Butcher v. Creel's Heirs, 9 Gratt. (Va.) 201; Harding v. Jennings 68 W. Va. 354, 70 S. E. 1.

32. Butler v. Gosling, 130 Cal. 422, 62 Pac. 596; Thruston v. Masterson, 9 Dana (Ky.) 228; Smith v. Furbush, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398; Dygert v. Matthews, 11 Wend. (N. Y.) 35; DeRoach v. Clardy, 52 Tex. Civ. App. 233, 113 S. W. 22; Benn v. Hetcher, 81 Va. 25, 59 Am. Rep. 645. Compare Chapman v. Mill Creek Coal and Coke Co., 54 W. Va. 192, 46 S. E. 262.

Until the land excepted is ascertained by the election of the

grantor, the parties are in the position of tenants in common, it has been said. Smith v. Furbush, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398.

It has been decided in England that an exception, thus to be subsequently ascertained by election, involved an attempt to create an estate *in futuro*, and might consequently be invalid, under the Rule against Perpetuities, or otherwise. Savill Bros., Ltd. v. Bethell (1902) 2 Ch. 523.

33. Melton v. Monday, 64 N. Car. 295 (subsequent survey); *Ex parte* Branch 72 N. Car. 106; (homestead to be set off); Langdon v. New York, 6 Abb. N. Cas. 314, 93 N. Y. 129 (street to be laid out); Consolidated Ice Co. v. New York. 166 N. Y. 92, 59 N. E. 713 (street to be laid out).

34. Bromberg v. Smee, 130 Ala. 601, 30 So. 483; Swindall v. Ford, 184 Ala. 137, 63 So. 651; Mooney v. Cooledge, 30 Ark. 640; Baldwin v. Winslow, 2 Minn. 213; McAllister v. Honea, 71 Miss.

Since an exception is in effect merely a part of the description of the thing granted, the subject of the exception remains in the grantor, as before the conveyance, and no words of inheritance or other words of limitation are necessary in order that the grantor may retain the same estate in the thing excepted as he had before.³⁵

An exception, in its very nature, cannot operate in favor of a person other than the grantor.³⁶ But we frequently find in a conveyance language undertaking to except a part or parts of the land as being the property of another, or as having been previously sold or conveyed to another.³⁷ In such cases it is obvious that the rights of such other in the part excepted are not properly based on the exception, but exist prior thereto, and the effect of the words of exception is merely

256, 14 So. 264; Den d. Waugh v. Richardson, 30 N. C. 470.

35. Smith v. Ladd, 41 Me. 314; Lipsky v. Heller, 199 Mass. 310, 85 N. E. 453; Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468; Emerson v. Mooney, 50 N. H. 318; Whitaker v. Brown, 46 Pa. St. 197; Mandle v. Gharing, 256 Pa. 121, 100 Atl. 535; Wheeler v. Wood, 30 Vt. 242. And see cases cited *ante* §. 362.

The occasional Massachusetts decisions to the contrary (Curtis v. Gardner, 13 Metc. (Mass.) 457; Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen (Mass.) 170; are evidently no longer law. See Wood v. Boyd, 145 Mass. 176, 13 N. E. 476; Claffin v. Boston & Albany R. Co., 157 Mass. 489, 20 L. R. A. 638, 32 N. E. 659. The decision in Knotts v. Hydrick, 12 Rich. L. (S. Car.) 314 is based on a passage in Sheppards'

Touchstone at p. 100, which is corrected in Preston's edition of the work.

36. Parsons v. Miller, 15 Wend. (N. Y.) 561; Beardsley v. New Berlin Light & Power Co., 207 N. Y. 34, 100 N. E. 434; Redding v. Vogt, 140 N. C. 562, 6 A. & E. Ann. Cas. 312, 53 S. E. 337. Any suggestion *contra* in Stone v. Stone, 141 Iowa, 438, 20 L. R. A. (N. S.) 221, 18 Ann. Cas. 797, 119 N. W. 712, cannot be accepted.

But an exception in terms of a part of the land in favor of a third person may operate in favor of the grantor, to exclude that part from the conveyance. Corning v. Nail Factory, 40 N. Y. 209.

37. Lloyd v. Oates, 143 Ala. 231, 111 Am. St. Rep. 39, 38 So. 1022; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Mayberry v. Beck, 71 Kan. 609, 81 Pac. 191; Sanford v. Stillwell, 101 Me. 466,

to charge the grantee, and persons claiming under him, with notice of the rights of such other person. So an exception, so called, of an outstanding dower interest,³⁸ does not confer on the widow a dower interest not previously existent, but merely recognizes the existence of such interest.

— **Sufficiency of reservation.** Upon the question whether words of inheritance are necessary in a reservation, in order to confer an interest greater than for life, the cases are not in accord. It would seem, on principle, that such words would be necessary, in the creation of an easement or right of profit by reservation, when they would be necessary in the creation of such a right by grant, and not otherwise. The cases, however, ordinarily discuss the question without reference to the consideration of the necessity of such words in a grant. It has occasionally been decided, or asserted, that such words are necessary in order to reserve an easement to the grantor and his heirs,³⁹ and this view has been adopted in at least one state in which a conveyance of the land itself in fee simple may be made without the use of such words.⁴⁰ In the greater number of states the courts have refused to apply the requirement of words of inheritance to the case of a reservation of an easement, this view being sometimes based on the statute dispensing with words of

64 Atl. 843; *Midget v. Wharton*, 102 N. C. 144, 8 S. E. 778; *In re Stokeley's Estate*, 19 Pa. 476; *Bell v. Gardner & Lacey Lumber Co.*, 85 S. C. 182, 67 S. E. 151; *Harman v. Stearns*, 95 Va. 58, 27 S. E. 601.

38. *Canedy v. Marcy*, 13 Gray (Mass.) 373; *Meserve v. Meserve*, 19 N. H. 240; *Crosby v. Montgomery*, 38 Vt. 238; *Swick v. Sears* 1 Hill (N. Y.) 17.

39. *Koelle v. Knecht*, 99 Ill. 396; *White v. New York & N.*

E. R. Co., 156 Mass. 181, 30 N. E. 612; *Claflin v. Boston & A. R. Co.*, 157 Mass. 489, 20 L. R. A. 638, 32 N. E. 659; *Simpson v. Boston & M. R. R.*, 176 Mass. 359, 57 N. E. 674; *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 73; *Kister v. Rieser*, 98 Pa. 1.

40. *Dawson v. Western M. R. Co.*, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678, 68 Atl. 301. See *Negaunee Iron Co. v. Iron Cliffs Co.*, 134 Mich. 264, 96 N. W. 468.

inheritance for the purpose of creating an estate in fee simple, and sometimes on the theory that the easement must be presumed to be of a quantum corresponding to the estate of the neighboring land retained by him, to which the easement is appurtenant.⁴¹

§ 437. Rules of construction. The courts, in connection with the construction of written conveyances, as of other instruments, have asserted some general rules of construction, to aid in ascertaining the intention of the parties thereto.

In case of doubt, it is said, the conveyance is to be construed most strongly as against the grantor, or in favor of the grantee, on the theory, it seems, that the words used are to be regarded as the words of the grantor rather than of the grantee.⁴² Applying this rule, an exception or reservation in a conveyance is construed in favor of the grantee rather than of the grantor.⁴³

41. *Ante* § 362.

42. Co. Litt. 48a, 183a; Neill v. Devonshire, 8 App. Cas. 135; Dickson v. Van Hoose, 157 Ala. 459, 19 L. R. A. (N. S.) 717, 47 So. 718; Jenkins v. Ellis, 111 Ark. 220, 163 S. W. 524; Younger v. Moore, 155 Cal. 767, 103 Pac. 221; Brown v. State, 5 Colo. 496; Sweeney v. Landers, 80 Conn. 575, 69 Atl. 566; Peoria & P. Union Ry. Co. v. Tamplin, 156 Ill. 285, 40 N. E. 960; Robertson v. Lieber, 56 Ind. App. 152, 105 N. E. 66; Weaver v. Osborne, 154 Iowa 10, 38 L. R. A. (N. S.) 706, 134 N. W. 103; Chapman v. Hamblet, 100 Me. 454, 62 Atl. 215; Second Universalist Soc. v. Dudan, 65 Md. 460; Soria v. Harrison County, 96 Miss. 109, 50 So. 443; Grooms v. Morrison, 249 Mo. 544, 155 S. W. 430;

Crane v. McMurtrie, 77 N. J. Eq. 545, 78 Atl. 170; Outlaw v. Gray, 163 N. C. 325, 79 S. E. 676; Collison v. Philadelphia Co. 233 Pa. 350, 82 Atl. 474; Huntley v. Houghton, 85 Vt. 200, 81 Atl. 452; South & Western R. Co. v. Mann, 108 Va. 557, 62 S. E. 354; Maxwell v. Harper, 51 Wash. 351, 98 Pac. 756; Dear Creek Lumber Co. v. Sheets, 75 W. Va. 21, 83 S. E. 81; Green Bay & Mississippi Canal Co. v. Hewett, 55 Wis. 96, 12 N. W. 382.

43. Cardigan v. Armitage, 2 B. & C. 197; Jacobs v. Roach, 161 Ala. 201, 49 So. 576; Wiley v. Sirdorus, 41 Iowa, 224; Towns v. Brown, (Ky.) 114 S. W. 773; Wellman v. Churchill, 92 Me. 193, 42 Atl. 352; Billings v. Beggs, 114 Me. 67, 95 Atl. 354;

The rule has been applied in the case of a lease, in favor of the lessee,⁴⁴ and in the case of a mortgage, in favor of the mortgagee.⁴⁵ The rule has been occasionally referred to as one of last resort,⁴⁶ and as one of questionable utility or propriety.⁴⁷ There are occasional suggestions to be found that the rule, while applicable in the case of a deed poll, does not apply in the case of an indenture, the language of which is to be regarded as that of both parties.⁴⁸

In case of a clear repugnancy between two clauses of the conveyance, the earlier clause should, it is said, prevail over the later clause.⁴⁹ This rule likewise has been referred to as one of last resort,⁵⁰ and of questionable utility.⁵¹

Derby v. Hall, 2 Gray (Mass.) 236; Bollo v. Marvin, 130 Mich. 82, 89 N. W. 563; Cochecho Mfg. Co. v. Whittier, 10 N. H. 305; Duryea v. New York, 62 N. Y. 592; Beardslee v. Light etc. Co., 207 N. Y. 34, 100 N. E. 434; Klaer v. Ridgeway, 86 Pa. 329; Sheffield Water Co. v. Elk Tanning Co., 225 Pa. 614, 74 Atl. 742; Bradley v. Virginia Ry. & Power Co., 118 Va. 233 87 S. E. 721.

44. Doe v. Dixon, 9 East 15; Dann v. Spurrier, 3 Bos. & P. 399.

45. Stuart v. Worden, 42 Mich. 154, 3 N. W. 876; United States Mortgage Co. v. Gross, 93 Ill. 483.

46. Patterson v. Gage, 11 Colo. 50; Swan v. Morehouse, 6 Dist. Col. 225; Falley v. Giles, 29 Ind. 114; Carroll v. Granite Mfg. Co., 11 Md. 411; Biddle v. Vandeventer, 26 Mo. 500; Flagg v. Eames, 40 Vt. 16, 94 Am. Dec. 363.

47. Taylor v. St. Helens Corp., 6 Ch. D. 264, per Jessel M. R.;

Swan v. Morehouse, 6 Dist. Col. 225; Biddle v. Vandeventer, 26 Mo. 500.

48. Sheppard's Touchstone 87, 2 Blackst. Comm. 380; Browning v. Boston, Plowd 131; Palmer v. Evangelical Baptist Benevolent & Missionary Soc. 166 Mass. 143, 43 N. E. 1028; Union Water Power Co. v. Lewiston, 101 Me. 564, 65 Atl. 67.

49. Sheppard's Touchstone, 88; Norton Deeds, 80; Robertson v. Robertson, 191 Ala. 297, 68 So. 52; Tubbs v. Gatewood, 26 Ark. 128; Havens v. Dale, 18 Cal. 359; Lewman v. Owens, 132 Ga. 484; Marden v. Leimbach, 115 Md. 206, 80 Atl. 958; Blackwell v. Blackwell, 124 N. C. 269, 32 S. E. 676.

50. Bush v. Watkins, 14 Beav. 425; Berners v. Real Estate Co., 134 Mo. App. 290, 114 S. W. 131; Waterman v. Andrews, 14 R. I. 589.

51. McWilliams v. Ramsay, 23 Ala., 813; Pike v. Munroe, 36 Me. 309, 58 Am. Dec. 751.

— **Language of premises as controlling.** It was a well established rule of the common law that, in the case of a clear repugnancy between the premises and the *habendum*, the premises would prevail to the extent that an estate specifically limited in the granting clause could not be cut down to a less estate or invalidated by the language of the *habendum*.⁵² This rule was applied, however, only when there was a specific limitation in the premises and, in the absence of such a limitation, the *quantum* of the estate conveyed might be determined by the language of the *habendum*. For instance, while a conveyance without words of inheritance would pass merely a life estate, the insertion of such words in the *habendum* was sufficient to supply their lack in the premises, for the purpose of creating an estate in fee simple, as for instance, in the case of a conveyance to A, to have and hold to A and his heirs.⁵³ And on the same principle where, under the modern

52. Throckmerton v. Tracy, 1 Plowd. 145; 2 Blackst. Comm. 298; 2 Sanders, Uses & Trusts 155, note; Challis, Real Prop. (3rd Ed.) 411; Norton Deeds 294.

Even at common law, although the grant in the premises was to A. and his "heirs," the *habendum* might show that a fee tail only was created, this being regarded, not as abridging the estate granted, but as merely a qualification of the word "heirs" as first used. Co. Litt. 21a; Turnman v. Cooper, Cro. Jac. 476; Altham's Case, 8 Coke, 154b. See Smith v. Lindsay, 37 Pa. Super Ct. 171. A conveyance to A. and the heirs of his body, *habendum* to him and his heirs forever, gave A. an estate tail, probably with a fee simple expectant. Co. Litt. 21a and Har-

grave's note; Corbin v. Healy, 20 Pick. (Mass.) 514. See Hunter v. Patterson, 142 Mo. 310, 44 S. W. 250.

The English authorities are to the effect that the *habendum* may operate to enlarge the estate named in the premises, though not to abridge it. See Co. Litt. 299a, 2 Sanders, Uses & Trusts (5th Ed.) 156; Challis' Real Prop. (3rd Ed.) 411; Kendal v. Macfeild Barn. Ch. Rep. 46. But see Karchner v. Hoy, 151 Pa. 383, 25 Atl. 20.

53. Co. Litt. 183a; Sheppard's Touchstone, 76, 102, 113; Altham's Case, 8 Coke, 154b; Berry v. Billings, 44 Me. 416, 69 Am. Dec. 107; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497; Phillips v. Thompson, 73 N. C. 543; McLeod v. Tarrant, 39 S. C. 271, 20 L. R. A. 846, 17 S. E. 773;

statutes in force in many states,⁵⁴ a grant to A, without words of inheritance, creates a fee simple, or passes whatever estate the grantor may have, the *habendum* may show that an estate for life only is intended to be conveyed.⁵⁵

While the common-law rule that an estate specifically limited in the premises cannot be abridged by the *habendum* is still not infrequently asserted and occasionally receives a practical application,⁵⁶ the tendency

Hanks v. Folsom, 11 Lea, (Tenn.) 555.

54. *Ante* § 21(a).

55. McDill v. Meyer, 94 Ark. 615, 128 S. W. 364; Montgomery v. Sturdivant, 41 Cal. 290; Buck v. Garber, 261 Ill. 378, 103 N. E. 1059; Doren v. Gillum, 136 Ind. 134, 35 N. E. 1101; Yeager v. Farnsworth, 163 Iowa, 537, 145 N. W. 87; Bodine's Adm'rs v. Arthur, 91 Ky. 53, 34 Am. St. Rep. 162, 14 S. W. 904; Baskett v. Sellars, 93 Ky. 2, 19 S. W. 9; Kelly v. Hill,—(Md.)—25 Atl. 919; Weekley v. Weekley 75 W. Va. 280, 83 S. E. 1005.

It has even been decided that since, under these statutes, the presence of words of inheritance is immaterial, the *habendum* may show that a life estate only is intended, although the grant is in terms to one and his heirs. Barnett v. Barneft, 10½ Cal. 298. 37 Pac. 1049; Davidson v. Manson' 146 Mo. 608, 48 S. W. 635; Triplett v. Williams, 149 N. C. 394, 24 L. R. A. (N. S.) 514, 63 S. E. 79; *Contra*. Prindle v. Iowa Soldiers' Orphans' Home, 153 Iowa, 234, 133 N. W. 160.

56. Dickson v. Van Hoose, 157 Ala. 459, 19 L. R. A. (N. S.) 719. 47 So. 718; Caulk v. Fox, 13 Fla.

148; Kron v. Kron, 195 Ill. 181, 62 N. E. 809; Chamberlain v. Runkle, 28 Ind. App. 607, 63 N. E. 486; Richards v. Richards, 60 Ind. App. 34, 110 N. E. 103; Prindle v. Iowa Soldiers' Orphans' Home, 153 Iowa, 234, 133 N. W. 106; Land v. Land, 172 Ky. 145, 189 S. W. 1; Lurk v. McNabb, 111 Md. 641, 74 Atl. 825; Smith v. Smith, 71 Mich. 633, 40 N. W. 21; Teague v. Sowder,—(Tenn.)—114 S. W. 484; Reese Howell Co. v. Brown, 48 Utah, 142, 158 Pac. 684.

So after giving in clear terms a fee simple, a subsequent clause undertaking to state the persons to whom the land should pass on the grantee's death has been regarded as invalid. Marsh v. Morris, 133 Ind. 548, 33 N. E. 290; Humphrey v. Potter, 24 Ky. L. Rep. 1264, 70 S. W. 1062; Robinson v. Payne, 58 Miss. 690; Wilkins v. Norman, 139 N. C. 40, 111 Am. St. Rep. 767, 51 S. E. 797.

In Morton v. Babb, 251 Ill. 488, 96 N. E. 279. it was decided that where the granting clause was to A and his heirs subject to a limitation over to B., such limitation over was valid and effective although the *habendum* was to A

at the present time is very considerably to limit its operation. Even though the language of the habendum, or of some other subsequent clause of the conveyance is, considered by itself, inconsistent with that of the premises, the court will frequently refuse to recognize any inconsistency and, viewing the instrument as a whole rather than as an aggregate of distinct parts, will consider the *habendum* or other subsequent clause merely as an aid in the construction of the premises.⁵⁷ In this way, without any explicit repudiation of the common-law rule, the court may accord to the *habendum* a preponderating influence such as it did not have at common law.⁵⁸ So it has been said that the common-law rule is one to be applied only when there is an irreconcilable conflict between the two parts of the conveyance.⁵⁹

and his heirs without the limitation over, it being said that in case of inconsistency the granting clause should control.

In *Cole v. Collie*, 131 Ark. 103, 198 S. W. 710, it was held that an exception of the minerals in the land conveyed, inserted in the *habendum*, was nugatory.

57. *McWilliams v. Ramsey*, 23 Ala. 813; *Whetstone v. Hunt*, 78 Ark. 230, 8 A. & E. Ann. Cas. 443, 93 S. W. 979; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049; *Bray v. McGinty*, 94 Ga. 192, 21 S. E. 284; *Husted v. Rollins*, 156 Iowa, 546, 137 N. W. 462, 42 L. R. A. N. S. 378; *Palmer Oil & Gas. Co. v. Blodgett*, 60 Kan. 712, 57 Pac. 947; *Wilson v. Moore*, 146 Ky. 679, 143 S. W. 431; *May v. Justice*, 148 Ky. 696, 147 S. W. 409; *Putnam v. Pere Marquette R. R.*, 174 Mich. 246, 140 N. W. 554; *Davidson v. Manson*, 146 Mo. 608,

48 S. W. 635; *Triplett v. Williams*, 149 N. C. 394, 24 L. R. A. N. S. 514, 63 S. E. 79; *Fogarty v. Stach*, 86 Tenn., 610, 8 S. W. 846; *Johnson v. Barden*, 86 Vt. 19, Ann. Cas. 1915 A, 1243, 83 At. 721.

58. See *Barnett v. Barnett*, 104 Cal. 300, 37 Pac. 1050; *Garrett v. Wiltse*, 252 Mo. 699, 161 S. W. 694; *Jones v. Whichard*, 163 N. C., 241, 79 S. E. 503; *Culpepper Nat. Bank v. Wrenn*, 115 Va. 55, 78 S. E. 620; *Weekley v. Weekley*, 75 W. Va. 280, 83 S. E. 1005.

59. *McWilliams v. Ramsay*, 23 Ala. 813; *Whetstone v. Hunt*, 78 Ark. 230, 93 S. W. 979; *Richards v. Richards*, 60 Ind. App. 34, 110 N. E. 103; *Henderson v. Mack*, 82 Ky. 379; *Land v. Land*, 172 Ky. 145, 189 S. W. 1; *Robinson v. Payne*, 58 Miss. 690; *Blackwell v. Blackwell*, 124 N. C. 269, 32 S. E. 676.

Occasionally the application of the common-law rule referred to has been regarded as called for when an estate in fee simple was clearly created by the granting clause, and subsequently a limitation over in favor of another person was inserted, to take effect upon the death of the grantee under some particular contingency, as for instance, death without issue, with the result of regarding such limitation over as invalid because operating to abridge the estate previously created.⁶⁰ Such a view is, however, difficult to accept. An executory limitation in defeasance of a fee simple is perfectly valid when it occurs in a will;⁶¹ and there is no reason why it should not be so regarded when it occurs in a conveyance *inter vivos*. Indeed the validity of such a limitation, taking effect under the Statute of Uses, has long been recognized, being the ordinary case of a "shifting use."⁶² The common-law rule that an estate given in the granting clause cannot be subsequently cut down to a less estate does not properly apply to such a case of a mere possibility of the divesting of the fee simple estate by reason of the occurrence of some future contingency, even though this is named to occur at the time of the death of the grantee. The grantee has, in spite of this divesting clause, an estate in fee simple and not a life estate, so long as he has any estate whatsoever.⁶³

60. Scull v. Vaugine, 15 Ark. 695; Carl Lee v. Ellsberry, 82 Ark. 29, 12 L. R. A. N. S. 957, 101 S. W. 407; Palmer v. Cook, 159 Ill., 300, 50 Am. St. Rep. 165, 42 N. E. 796; Lamb v. Medsker, 35 Ind. App. 662, 74 N. E. 1012 (*semble*); Ray v. Spears, 23 Ky. Law Rep. 14, 64 S. W. 413; Hughes v. Hammond, 136 Ky. 694, 26 L. R. A. N. S. 808, 125 S. W. 144; *Ex parte Town*, 17 S. C. 532; Glenn v. Jamison, 48 S. C. 316, 26 S. E. 277; *Contra*, Mor-

ton v. Babb, 251 Ill. 488, 96 N. E. 279; Fogarty v. Stack, 86 Tenn. 610, 8 S. W. 846.

61. *Ante* §§ 160, 163b.

62. *Ante* § 157.

63. A like criticism may be made, it is submitted, of occasional decisions that after a clause creating a fee simple estate, a subsequent clause creating a power of disposition, the exercise of which would divest the fee simple, is invalid. See e. g. Pritchett v. Jackson, 103 Md. 696,

§ 438. **Consideration.** A conveyance is not, properly speaking, a contract, though it is usually the result of agreement, and a consideration is consequently not necessary to its validity, except when the conveyance is one operating under the Statute of Uses.⁶⁴ In other words, the owner of land has the same right to make a gift thereof to another person as he has to sell it, and the only persons who can question the validity of the conveyance for want of consideration are creditors who may thereby lose the means of satisfying their demands.⁶⁵ The absence of consideration may also deprive the grantee of the right to claim the position of a purchaser for value as against the adverse rights of third persons,⁶⁶ as well as of the right to ask a reformation of the conveyance on account of mistake.⁶⁷ In some states, by reason of a statute abolishing private seals, or changing their effect, the fact that the con-

63 At. 965; Blair v. Muse, 83 Va. 238, 2 S. E. 31.

64. 1 Sanders, Uses & Trusts 67, 4 Kent. Comm. 462; McKee v. West, 141 Ala. 531, 109 Am. St. Rep. 54, 37 So. 740; Kline v. Kline, 14 Ariz. 369, 128 Pac. 805; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Campbell v. Whitson, 68 Ill. 240, 18 Am. Rep. 553; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Conway v. Rock, 139 Iowa, 162, 117 N. W. 273; Hanson v. Buckner's Exc'r. 4 Dana (Ky.) 251, 29 Am. Dec. 401; Laboree v. Carleton, 53 Me. 211; Goodwin v. White, 59 Md. 503; Beal v. Warren, 2 Gray (Mass.) 447; Gale v. Gould, 40 Mich. 515; Burnett v. Smith, 93 Miss. 566, 47 So. 117; Masterson v. Sheahan,—Mo.—186 S. W. 524; Campbell v. Tompkins, 32 N. J. Eq. 170; Mosely v. Mosely, 87 N.

Car. 69; Howard v. Turner, 125 N. Car. 107, 34 S. E. 229; Carnegie v. Diven, 31 Oreg. 366, 49 Pac. 891; Kelly's Appeal, 108 Pa. 29; Brown v. Brown, 44 S. C. 378, 22 S. E. 412; Bernardy v. Colonial & U. S. Mtge. Co., 17 S. Dak. 637, 106 Am. St. Rep. 791, 98 N. W. 166; Battle v. Claiborne, 133 Tenn. 286, 180 S. W. 584.

65. *Post*, § 587.

66. *Post*, §§ 566-579.

67. Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005; Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767; St. Clair v. Marquell, 161 Ind. 56, 67 N. E. 693; Shears v. Westover, 110 Mich. 505, 68 N. W. 266; Powell v. Morisey, 98 N. Car. 426, 2 Am. St. Rep. 343, 4 S. E. 185; Hout v. Hout, 20 Ohio St. 119; Burgson v. Jacobson, 124 Wis. 295, 102 N. W. 563.

veyance is voluntary would constitute a defense to an action on the grantor's covenants.⁶⁸

Although there can be not the slightest question that a conveyance is ordinarily valid without any consideration, expressions are to be found in judicial opinions in this regard which may tend to mislead. For instance, in upholding a conveyance, the courts occasionally refer to the consideration as being sufficient,⁶⁹ and not infrequently it is stated that love and affection constitute a sufficient consideration.⁷⁰ And likewise, the statement that the seal on the conveyance imports a consideration is calculated to imply that a consideration is, apart from the seal, necessary to a conveyance.⁷¹ But there are few, if any, actual decisions, that a conveyance, not operating under the Statute of Uses, is invalid as against the grantor or his heirs, by reason of lack of consideration.

Ordinarily in a conveyance, a consideration, frequently a nominal sum merely, is named, and the receipt thereof is expressly acknowledged. Such a clause in the conveyance serves to rebut any implication of a resulting use or trust in favor of the grantor,⁷² and

68. See *Wilbur v. Warren*, 104 N. Y. 192, 10 N. E. 263.

69. See *e. g.* *Barnes v. Multnomah County*, 145 Fed. 695; *Steen v. Steen*, 169 Iowa, 264, 151 N. W. 115; *Bissell v. Taylor*, 41 Mich. 702, 3 N. W. 194; *Anderson v. Baines*, 156 Mo. 664, 57 S. W. 726; *Boyd v. Lloyd*, 86 Ark. 169, 110 S. W. 596; *Jones v. Gatliff*,—(Ky.)—113 S. W. 436; *Ames v. Moore*, 54 Ore. 274, 101 Pac. 769.

70. See *e. g.* *Conley v. Nailor*, 118 U. S. 127, 30 L. Ed. 112; *Ohlphant v. Liversidge*, 142 Ill. 160, 30 N. E. 334; *Studybaker v. Cofield*, 159 Mo. 596, 61 S. W. 246; *Loeschigk v. Hatfield*, 51 N.

Y. 660. So it has been said that no consideration is necessary for a conveyance to children or grandchildren. *Spencer v. Razor*, 251 Ill. 278, 96 N. E. 300. And it has been said that a "good" consideration is sufficient, without stating what is a good consideration. *Powers v. Munson* 74, Wash. 234, 133 Pac. 453.

71. *Rendleman v. Rendleman*, 156 Ill. 568, 41 N. E. 223; *Brown v. Brown*, 44 S. Car. 378, 22 S. E. 412; *Golle v. State Bank of Wilson Creek*, 52 Wash. 437, 100 Pac. 984.

72. *Feeney v. Howard*, 79 Cal. 525, 4 L. R. A. 826, 12 Am. St. Rep. 162, 21 Pac. 984; *Meeker v.*

likewise to furnish support for the conveyance as a bargain and sale.⁷³ But the fact that the instrument does not recite the payment of a consideration does not affect the right of the grantee to show its payment.⁷⁴

An acknowledgment in the instrument of the receipt of the consideration is conclusive upon the parties as to the fact that a consideration was paid, in so far as the payment of a consideration may be regarded as necessary to support the conveyance,⁷⁵ or in so far as such payment might serve to exclude any presumption of a resulting trust in favor of the grantor.⁷⁶ It is, however, for most purposes, open to contradiction, as is

Meeker, 16 Conn. 383; Acker v. Priest, 92 Iowa, 610, 61 N. W. 235; Groff v. Rohrer, 35 Md. 327; Gould v. Lynde, 114 Mass. 366; Moore v. Jordan, 65 Miss. 229, 7 Am. St. Rep. 641, 3 So. 737; 2 Story, Eq. Jur. § 1199.

73. *Ante* § 428.

74. Fisher v. Smith, Moore, 569; Smith v. Lane, 1 Leon. 170; Goad v. Moulton, 67 Cal. 536, 8 Pac. 63; Lowry v. Howard, 35 Ind. 170, 9 Am. Rep. 676; Boynton v. Rees, 8 Pick. (Mass.) 329, 19 Am. Dec. 326; Underwood v. Campbell, 14 N. H. 393; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Den d Springs v. Hanks, 27 N. C. 30; Sprague v. Woods, 4 Watts & S. (Pa.) 192; Jackson v. Dillon's Lessee, 2 Overt (Tenn.) 261; Wood v. Beach, 7 Vt. 522.

75. Russ v. Mebins, 16 Cal. 350; Cheesman v. Nicholl, 18 Colo. App. 174, 70 Pac. 797; Kimball v. Walker, 30 Ill. 482, 511; Abernathie v. Rich. 256 Ill. 166, 99 N. E. 883; Acker v. Priest, 92 Iowa, 610, 61 N. W. 235; Maxwell v. McCall, 145 Iowa, 687, 124 N. W. 760; Beavers v. McKinley, 50 Kan.

602, 32 Pac. 363, 33 Pac. 359; Goodspeed v. Fuller, 46 Me. 141; McKusick v. Washington County Commissioners, 16 Minn. 151; Strong v. Whyback, 204 Mo. 341, 12 L. R. A. N. S. 240, 102 S. W. 968; Morse v. Shattuck, 4 N. H. 229; Farrington v. Barr, 36 N. H. 86; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Deaver v. Deaver, 137 N. Car. 240, 49 S. E. 113; Finlayson v. Finlayson, 17 Ore. 347, 11 Am. St. Rep. 836, 3 L. R. A. 801, 21 Pac. 57.

So such acknowledgment is conclusive for the purpose of supporting the conveyance as a deed of bargain and sale. Fisher v. Smith, Moor. 569; Smith v. Lane. 1 Leon 170; Wilt v. Franklin, 1 Binn. 502; Sheppard's Touchstone-223.

76. Story Equity Jur. § 1199; 3 Pomeroy, Eq. Jur. § 1036; Davis v. Jernigan, 71 Ark. 494, 76 S. W. 554; Feeney v. Howard, 79 Cal. 525, 4 L. R. A. 826, 12 Am. St. Rep. 162, 21 Pac. 984; Luckhart v Luckhart, 120 Iowa, 248, 94 N. W. 461; Philbrook v. Delano, 29 Me. 412; Weiss v.

any receipt.⁷⁷ Likewise the recital in the instrument as to the amount of the consideration is ordinarily not conclusive,⁷⁸ for the same reason, that such recital is not intended to have a legal effect, is not, so to speak, the "integration of a legal act,"⁷⁹ but is merely the statement of a fact, and is as such open to explanation or contradiction. If, however, the recital of the consideration is intended to have a contractual or other legal operation, creating or divesting a right, it is conclusive upon the parties to the instrument.⁸⁰ It is for

Heitkamp, 127 Mo. 23, 29 S. W. 709; Graves v. Graves, 29 N. H. 129.

77. Morton v. Morton, 82 Ark. 492, 102 S. W. 213; Wood v. Bangs, 2 Penn. (Del.) 435; Sullivan v. Lear, 23 Fla. 463, 11 Am. St. Rep. 388, 2 So. 846; Koch v. Roth, 150, Ill. 212, 37 N. E. 317; Rhodes v. Walker,—(Ky.)—115 S. W. 257; Bassett v. Bassett, 55 Me. 127; Fowlkes v. Lea, 84 Miss. 509, 68 L. R. A. 925, 2 A. & E. Ann. Cas. 466, 36 So. 1036; Shelton v. Cooksey, 138 Mo. App. 389, 122 S. W. 331; Bingham v. Weiderwax, 1 N. Y. 509; Marcom v. Adams, 122 N. C. 222, 29 S. E. 333; Singletary v. Goeman, 58 Tex. Civ. App. 5, 123 S. W. 436; Spangler v. Ashwell, 116 Va. 992, 83 S. E. 930; Halvorsen v. Halvorsen, 120 Wis. 52, 97 N. W. 494.

78. Hitz v. National Metropolitan Bank, 111 U. S. 722, 28 L. Ed. 577; London v. G. L. Anderson Brass Works, 197 Ala. 16, 72 So. 359; Vaugine v. Taylor, 18 Ark. 65; Byers v. Locke, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119; Lloyd v. Sandusky, 203 Ill. 621, 68 N. E. 154; Allen v. Rees, 136 Iowa, 423, 8 L. R. A. N. S. 1137, 110 N. W. 583; Goodspeed v.

Fuller, 46 Me. 141; Wilkinson v. Scott, 17 Mass. 249; Smith v. Maxey, 186 Mich. 151, 152 N. W. 1011; Bolles v. Sachs, 37 Minn. 318, 33 N. W. 862; Goodman v. Smith, 94 Neb. 227, 142 N. W. 521; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Hebbard v. Haughian, 70 N. Y. 54; Michael v. Foil, 100 N. C. 178, 6 Am. St. Rep. 577, 6 S. E. 264; Conklin v. Hancock, 67 Ohio St. 455, 66 N. E. 518; Grace v. McDowell, 60 Ore. 577, 120 Pac. 413; Henry v. Zurfliet, 203 Pa. 440, 53 Atl. 243; Miller v. Livingston, 36 Utah 174, 61 Pac. 569; Kickland v. Menasha Wooden Ware Co., 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471.

79. See 4 Wigmore, Evidence §, 2425 *et seq.*

80. Wallace v. Meeks, 99 Ark. 350, 138 S. W. 638; Hilgeman v. Sholl, 21 Ind. App. 86, 51 N. E. 728; Milich v. Armour Packing Co., 60 Kan. 229, 56 Pac. 1; Gully v. Grubbs, 1 J. J. Marsh. (Ky.) 387; Kramer v. Gardner, 104 Minn. 370, 22 L. R. A. (N. S.) 492, 116 N. W. 925; Baum v. Lynn, 72 Miss. 932, 30 L. R. A. 441, 18 So. 428; Halferty v. Searce, 135 Mo. 428, 37 S. W. 113, 255;

this latter reason that the recital of the payment of the consideration is conclusive for the purpose of supporting the validity of the conveyance.⁸¹ Such recital involves the statement of a dispositive or vestitive fact, and as such is not susceptible of contradiction, it standing, in this regard, in the same category as the words of conveyance, or the description of the property conveyed. It is for a like reason that such recital cannot be contradicted for the purpose of showing a resulting trust in favor of the grantor.⁸² The operation of the recital is to vest the beneficial interest in the grantee, and the recital cannot be contradicted in order to deprive him of such interest.

There has been considerable discussion of the question whether the recital as to the consideration precludes the parties from showing, not that the consideration is different in amount from that recited, but is different in character therefrom. The difference in character ordinarily referred to in this connection is the difference between a valuable consideration and a good consideration, so called. The expression "good consideration," means, however, merely a lack of valuable consideration. Consequently, the question whether an instrument which recites a valuable consideration can be shown to be based on a good consideration involves merely the question whether it can be shown to be a gift, while the converse question, whether an instrument which recites a good consideration can be shown to be based on a valuable consideration, involves merely the question whether it can be shown not to be a gift. Conceding that the recital is not conclusive as to the amount of the valuable consideration, and the cases are in apparent

McDaniels v. United Railways of St. Louis, 165 Mo. App. 678, 148 S. W. 464; Kahn v. Kahn, 94 Tex. 114, 58 S. W. 825; Walter v. Dearing,—(Tex.)—65 S. W. 380; Pierce v. Brew, 43 Vt. 292; Union Machinery & Supply Co.

v. Darnell, 89 Wash. 226, 154 Pac. 183; Monongohela Tie & Lumber Co. v. Flannigan, 77 W. Va. 162, 87 S. E. 161; 4 Wigmore, Evidence § 2433.

81. *Ante.* this section, note 75.

82. *Ante.* this section, note 76.

unison to that effect, it is not readily perceptible why it should be conclusive as to whether there is any valuable consideration whatsoever. The cases⁸³ adverse to the right to show such a different character of consideration, as it is expressed, ordinarily involve the right to show that the conveyance was or was not an advancement, for the purpose of settling the grantor's estate upon his death, or that it was or was not a gift, for the purpose of determining the course of descent from the grantee, and they are usually based on the theory that an attempt to contradict the recital by showing the presence or absence of a valuable consideration involves an attempt to change the legal operation of the conveyance. But, it is submitted, the operation of the conveyance, as transferring the grantor's rights, is the same, whether he does or does not receive something of value in exchange therefor, and this is so even though the presence or absence of such a consideration may affect the grantee's rights as regards other persons, or the rights *inter se* of persons claiming under the grantee. The very decided weight of authority is to the effect that the recital of a valuable consideration does not preclude a showing that there was no such consideration,⁸⁴ and it has likewise been decided that a recital

83. *Winningham v. Pennock*, 36 Mo. App. 688; *Yates v. Burt*, 161 Mo. App. 267, 143 S. W. 73; *Burrage v. Bear Isley*, 16 Ohio, 438; *Patterson v. Lamson*, 45 Ohio St. 77, 12 N. E. 531; *Groves v. Groves*, 65 Ohio St. 442, 62 N. E. 1044.

That the conveyance cannot be supported as a covenant to stand seised when a valuable consideration alone is recited. See *Bedell's Case* 7 Co. Rep. 133; *Foster v. Foster*, Tho. Raym. 43, 1 Lev. 55; *Elysville Co. v. Okisko*, 1 Md. Ch. 315; *Contra* *Gale v.* 2 R. P.—28

Coburn, 18 Pick. (Mass.) 397. And see *Miller v. Goodwin*, 8 Gray (Mass.) 542, where evidence that the consideration was marriage was admitted for this purpose though the deed recited merely past services as a consideration.

84. *Morton v. Morton*, 82 Ark. 492, 102 S. W. 213; *Peck v. Vandenberg*, 30 Cal. 11; *Carty v. Connolly*, 91 Cal. 15, 27 Pac. 599; *Meeker v. Meeker*, 16 Conn. 387; *Leggett v. Patterson*, 114 Ga. 714, 40 S. E. 736; *Rickhill v. Spraggs*, 9 Ind. 30; *Kenney v. Phillippy*, 91

of love and affection as the consideration does not preclude a showing of a valuable consideration.⁸⁵

The right to show that the consideration for a conveyance which recites a valuable consideration was, while a thing of value, a thing of a different kind, as for instance, merchandise instead of money, has been generally recognized.⁸⁶

Ind. 511; Finch v. Garrett, 102 Iowa, 381, 71 N. W. 429; Crafton v. Inge, 124 Ky. 89, 98 S. W. 325; Koogle v. Cline, 110 Md. 587, (*semble*), 24 L. R. A. (N. S.) 413, 73 Atl. 672; Gale v. Coburn, 18 Pick. (Mass.) 397; Harman v. Fisher, 90 Neb. 688, 39 L. R. A. (N. S.) 157, 134 N. W. 246; Speer v. Speer, 14 N. J. Eq. 240; Voigt v. Dowe, 74 N. J. Eq. 560, 70 Atl. 344; Palmer v. Culbertson, 143 N. Y. 213, 38 N. E. 199; Barbee v. Barbee, 108 N. C. 581, 13 S. E. 215; Shehy v. Cunningham, 81 Ohio St. 289, 25 L. R. A. (N. S.) 1194, 90 N. E. 805; Velten v. Carmack, 23 Ore. 282, 20 L. R. A. 101, 31 Pac. 658; Lewis v. Brewster, 57 Pa. St. 410; Wolf v. King, 49 Tex. Civ. App. 41, 107 S. W. 617; Bruce v. Slemp, 82 Va. 352, 4 S. E. 692.

85. Attwell v. Harris, 2 Roll Rep. 91; Gale v. Williamson, 8 Mees. & W. 405 (as against creditors); Harman v. Richards, 10 Hare 81 (as against creditors); Leahy v. Dancer, 1 Molloy 313 (to show purchaser for value).

Tompson v. Cody, 100 Ga. 771, 28 S. E. 669; Nichols, Shepherd & Co. v. Burch, 128 Ind. 324, 27 N. E. 737; Chantland v. Sherman, 148 Iowa, 352, 125 N. W. 871; Thomas v. Smith, 6 Ky. L. Rep. 737; Scudder v. Morris, 107 Mo.

App. 634, 82 S. W. 217; Lewis v. Brewster, 57 Pa. St. 410 (*dictum*); Ferguson v. Harrison, 41 S. C. 340, 19 S. E. 19; *Contra*, Potter v. Gracie, 58 Ala. 303; Baxter v. Sewell, 3 Md. 334; Ellinger v. Crowl, 17 Md. 361; Latimer v. Latimer, 53 S. C. 483, 31 S. E. 304. And see Ogden State Bank v. Barker, 12 Utah 13, 40 Pac. 765.

86. Townend v. Toker, L. R. 1 Ch. 446; Bailey v. Litten, 52 Ala. 282; Harraway v. Harraway, 136 Ala. 499, 34 So. 836; St. Louis & N. R. R. Co. v. Crandall, 75 Ark. 89, 112 Am. St. Rep. 42, 86 S. W. 855; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Droop v. Ride-nour, 11 App. D. C. 224; Stone v. Minter, 111 Ga. 45, 50 L. R. A. 356, 36 S. E. 321; Kintner v. Jones, 122 Ind. 148, 23 N. E. 701; Bristol Sav. Bank v. Stiger, 86 Iowa, 344, 53 N. W. 265; Twomey v. Crowley, 137 Mass. 184; Edwards v. Latimer, 183 Mo. 610, 82 S. W. 109; Lake v. Bender, 18 Nev. 361, 4 Pac. 711; 7 Pac. 74; Medical College Laboratory v. New York University, 178 N. Y. 153, 70 N. E. 467; Price v. Harrington, 171 N. C. 132, 87 S. E. 986; Conklyn v. Hancock, 67 Ohio St. 455, 66 N. E. 518; Barnes v. Black, 193 Pa. 447, 74 Am. St. Rep. 694, 44 Atl.

As it is not permissible to introduce evidence as to the consideration in contradiction of the consideration clause in so far as such clause is contractual in character, or is otherwise intended to have a legal effect,⁸⁷ so it is not permissible to introduce evidence as to the consideration in contradiction of any other clause which is contractual in character or intended to have a legal effect.⁸⁸ Accordingly, the language of the instrument being such as to vest in the grantee an estate free from any condition subsequent or limitation over, it cannot be shown, under the pretext of proving the real consideration, that there was such a condition or limitation.⁸⁹ And for the same reason, it appears, one cannot, after purporting to convey land, restrict the operation of the instrument by introducing evidence that it was agreed, as part consideration of the conveyance, that some part of what would otherwise pass by the conveyance, the growing crop for instance, or fixtures, should not pass.⁹⁰ And the oral reservation of an easement cannot be asserted under the pretext of showing the consideration.⁹¹

550 (*semble*); *Whitman v. Corley*, 72 S. C. 410, 52 S. E. 49; *Tipton v. Tipton*, 47 Tex. Civ. App. 619, 105 S. W. 830, 118 S. W. 842; *Martin v. Hall*, 115 Va. 358, 79 S. E. 320; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730. *Contra*, *Thompson v. Corrie*, 57 Md. 197; *Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938.

87. *Ante*, this section, note 80.

88. *Jensen v. Crosby*, 80 Minn. 158, 83 N. W. 43; *Louisville & N. R. Co. v. Willbanks*, 133 Ga. 15, 24 L. R. A. (N. S.) 374, 17 Ann. Cas. 860, 65 S. E. 86; *Miller v. Edgerton*, 38 Kan. 36, 15 Pac. 894.

89. *Erfurth v. Erfurth*, 90 Wash. 521, 156 Pac. 523.

But it has been decided that though a money consideration is recited, it may be shown that the conveyance was made in consideration of a contract to support the grantor, a failure to comply with which justified a rescission. *Martin v. Hall*, 115 Va. 358, 79 S. E. 320; *Furst v. Galloway*, 56 W. Va. 246, 49 S. E. 146; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730. See *ante*, § 89.

90. *Adams v. Watkins*, 103 Mich. 431, 61 N. W. 774; *Kammrath v. Kidd*, 89 Minn. 380, 99 Am. St. Rep. 603, 95 N. W. 213; *Stewart v. McArthur*, 77 Iowa. 162, 41 N. W. 604.

91. *Louisville & N. R. Co. v.*

In accordance with the rule above referred to, that evidence of the consideration is not admissible in contradiction of a clause of the conveyance intended to have a contractual or other legal effect, are decisions that, when the instrument contains a covenant against incumbrances or of warranty it cannot be shown that, as part consideration for the conveyance, the grantee orally assumed the payment of a particular incumbrance, not excepted in terms from the covenant, since this involves a direct contradiction of the language of the covenant.⁹² It must be conceded, however, that there are a considerable number of decisions to an opposite effect, that the grantee's oral assumption of an incumbrance may be shown to affect the liability under the covenant against incumbrances.⁹³ Occasionally these latter decisions are based on the theory, a sound one, it would seem,⁹⁴ that the assumption merely serves to aid in the construction of the covenant, but some are based on the theory that it serves to show the consideration. If evidence of a contract which involves a direct con-

Willbanks, 24 L. R. A. (N. S.) 375, 133 Ca. 15, 65 S. E. 86; Schrimper v. Chicago M. & S. & P. R. Co., 115 Iowa, 35, 82 N. W. 916, 87 N. W. 731; Pickett v. Mercer, 106 Mo. App. 689, 80 S. W. 285; Trout v. Norfolk & W. R. Co., 107 Va. 576, 17 L. R. A. (N. S.) 702, 59 S. E. 394; Mat-tism v. Chicago etc., R. C., 42 Neb. 545, 60 N. W. 925.

92. Johnson v. Walter, 60 Iowa, 315, 14 N. W. 325; Flynn v. Bourneuf, 143 Mass. 277. 58 Am. Rep. 138, 9 N. E. 815; Simanovich v. Wood, 145 Mass. 180, 13 N. E. 391; Edison Electric Illuminating Co. v. Gibby Foundry Co., 194 Mass. 259, 80 N. E. 479; Burns v. Schreiber, 43 Minn. 468, 45, N. W. 861; Rooney v. Kornig, 80 Minn. 483, 83 N. W. 399;

Lamoille County Sav. Bank & Trust Co. v. Belden, 90 Vt. 535, 98 Atl. 1002; Patterson v. Cappon, 125 Wis. 198, 102 N. W. 1083.

93. Henderson v. Tobey, 105 Ill. App. 154; Carver v. Louthain, 38 Ind. 530; Hays v. Peck, 107 Ind. 389, 8 N. E. 274; Blood v. Wilkins, 43 Iowa, 565; Wachen-dorf v. Lancaster, 66 Iowa, 458, 23 N. W. 522; Burnham v. Dorr, 72 Me. 198; Landman v. Ingram, 49 Mo. 212; Gill v. Ferrin, 71 N. H. 421, 52 Atl. 558; Deaver v. Deaver, 137 N. C. 240, 49 S. E. 113; Johnston v. Markle Paper Co., 153 Pa. St. 195, 25 Atl. 560, 885; Johnson v. Elmen, 94 Tex. 168, 52 L. R. A. 162, 86 Am. St. Rep. 845, 59 S. W. 253.

94. Post. § 452, note 42a.

tradiction of an operative part of an instrument is admissible merely because it serves to show the consideration received by one or the other of the parties, contracts contradictory of other parts may also be shown, and in this way "a solemn and executed written contract would be totally eaten away."⁹⁵⁻⁹⁶

§ 439. Reality of consent—Mistake. While a conveyance is presumed to have been made with the full and free consent of the grantor, and correctly to embody his intention, it may be shown that this is not the case, by reason of mistake, fraud, duress, or undue influence.

If the parties are in agreement as to what they wish and intend to do, but there is a mistake in the preparation of the instrument, so that it fails correctly to embody their intention, equity will reform or rectify the instrument accordingly.⁹⁷ And so a mistake in the words in the conveyance limiting the interest in the land which it was agreed should be conveyed may be corrected, as when there is an omission of words of inheritance.⁹⁸ Likewise, the fact that the conveyance pur-

95-96. See *Baum v. Lynn*, 72 Miss. 932, 30 L. R. A. 441, 18 So. 428.

97. *Ivinson v. Hutton*, 98 U. S. 79, 25 L. Ed. 66; *Brown v. Cranberry Iron & Coal Co.*, 84 Fed. 930, 28 C. C. A. 567; *Allis v. Hall*, 76 Conn. 322, 56 Atl. 637; *Kerr v. Couper*, 5 Del. Ch. 507; *Gruing v. Richards*, 23 Iowa, 288; *Canedy v. Marcy*, 13 Gray (Mass.) 373; *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 816, 33 N. W. 38; *Sparks v. Pittman*, 51 Miss. 511; *Barataria Canning Co. v. Ott*, 88 Miss. 771, 41 So. 378; *Leitensdorfer v. Delphy*, 15 Mo. 160, 55 Am. Dec. 137; *Grant v. Baird*, 61 N. J. Eq. 389, 49 Atl.

150; *Bank of Union v. Redwine*, 171 N. C. 559, 88 S. E. 878; *Huss v. Morris*, 63 Pa. 367; *Melott v. West*, 76 W. Va. 739, 86 S. E. 759.

98. *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925; *Drum v. Drum*, 251 Ill. 232, 95 N. E. 1071; *Whittaker v. Lewis*, 264 Mo. 208, 174 S. W. 369; *McMillan v. Fish*, 29 N. J. Eq. 610; *Higinbotham v. Burnet*, 5 Johns Ch. (N. Y.) 184; *Henley v. Wilson*, 77 N. C. 216; *Clayton v. Freet*, 10 Ohio St. 544; *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976; *Lardner v. Williams*, 98 Wis. 514, 74 N. W. 346.

ports to convey land other than that which both parties intended should be conveyed, or that the land as conveyed differs from that sold, is ground for reformation.⁹⁹

Occasionally it is stated that, in order to justify the reformation of an instrument as not correctly expressing the agreement of the parties, there must have been a mutual mistake in the preparation of the instrument.¹ This, however, appears questionable. If the instrument fails correctly to express the agreement of the parties, there should be a right to have it reformed, regardless of the person or persons whose mistake caused this result.²

If the instrument as executed expresses the agreement of the parties, it is no ground for reformation that in arriving at such agreement both parties labored under the same misconception.³ Nor will the instru-

99. *Tillis v. Smith*, 108 Ala. 264, 19 So. 374; *Felton v. Leigh*, 48 Ark. 498, 3 S. W. 638; *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670; *Barth v. Deuel*, 11 Colo. 494, 19 Pac. 471; *Barnes v. Peterson*, 136 Ga. 364, 71 S. E. 163; *Keeley v. Sayles*, 217 Ill. 589, 75 N. E. 567; *Baker v. Pyatt*, 108 Ind. 61, 9 N. E. 112; *Bottorff v. Lewis*, 121 Iowa, 27, 95 N. W. 262; *Critchfield v. Kline*, 39 Kan. 721, 18 Pac. 898; *Holbrook v. Schofield*, 211 Mass. 234, 98 N. E. 97; *Fisher v. Dent*, 259 Mo. 86, 167 S. W. 997; *Blair v. McDonnell*, 5 N. J. Eq. 327; *Bush v. Hicks*, 60 N. Y. 298; *Pelletier v. Interstate Cooperage Co.*, 158 N. C. 403, 74 S. E. 112; *Carroll v. Ryder*, 34 R. I. 383, 83 Atl. 845; *Walker v. Dunlop*, 5 Hayw. (Tenn.) 271, 9 Am. Dec. 787; *Abbott v. Flint's Adm'r*, 78 Vt.

274, 62 Atl. 721; *Carlson, v. Druse*, 79 Wash. 542, 140 Pac. 570; *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094; *Fuchs v. Treat*, 41 Wis. 404.

1. *Chapman v. Lambert*, 176 Ind. 461, 96 N. E. 459; *Dougherty v. Dougherty*, 204 Mo. 228, 102 S. W. 1099; *Robinson v. Korn*, 250 Mo. 663, 157 S. W. 790; *Welles v. Yates*, 44 N. Y. 525; *Waslee v. Rossman*, 231 Pa. 219, 80 Atl. 643; *R. M. Cobban Realty Co. v. Chicago, M. & St. P. R. Co.*, 52 Mont. 256; 157 Pac. 173; 6 *Pomeroy Eq. Jur.* § 675.

2. See 11 *Columbia Law Rev.* at p. 301, article by Roland R. Foulke, Esq.

3. *Holland Blow Stave Co. v. Barclay*, 193 Ala. 200, 69 So. 118; *Toops v. Snyder*, 70 Ind. 554; *Wise v. Brooks*, 69 Miss. 891, 13 So. 836; *Pittsburg Lumber*

ment be reformed, if made on a valuable consideration, merely because it fails to accord with the intention or expectation of one party, provided it accords with the intention of the other, and with the terms of the agreement between them.⁴

The fact that the failure of the instrument as written to embody the intention of the parties arises from a mistake of law, as distinguished from a mistake of fact, does not prevent a reformation of the instrument to accord with the true intention of the parties.⁵ But on the other hand, if the parties, by reason of a mistake of law, deliberately select a particular form of instrument, or deliberately insert particular language therein, neither of them can afterwards assert that the instrument as executed does not represent their agreement.⁶ In other words, if the conveyance is in the form agreed

Co. v. Shell, 133 Tenn. 466, 189 S. W. 879.

4. James Holcombe & Rainwater v. Furr, 126 Ark. 251, 190 S. W. 444; Ruby v. Ewing, 49 Ind. App. 520, 97 N. E. 798; Allen v. Roanoke R. & Lumber Co., 171 N. C. 339, 88 S. E. 492; R D. Johnson Milling Co. v. Read, 76 W. Va. 557, 85 S. E. 726.

5. Orr v. Echols, 119 Ala. 340, 24 So. 357; Haussman v. Burnham, 59 Conn. 117, 21 Am. St. Rep. 74, 22 Atl. 1065; Parish v. Camplin, 139 Ind. 1, 37 N. E. 607; Bonbright v. Bonbright, 123 Iowa, 305, 98 N. W. 784; Lear v. Prather, 89 Ky. 501, 12 S. W. 946; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688; Sparks v. Pittman, 51 Miss. 511; Corrigan v. Tlernay, 100 Mo. 276, 13 S. W. 401; Pinkham v. Pinkham, 60 Neb. 600, 83 N. W. 837; Green v. Morris & E. R.

Co., 12 N. J. Eq. 165; Kornegay v. Everett, 99 N. C. 30, 5 S. E. 30; Evants v. Strode's Adm'r, 11 Ohio 480, 38 Am. Dec. 744; Brock v. O'Dell, 44 S. C. 22, 21 S. E. 976; State v. Lorenz, 22 Wash. 289, 60 Pac. 644; Biggs v. Bailey, 49 W. Va. 188, 33 S. E. 499; Whitmore v. Hay, 85 Wis. 240, 39 Am. St. Rep. 838, 55 N. W. 708. *Contra*, Fowler v. Black, 136 Ill. 363, 11 L. R. A. 670, 26 N. E. 596.

6. Hunt v. Rhodes, 1 Pet (U. S.) 1, 7 L. Ed. 27; Gordere v. Downing, 18 Ill. 492; Dever v. Dever, 19 Ky. L. Rep. 1988, 44 S. W. 986; Farley v. Bryant, 32 Me. 474; Durant v. Bacot, 13 N. J. Eq. 201; Lanning v. Carpenter, 48 N. Y. 408; Morton v. Morris, 27 Tex. Civ. App. 262, 66 S. W. 94; 2 Pomeroy, Eq. Jur. § 843; Pollock, Contracts (Williston's Ed.) 576.

on, the fact that, had the parties understood the law, a different form would have been agreed on, is not ground for reformation, while if the form of conveyance was not agreed on, but merely the end to be attained by the conveyance, the fact that this end is, by reason of a mistake of law, not attained by the conveyance actually executed, may be ground for reformation.

If the conveyance is purely voluntary, that is, if it represents a mere gift as distinguished from a sale, the donor is ordinarily entitled to a reformation on account of his own mistake, regardless of whether the mistake was shared in by the donee.⁷ On the other hand, if the conveyance is not based on a valuable, or at least a meritorious consideration, relief will not be given as against the donor while living,⁸ and, according to the weight of authority, it will not be given as against the heirs or devisees of a deceased donor by reason of the failure of the language of the conveyance to express the donor's probable intention.⁹

A contract for the sale of land, as any other contract, may be made under such a mistaken assumption on the part of both parties as to justify relief therefrom in equity at the suit of either of them, and the fact that a conveyance is made in pursuance of the contract

7. *Jones v. McNealy*, 139 Ala. 379, 35 So. 1022; *Manfredo v. Manfredo*, 191 Ala. 322, 68 So. 157, (mistakes as to legal effect); *Mitchell v. Mitchell*, 40 Ga. 11; *Crockett v. Crockett*, 73 Ga. 647; *Day v. Day*, 84 N. C. 408; *Coale v. Merryman*, 35 Md. 382; *Mulock v. Mulock*, 31 N. J. Eq. 594; *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187; 6 Pom. Eq. Jur. § 679; 23 Harv. Law Rev. at p. 620, article by Edwin H. Abbott, Jr., Esq.

8. *Lister v. Hodgson*, L. R. 4 Eq. 30; *Shears v. Westover*, 110 Mich. 505, 68 N. W. 266;

Gwyer v. Spaulding, 33 Neb. 573, 50 N. W. 681.

9. *Enos v. Stewart*, 138 Cal. 112, 70 Pac. 1005; *Powell v. Powell*, 27 Ga. 36; *Strayer v. Dickerson*, 205 Ill. 257, 68 N. E. 767; *Else v. Kennedy*, 67 Iowa, 376, 25 N. W. 290; *Comstock v. Cook*, 135 Ind. 642, 35 N. E. 909; *Miller v. Beardslee*, 175 Mich. 414, 141 N. W. 566; *Powell v. Morisey*, 98 N. C. 42, 2 Am. St. Rep. 343, 6, 4 S. E. 185; *Hout v. Hout*, 20 Ohio St. 119; *Willey v. Hodge*, 104 Wis. 81, 76 Am. St. Rep. 852, 80 N. W. 75; *Contra Mattingly v. Speak*, 4 Bush

would not ordinarily affect the right to relief. Whether there was a mistake justifying such relief is frequently a difficult question, but it is properly one of the law of contracts, and calls for discussion in a work on that subject rather than in one on the law of land.¹⁰ Whether, for instance, a mistaken supposition indulged in by both the parties as to the character or value of the land sold, or a misunderstanding between them as to the identity of the land, is ground for rescinding the conveyance and relieving the grantee from liability for the purchase money, is determined by the consideration whether it would have been ground for rescinding the contract of sale in pursuance of which the conveyance was made. So when the conveyance is not made in pursuance of a prior contract of sale, but the execution of the conveyance constitutes the proposal or acceptance of an agreement for the sale of the land, the right to a rescission of the conveyance on the ground of mistake is determinable by the consideration whether the mistake is such that it would have afforded relief from an executory contract of sale under like circumstances. It may happen, however, that a conveyance is executed, not by way of sale but by way of gift, and then the principles which apply in the case of a contract are not adapted to determine the rights of the parties. Whether, in such a case, that of a purely voluntary conveyance, the grantor will be relieved therefrom because, while it conforms with the actual intention of the grantor, such intention is itself based on a mistaken supposition as to the existence or non existence of a particular fact, is a question as to which there appears to be but little explicit authority. It would seem, however, that the donor will not be relieved by reason of

(Ky.) 316; *Huss v. Morris*, 63 Pa. 367; *McMechan v. Warburton* [1896] 1 I. R. 435.

10. What appears to the writer the most satisfactory discus-

sion of this matter is found in two articles by Roland R. Foulke, Esq. in 11 *Columbia Law Rev.* at pp. 197, 299.

such a mistake on his part, not induced by the donee.¹¹ That a gift is not ordinarily revocable is generally recognized, and yet in but few cases, presumably, could the donor seeking to revoke not assert that he made the gift under a mistaken impression, as regards the merits of the donee, for instance, or his own ability to dispense with the subject of the gift.

That the grantor, at the time of his execution of the conveyance, mistakenly supposed it to be some other character of instrument, is sufficient to justify its cancellation, provided at least his mistake was not the result of negligence on his part.¹² In such a case the instrument is not that which the grantor intended to deliver and it is consequently not his deed,¹³ though, as just indicated, negligence on his part may operate to prevent him from asserting that he did not intend to execute the character of instrument which he did execute.¹⁴ In determining the existence of negligence *vel non* for the purpose of determining whether one is bound by his execution of an instrument, a distinction is quite frequently asserted between the case of a grantor or obligor who is able to read, and that of one who is unable to read, a person of the latter description being entitled to relief if the instrument was not properly explained to him, provided at least he sought to have it explained,¹⁵ while a person of the former description is usually negligent if he fails to read it.¹⁶

11. See, to that effect, Kerr, *Fraud & Mistake* (4th ed.) 199; *Pickslay v. Starr*, 149 N. Y. 432, 32 L. R. A. 703, 52 Am. St. Rep. 740, 44 N. E. 163

12. *Hammon*, *Contracts*, § 93; 4 *Wigmore*, *Evidence*, § 2416.

13. *Harriman*, *Contracts* (2nd ed.), § 80.

14. *Pollock*, *Contracts* (Williston's Edition) 587.

15. *Chicago, etc., R. Co. v. Belliwith*, 83 Fed. 437, 28 C. C.

A. 358; *Robinson v. Glass*, 94 Ind. 211; *Roach v. Karr*, 18 Kan. 529; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Hallenbeck v. Dewitt*, 2 Johns. (N. Y.) 404; *Providence Twp. v. Kesler*, 67 N. C. 443; *Weller's Appeal*, 103 Pa. 594; *Sheppard's Touchstone*, 56.

16. *Dawson v. Burrus*, 73 Ala. 111; *McHenry v. Day*, 13 Iowa 445, 81 Am. Dec. 438; *Van Sickles v. Town*, 53 Iowa, 259; *El-*

— **Fraud.** The making of the conveyance by the grantor may have been induced by some fraudulent misrepresentation on the part of the grantee, or, which is in effect the same, the conveyance may have been made by way of compliance with a contract of sale which was induced by fraudulent misrepresentation. A vendor's right to repudiate a bargain obtained from him by fraud is not lost by the fact that he has executed a conveyance in accordance with the bargain, unless he did this with knowledge of the fraud, so as to justify a finding that he waived his rights in this regard. The execution of the conveyance is material only in so far as it renders it necessary for the vendor (grantor), in order to obtain complete relief, to effect a cancellation of the conveyance, and this he can do, ordinarily, only by recourse to a court of equity. The grantor may, moreover, be entitled to a cancellation of the conveyance by reason of a fraud connected, not with negotiations for the sale by him of the property, but with the execution of the conveyance, as when the grantee intentionally misstates to him the effect of the conveyance, or intentionally causes him to execute an instrument other than that which he intends to execute.¹⁷

— **Duress.** A conveyance may be set aside because executed by the grantor under duress. Duress, as recognized by the modern decisions consists, it has been said, in the actual or threatened unlawful exercise of power possessed, or believed to be possessed, by one party, over the person or property of another, from

dridge v. Dexter & P. R. Co., 88 Me. 191, 33 Atl. 974; *Jackson v. Croy*, 12 Johns. (N. Y.) 427; *Witthaus v. Schack*, 57 How. Pr. 310; *Powers v. Powers*, 46 Ore. 479, 80 Pac. 1058; *Picton v. Graham*, 2 Desauss. (S. C.) 592; *Gibson v. Brown*, (Tex. Civ. App.) 24 S. W. 574. See *Harri-*
man, Contracts, §§ 77, 78; *Pol-*

lock, Contracts, (Williston's Ed.) 583. Compare cases cited 5 A. & E. Ann. Cas. 215, 11 Id. 1164. 17. As to fraud as a ground for rescission or cancellation, see *Pollock, Contracts* (Williston's Ed.) 646-726; 2 *Pomeroy, Equity*, § 872 *et seq*; *Hammon, Contracts*, § 117 *et seq*.

which the latter has no means of immediate relief other than by performing the required act.¹⁸ It ordinarily involves either threats of bodily injury, threats of imprisonment, or actual imprisonment, though by a number of cases threats of detention of or injury to goods have been regarded as sufficient for this purpose.¹⁹

— **Undue influence.** A conveyance may also be set aside on account of undue influence exerted upon the grantor. Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment. The fact that the parties stand in such a position towards one another, either by reason of relationship, professional employment, or otherwise, that the grantor is peculiarly susceptible to the exertion of influence by the grantee, is a consideration of primary importance in this connection, in cases where the transaction is in itself improvident or disadvantageous to the grantor. And the fact that the grantor is lacking in such mental vigor as to enable him to protect himself against imposition is a reason for the interposition of equity to protect him, although his mental weakness is not such as to justify him in being regarded as totally incapacitated.²⁰

In some cases threats which are of such a character as to be insufficient to constitute duress as understood at common law, may constitute undue influence for the

18. Harriman, Contracts, § 445.

19. The authorities are collected in Pollock, Contracts (Williston's Ed.) 728-732; 1 Black, Rescission & Cancellation, ch. 9. And see editorial note 26 Harv.

Law Rev. 255.

20. Pollock, Contracts (7th Ed.) 600. See Hammon, Contracts, § 138 *et seq*; 1 Black, Rescission & Cancellation, ch. 10.

purpose of a court of equity, so as to justify a rescission of the conveyance. If a wife executes a conveyance by reason of her husband's threats of physical injury, the conveyance may be set aside as having been procured by duress, while if she executes it by reason of her husband's threats of abandonment, it is, it is said, a case of undue influence.²¹

§ 440. **Effect of alterations.** Since the conveyance takes effect only upon delivery,²² until that is effected, the grantor may make such alterations or insertions therein as he may desire.²³

An alteration made, after delivery, by consent of all the parties to the conveyance, is binding and effective if it is followed by a new delivery of the instrument,²⁴ in so far as no proprietary rights vested in the grantee by the conveyance as it originally stood are divested by such alteration,²⁵ and subject to the qualification that the subsequent record of the conveyance does not affect an innocent third person with notice of the alteration unless it was acknowledged after the alteration.²⁶ The new delivery, in such case, would ordinarily be inferred,

21. Pollock, Contracts, (Williston's Edition) 729, note.

22. *Post*, § 461.

23. Sheppard's Touchstone, 55; Miller v. Williams, 27 Colo. 34, 59 Pac. 740; Tharp v. Jamison, 154 Iowa 77, 39 L. R. A. (N. S.) 100, 134 N. W. 583; Coney v. Laird, 153 Mo. 408, 55 S. W. 96; Reformed Dutch Church of North Branch v. Ten Eyck, 25 N. J. Law, 40; Wetherington v. Williams, 134 N. C. 276, 46 S. E. 728; Duncan v. Hodges, 4 McCord (S. C.) 239, 17 Am. Dec. 734.

24. Malarin v. United States, 1 Wall. (U. S.) 282, 17 L. Ed. 594; Stiles v. Probst, 69 Ill. 382; Abbott v. Abbott, 189 Ill.

488, 82 Am. St. Rep. 470, 59 N. E. 958; Tucker v. Allen, 16 Kan. 312; Bassett v. Bassett, 55 Me. 127; Byers v. McClanahan, 6 Gill & J. (Md.) 250; Burns v. Lynde, 6 Allen (Mass.) 305; Fitzpatrick v. Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

25. See *post*, § 465.

26. Moelle v. Sherwood, 148 U. S. 21, 37 L. Ed. 350; Sharpe v. Orme, 61 Ala. 263; Webb v. Mullins, 78 Ala. 111; Wagle v. Iowa State Bank, 175 Iowa 92, 156 N. W. 991; Collins v. Collins, 51 Miss. 311, 24 Am. Rep. 632; See Coit v. Starkweather, 8 Conn. 289. Waldron v. Waller, 65 W. Va. 605, 32 L. R. A. (N. S.) 285, 64 S. E. 964.

it appears, from the fact that the grantor makes or approves the alteration, such fact, taken in connection with the fact of the prior delivery, serving to show an intention that the instrument shall be operative as altered.²⁷ There is, however, considerable difficulty in inferring a new delivery when the grantor merely consents to the alteration, which is made out of his presence, especially if he does nothing thereafter to indicate his intention that the instrument, as altered, shall operate as his act and deed.²⁸

An alteration made after the delivery of the conveyance is absolutely nugatory to divest property rights vested in the grantee by the conveyance.²⁹ The operation of the instrument as a conveyance becomes, after delivery, a thing of the past, and the fact that the instrument is then altered, or even that it is destroyed,³⁰

27. *Speake v. United States*, 9. *Crouch (U. S.)* 28, 3 L. Ed. 645; *Woodbury v. Allegheny & K. R. Co.*, 72 Fed. 371; *Prettyman v. Goodrich*, 23 Ill. 330; *Tucker v. Allen*, 16 Kan. 312; *Coney v. Laird*, 153 Mo. 408, 55 S. W. 96; *Wooley v. Constant*, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246; *Martin v. Buffaloe*, 121 N. C. 34, 27 S. E. 995; *Barrington v. Branch*, 14 Serg. & R. (Pa.) 405; *Bryant v. Bank of Charleston*, 107 Tenn. 560, 64 S. W. 895.

28. See *Davenport v. Sleight*, 19 N. C. 381; *Burns v. Lynde*, 6 Allen (Mass.) 305. *Bowen, L. J.*, in *Powell v. London & Provincial Bank* [1893] 2 Ch. at p. 563; *Martin v. Hanning*, 26 Up. Can. Q. B. 80.

29. *Doe d. Lewis v. Bingham*, 4 Barn. & Ald. 672; *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep.

80, 16 So. 440; *Faulkner v. Feazel*, 113 Ark. 289, 168 S. W. 568; *Gibbs v. Potter*, 166 Ind. 471, 77 N. E. 942; *Hollingsworth v. Holbrook*, 80 Iowa, 151, 20 Am. St. Rep. 411, 45 N. W. 561; *Hunt v. Nance*, 122 Ky. 274, 92 S. W. 6; *Chessman v. Whittemore*, 23 Pick. (Mass.) 231; *Robbins v. Hobart*, 133 Minn. 49, 157 N. W. 908; *Collins v. Collins*, 51 Miss. 311, 24 Am. Rep. 662; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Jackson v. Jacoby*, 9 Cow. (N. Y.) 125; *Rifener v. Bowman*, 53 Pa. St. 313; *Booker v. Stivender*, 13 Rich. (S. C.) 85; *Stanley v. Epperson*, 45 Tex. 645; *North v. Henneberry*, 44 Wis. 306.

30. See the full discussion of the whole subject in 18 Harv. Law Rev. at pp. 105, 165, article by Professor Samuel Williston. See also *post* § 465.

The question of the validity

cannot well affect the property rights which it has previously vested in the grantee. In former times a distinction was said to exist in this regard between things which lay in grant and those which lay in livery, a material alteration or a cancellation of the conveyance being regarded as effective to divest the grantee's title in the latter though not in the former case.³¹ But such a distinction is no longer recognized in England,³² and while it has been referred to in terms of approval in two states,³³ it appears to be generally ignored. But though an alteration after delivery does not operate to divest, in favor of the grantor, property rights vested in the grantee by the conveyance, it has the effect, in a number of jurisdictions, at least if fraudulently made, of rendering the instrument inadmissible in evidence, and of thus indirectly disabling him from asserting his rights in the land.³⁴ Though the validity of a conveyance is as such not usually affected by an alteration after delivery, any covenant or other contract contained in the instrument, since it is executory in its nature, is invalidated by a material alteration, erasure, or cancel-

of an attempt to change the name of the grantee after delivery is referred to *ante*, § 434 notes 81-86.

31. *Miller v. Mainvaring*, Cro. Car. 397; *Gilbert*, Evidence (6th Ed.) p. 94-96.

32. *Bolton v. Bishop of Carlisle*, 2 H. Bl. 259; *Norton*, Deeds, 29.

33. *Lewis v. Payne*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Wallace v. Harmstad*, 44 Pa. St. 492.

34. *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195 (*statute*); *Robbins v. Magee*, 76 Ind. 381; *Babb v. Clemson*, 10 Serg. & R. 419; *Flitcraft v. Commonwealth Title Ins. & Trust Co.*, 211 Pa. 114,

60 Atl. 557; *Collins v. Ball*, 82 Tex. 259, 27 Am. St. Rep. 877, 17 S. W. 614; *Bliss v. McIntyre*, 18 Vt. 466. And see cases cited *post*, § 465. *Contra Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 So. 440; *Burgess v. Blake*, 128 Ala. 105, 86 Am. St. Rep. 78, 28 So. 963. And see *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513.

As to whether such an alteration should operate to exclude the instrument when offered in favor of a subsequent purchaser or creditor, see *Pollock*, Contracts, (Williston's Edition), p. 849.

lation, made by the obligee without the consent of the obligor.³⁵ A covenant or contract in an instrument of conveyance stands in this regard in the same position as a covenant or contract in any other instrument.

An alteration in a mortgage instrument, made by the mortgagee after its delivery, without the consent of the mortgagor, has been decided, in a number of cases, to invalidate the mortgage.³⁶ These decisions are based on the theory that since the mortgagee has a lien only, his rights are executory in character, and consequently the rule which makes alterations in a conveyance ineffective to divest rights once vested by the conveyance has no application. On the other hand in one state, in which the mortgage vests the legal title in the mortgagee, it has been held that, by reason of the rule referred to, a foreclosure proceeding based on such title may be maintained regardless of the alteration.³⁷⁻³⁸ The correctness of the decisions that an alteration invalidates

35. *Ward v. Lumley*, 5 Hurlst. & N. 656; *Agricultural Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432; *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 So. 440; *Hollingsworth v. Holbrook*, 80 Iowa 151, 20 Am. St. Rep. 411, 45 N. W. 561; *Chessman v. Whittemore*, 23 Pick. (Mass.) 231; *Lewis v. Payn*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Withers v. Atkinson*, 1 Watts (Pa.) 236; *Wallace v. Harmstad*, 15 Pa. St. 462, 53 Am. Dec. 603; *Churchill v. Capen*, 84 Vt. 104, 78 Atl. 734; *Waldron v. Waller*, 65 W. Va. 605, 32 L. R. A. (N. S.) 284, 64 S. E. 964; *North v. Henneberry*, 44 Wis. 306

36. *Murphy v. Purifoy*, 52 Ga. 480; *Cutter v. Rose*, 35 Iowa 456; *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 406; *Russell v. Reed*,

36 Minn. 376, 31 N. W. 452; *Merchants' & Farmers' Bank v. Dent*, 102 Miss. 455, 59 So. 805; *Powell v. Banks*, 146 Mo. 620, 48 S. W. 664; *Barnhart v. Little*, (Mo.), 185 S. W. 174; *Kime v. Jesse*, 52 Neb. 606, 72 N. W. 1050; *Marcy v. Dunlap*, 5 Lans. (N. Y.) 365; *McIntyre v. Velte*, 153 Pa. St. 350, 25 Atl. 739; *Powell v. Pearlstine*, 43 S. C. 403, 21 S. E. 328; *Bowser v. Cole*, 74 Tex. 222, 11 S. W. 1131.

37-38. *Kendall v. Kendall*, 12 Allen (Mass.) 92. And see *Rodriguez v. Haynes*, 76 Tex. 225, 13 S. W. 296. *Contra*, *Powell v. Banks*, 146 Mo. 620, 48 S. W. 664; *McIntyre v. Velte*, 153 Pa. 350, 25 Atl. 739. And see *Green v. Sneed*, 101 Ala. 205, 46 Am. St. Rep. 119, 13 So. 277 a case of chattel mortgage.

the mortgage depends on the correctness of the theory that the rights of one who has a mortgage lien are purely executory, and this is perhaps open to question. The execution of the mortgage, even in states where it does not pass the legal title to the land, vests in the mortgagee a lien, involving a power to effect the sale of the land, in case of default in the obligation secured, and such lien and power cannot, it would seem, be divested by a subsequent alteration of the mortgage.³⁹ In any state, however, in which a conveyance is, after alteration, inadmissible in evidence, the mortgage would be subject to a like rule, so as to be practically nugatory as a result of the alteration, although in theory the lien still exists.

III. DESCRIPTION OF THE LAND.

§ 441. **General considerations.** In order to make a valid conveyance of land, it is essential that the land itself, the subject of the conveyance, be capable of identification, and, if the conveyance does not describe the land with such particularity as to render this possible, the conveyance is absolutely nugatory.⁴⁰ The language of the conveyance by which the land is sought to be identified is usually referred to as the "description."

39. Such a view is, however, contradicted by occasional decisions that a power given to a chattel mortgagee to enter and to take the goods on the mortgagor's land is destroyed by an unauthorized alteration of the instrument. *Hollingsworth v. Holbrook*, 80 Iowa 151, 20 Am. St. Rep. 411, 45 N. W. 561; *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279, 58 N. E. 1078.

40. *Brandon v. Leddy*, 67 Cal.

43, 7 Pac. 33; *Huntress v. Portwood*, 116 Ga. 351, 42 S. E. 513; *Carter v. Barnes*, 26 Ill. 455; *Wilson v. Johnson*, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; *McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822; *Wilson v. Inloes*, 6 Gill (Md.) 121, *Holme v. Strautman*, 35 Mo. 293; *Bailey v. White*, 41 N. H. 337; *Jackson v. Ransom*, 18 Johns. (N. Y.) 107; *Kea v. Robeson*, 40 N. C. 373; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769.

The description may be by the use of a designation for the land which has a recognized application thereto, as when one conveys the "A" estate or the "B" farm.⁴¹ The grantor may also describe the land as his land in a certain town, or in a certain block, or on a certain street, and such a description is sufficient if the land can be identified.⁴² So, a conveyance of "all the land" or "all the property" owned by the grantor, or of all that owned by him in a particular district, is sufficient to convey land within the scope of the description,⁴³ as is a conveyance of all one's interest in the estate of a person deceased,⁴⁴ or of such land as formerly belonged to or was conveyed to a particular person.⁴⁵

Whenever land is occupied and improved by a building or other structure designed for a particular purpose, which comprehends its beneficial use and enjoyment, it may be conveyed by a term which describes the purpose to which it is thus appropriated.⁴⁶ For instance,

41. See *Haley v. Amestoy*, 44 Cal. 132; *Trentman v. Neff*, 124 Ind. 503; *Vaughan v. Swayzie*, 56 Miss. 706; *Charles v. Patch*, 87 Mo. 450; *Barker v. Publishers Paper Co.*,—N. H.,—41 97 Atl. 749; *Lennig's Ex'rs v. White* (Va.) 20 S. E. 831.

42. *Frey v. Clifford*, 44 Cal. 335; *Blair v. Bruns*, 8 Colo. 397; *Bird v. Bird*, 40 Me. 398; *Harmon v. James*, 7 Smedes & M. (Miss.) 111, 45 Am. Dec. 296; *Doe d. Carson v. Ray*, 52 N. C. 609, 78 Am. Dec. 267.

43. *Pettigrew v. Dobbelaar*, 63 Cal. 396; *Clifton Heights Land Co. v. Randell*, 82 Iowa 89, 47 N. W. 905; *Marr v. Hobson*, 22 Me. 321; *First Nat. Bank of Attleboro v. Hughes*, 10 Mo. App. 7; *Brown v. Warren*, 16 Nev. 228; *Sally v. Gunter*, 13 Rich.

Law (S. C.) 72; *Harvey v. Edens*, 69 Tex. 420, 6 S. W. 306.

44. *Sheppard's Touchstone*, 250; *Barnes v. Bartlett*, 47 Ind. 98; *Patterson v. Snell*, 67 Me. 559; *Butrick v. Tilton*, 141 Mass. 93, 6 N. E. 563; *Austin v. Dolbee*, 101 Mich. 292, 59 N. W. 608; *Stewart v. Cage*, 59 Miss. 558; *Barton's Lessee v. Morris' Heirs*, 15 Ohio, 408; *McGavock v. Deery*, 1 Cold. (Tenn.) 265.

45. *Eufaula Nat. Bank v. Pruett*, 128 Ala. 470; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Hogan v. Page*, 22 Mo. 55; *McChesney's Lessee v. Wainwright*, 5 Ohio, 452; *Gresham v. Chambers*, 80 Tex. 544, 16 S. W. 326.

46. *Johnson v. Rayner*, 6 Gray (Mass.) 107; *Cunningham v. Webb*, 69 Me. 92.

under the designation of a "house," a "mill," a "factory," or like expressions, not only the land beneath the building;⁴⁷ but also so much of the adjoining land as is ordinarily used therewith for the purpose expressed in such designation,⁴⁸ will pass, provided, of course, a contrary intention does not appear. So, by a conveyance of a "well," not merely the right to take water from the well, but the land itself occupied by the well, will pass.⁴⁹

By a conveyance of "water," the land under the water does not usually pass, the proper description being of the land as covered by water.⁵⁰ A conveyance of "woods" or "forests" is sufficient to pass the land itself.⁵¹ A conveyance in terms of the "profits" of land will pass the land itself, "for what is the land but

47. Comyn's Dig. Grant, E 11; Pottkamp v. Buss, 3 Cal. Unrep. 694, 31 Pac. 1121; Dikeman v. Taylor, 24 Conn. 219; Hatch v. Brier, 71 Me. 542; Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen (Mass.) 159; Webster v. Potter, 105 Mass. 414; Cravens v. Pettit, 16 Mo. 210; Langworthy v. Coleman, 18 Nev. 440; Doe d. Wise v. Wheeler 28 N. C. 196; Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795.

48. Whitney v. Olney, 3 Mason 280 Fed. Cas. No. 17,595; Sparks v. Hess, 15 Cal. 186; Maddox v. Goddard, 15 Me. 218, 33 Am. Dec. 604; Esty v. Baker, 48 Me. 495; Doane v. Broad Street Ass'n, 6 Mass. 332; Forbush v. Lombard, 13 Metc. (Mass.) 109; Ammidown v. Ball, 8 Allen (Mass.) 293; Snow v. Inhabitants of Orleans, 126 Mass. 453; Gibson v. Brockway, 8 N. H. 465, 31 Am. Dec. 200; Winchester v.

Hees, 35 N. H. 43; Marston v. Stickney, 58 N. H. 609; Bogard v. Barhan, 56 Ore. 269, 108 Pac. 214; Smith v. Martin, 2 Wms. Saund. 400, note 2. Compare Ogden v. Jennings, 62 N. Y. 526.

So a conveyance of a "pound" has been held to include the land under the pound (Wooley v. Inhabitants of Groton, 2 Cush. [Mass.] 305), of a "rope walk," land actually and exclusively devoted to the use of the rope walk (Davis v. Handy, 37 N. H. 65), and of a "bridge," land on which the bridge is erected (Sparks v. Hess, 15 Cal. 186). And a conveyance of a "railroad" may include land used with a railroad. Missouri Pac. Ry. Co. v. Maffit, 94 Mo. 56, 6 S. W. 600.

49. Johnson v. Rayner, 6 Gray (Mass.) 107; Mixer v. Reed, 25 Vt. 254. See Co. Litt. 5.

50. Co. Litt. 4b.

51. Co. Litt. 4b.

the profits'' thereof,⁵² and the same may be said of a conveyance of the "use" of the land.⁵³

§ 442. **Description by government survey.** One of the first acts passed by congress looking towards the disposal of the public domain provided for what is known as the "rectangular system" of surveys, which has ever since been in force, and which furnishes the method of description of land for all purposes of transfer in those parts of the country in which the title to land is derived from the United States.⁵⁴ By this system, the public lands are divided into "townships," each six miles square, these being formed by lines running east and west, six miles apart, which are crossed, at intervals of six miles, by lines running north and south. Each township, thus including approximately thirty-six square miles, is divided into thirty-six rectangular portions, each one mile square, called a "section." A section is the smallest subdivision of which the lines are actually run on the ground, but smaller subdivisions are recognized, these being the "quarter section," containing one hundred and sixty acres, formed by running lines at right angles from points on the section boundaries half way between the corners, and "quarter quarter sections," of forty acres each. The areas of the various divisions do not, however, always correspond exactly to the figures above given, owing to irregularities in the land, and the convergence of the meridians as one goes further north.

52. *Co. Litt.* 4b; *Doe d. Goldin v. Lakeman*, 2 Barn. & Ad. 42; *Green v. Biddle*, 8 Wheat. (U. S.) 75, 76, 5 L. Ed. 566; *McWilliams v. McNamara*, 81 Conn. 310, 70 Atl. 1043; *Caldwell v. Fulton*, 31 Pa. 484; *Drusadow v. Wilde*, 63 Pa. 170.

So it has been held that a grant of the profits or royalties from the numerals in certain

land was a grant of the minerals in place. *Weakland v. Cunningham*, (Pa.), 7 Atl. 148; *Paxton v. Benedum Trees Oil Co.*,—W. Va.,—94 S. E. 472.

53. *Fitzgerald v. Faunce*, 46 N. J. L. 596; *Blauvelt v. Passaic Water Co.*, 75 N. J. Eq. 351, 72 Atl. 1091.

54. See *Rev. St. U. S.* §§ 2395-2397.

When the land which would otherwise be comprised within a section is in part covered by navigable waters, "meander" lines are run to define the sinuosities of the bank of the stream or lake, and as a means of ascertaining the quantity of land in the "fractional" section, as it is called. These meander lines are not, however, in the ordinary case, boundaries of such fractional section,⁵⁵ these being the banks of the stream or lake, or the middle line thereof, in accordance with considerations previously referred to.⁵⁶

Each tier of townships running north and south is known as a "range," and the range is described with reference to a line known as the "principal meridian," while each tier of townships running east and west is described with reference to some parallel of latitude, taken as a "principal base line." Thus, a township is referred to as being a certain number north or south of a certain base line, and a certain number east or west of a certain meridian.

The thirty-six sections in a township are numbered consecutively, beginning at the northeast corner, and counting west therefrom, and then proceeding east on the tier of sections next below, and so on until section thirty-six is reached in the southeast corner. The quarter section or quarter quarter section is defined with reference to the section of which it forms a part, as when one conveys the southeast quarter of the northwest quarter of section ten, in township thirty-five north, range five east.⁵⁷

55. *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. (U. S.) 272, 19 L. Ed. 74; *Hendricks v. Feather River Canal Co.*, 138 Cal. 423, 71 Pac. 496; *Johnson v. Johnson*, 14 Idaho 561, 95 Pac. 499; *Tolleston Club v. State*, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; *Berry v. Hoogendoorn*, 133 Iowa 437, 108 N. W. 923; *Arnold v. Brechtel*, 174 Mich. 147, 140 N. W. 610; *Sherwin v. Bitzer*, 97 Minn. 252, 106 N. W. 1046; *Armstrong v. Plucus*, 81 Ore. 156, 158 Pac. 662; *Brown v. Dunn*, 135 Wis. 374, 115 N. W. 1097.

56. *Ante*, §§ 300-303.

57. The government method of survey is briefly and clearly described in *Warvelle*, *Abstracts of Title*, 138 *et seq.*

§ 443. **Reference to plat.** In many of the states there are statutory provisions authorizing an owner of land to have it surveyed and laid off in lots and blocks, streets, parks, and the like, and to file in the public records a plate or map of the land as thus laid off, authenticated and certified as may be required. Thereafter any one of these lots or blocks may be conveyed by mere reference to the number which it bears upon the recorded plat, thus all necessity of a detailed description being obviated. The statute usually contains provisions to the effect that the filing of the plat shall constitute a dedication of the land marked thereon as intended for streets or other public uses.

Even though there is no statutory provision on the subject, or the plat is not authenticated and recorded as required by the statute, a reference in the conveyance to a particular plat for the purposes of description makes the plat in effect a part of the conveyance, and it may accordingly be utilized to identify the land conveyed.⁵⁸ The only effect, therefore, of the statutes providing for the record of plats, so far as concerns their use for purposes of description, is apparently to furnish a means for their preservation, and thus to avoid any possible loss of the means of identifying the land.

§ 444. **Monuments, courses, and distances.** Land is frequently described in a conveyance, or attempted to be described, by naming its boundaries in detail. Such a description, if properly made, is well calculated to identify the land, but frequently, owing to carelessness in making the survey on which the description is based, or in preparing the conveyance, there is difficulty in

58. *Deery v. Cary*, 10 Wall. (U. S.) 263, 19 L. Ed. 887; *Sanders v. Ransom*, 37 Fla. 457, 20 So. 530; *Sears v. King*, 91 Ga. 577, 18 S. E. 830; *Peoria Gas. & Electric Co. v. Dunbar*, 234 Ill. 502, 85 N. E. 229; *Young v. Cos-*

grove, 83 Iowa 682, 49 N. W. 1040; *Ersine v. Moulton*, 66 Me. 276; *Sanborn v. Mueller*, 38 Minn. 27, 35 N. W. 666; *Corbett v. Norcross*, 35 N. H. 99; *Borough of Birmingham v. Anderson*, 48 Pa. St. 253; *Schwalin v.*

locating the named boundaries on the ground. In the case of a description by boundaries, as in other cases, the intention of the grantor, as inferred from the terms of the description, is the controlling consideration,⁵⁹ and any rules which the courts may have formulated as to the relative importance of various elements of the description are merely intended as aids in arriving at this intention. Boundaries are indicated by naming natural or artificial monuments to, from, or along which they are to run, or with reference to which the corner points are established, or by stating the "courses and distances" of the boundary lines, and frequently by all these "elements" of description, as they are termed.

A monument, for the purpose of description, may consist of an object or mark on the land, whether natural or artificial, which serves to identify the location of a line constituting a part of the boundary, and it may be either a permanent natural object, such as a river, lake, ledge of rocks, or tree, or it may be an artificial object, such as a highway, wall, ditch, or a post.

Frequently the boundary lines are defined as extending to or abutting on adjoining land, or some structure which, in its legal signification, includes the land under it, such as a house or a mill. In such a case, the adjoining land or structure may be regarded as a monument,⁶⁰ but the land conveyed ordinarily extends merely

Beardsley, 106 Va. 407, 56 S. E. 135; Simmons v. Johnson, 14 Wis. 523.

59. Reed v. Proprietors of Locks & Canals on Merrimac River, 8 How. (U. S.) 274, 12 L. Ed. 1077; Serrano v. Rawson, 47 Cal. 62; Abbott v. Abbott, 51 Me. 575; Codman v. Evans, 1 Allen (Mass.) 443; Bruensmann v. Carroll, 52 Mo. 313; White v. Gay, 9 N. H. 126, 31 Am. Dec. 224; Peck v. Mallams, 10 N. Y. 509; Miller v. Bryan, 86 N. C.

167; Browning's Adm'x v. Atkinson, 37 Tex. 633.

60. Where the description of tract A. refers to another tract, B., for the purpose of locating the boundary of A., the boundary of A. is to be adjusted with reference to the boundaries of B., as the parties supposed them to be located, rather than as they are actually located. Sullivan v. Hill, 33 Ky. L. Rep. 962, 112 S. W. 564; Whitwell v. Spiker, 238 Mo. 629, 142 S. W. 248; Staub

to the side of the land or structure referred to,⁶¹ while in the case of a monument the name of which does not include the ownership of land, such as a highway, wall, or post, the land conveyed usually extends to the center thereof.⁶² A monument may even consist of an object not existent or a point not fixed at the time of the conveyance, but which is intended to be thereafter erected or fixed, and, when this is done, the call therefor will be of the same effect as if the monument had existed at the time of the conveyance.⁶³ And so the boundary of the land conveyed may be fixed by reference to a street not yet laid out or opened, but intended to be laid out.⁶⁴

A "course" is the direction in which a line runs, stated with reference, not to its terminus, but to its correspondence with a certain point of the compass, or its variation from the magnetic or sidereal meridian.

— **Inconsistencies and ambiguities.** Subject to the controlling consideration of the intention of the parties as to the meaning of the language used, the primary rule in applying a description by boundaries is that, in case of conflict, calls for fixed and known

v. Hampton, 117 Tenn. 706, 101 S. W. 776.

61. Ross v. Richardson, 173 Ky. 255, 190 S. W. 1087; City of Boston v. Richardson, 13 Allen (Mass.) 146, 154; Schwalm v. Beardsley, 106 Va. 407, 56 S. E. 135; Davis Colliery Co. v. Westfall, 78 W. Va. 735, 90 S. E. 328.

62. City of Boston, v. Richardson, 13 Allen (Mass.) 146, 154; Freeman v. Bellegarde, 108 Cal. 179, 49 Am. St. Rep. 76, 41 Pac. 289; Sleeper v. Laconia, 60 N. H. 201; Tagliaferri v. Grande, 16 N. Mex. 486, 120 Pac. 730; Warfel v. Knott, 128 Pa. St. 528, 18 Atl. 390; Schwalm v. Beardsley, 106 Va. 407, 56 S. E. 135.

A reference to a house as a monument has sometimes been regarded as referring to the edge of the eaves. Millett v. Fowle, 8 Cush. (Mass.) 150; Sherman v. Williams, 113 Mass. 481, 18 Am. Rep. 522. And sometimes to the outer surface of the wall or foundation. Centre St. Church v. Machias Hotel Co., 51 Me. 413; Kendall v. Green, 67 N. H. 557, 42 Atl. 178.

63. Makepeace v. Bancroft, 12 Mass. 469; Lerner v. Morrill, 2 N. H. 197.

64. Manchester v. Hodge, 74 N. H. 468, 69 Atl. 527; Felin v. Philadelphia, 241 Pa. 164, 88 Atl. 421.

monuments will prevail over inconsistent calls for courses and distances, monuments being from their very nature more likely to be correct than mere paper statements as to the character of an imaginary line.⁶⁵ This rule is, however, not absolute, and the calls for monu-

65. *Newson v. Pryor's Lessee*, 7 Wheat. (U. S.) 10, 5 L. Ed. 382; *Watkins v. King*, 118 Fed. 524, 55 C. C. A. 290; *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149, 22 So. 910; *Paschal v. Swepston*, 120 Ark. 230, 179 S. W. 339; *Kimball v. McKee*, 149 Cal. 435, 86 Pac. 1089; *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Read v. Bartlett*, 255 Ill. 76, 99 N. E. 345; *Allen v. Kersey*, 104 Ind. 1, 3 N. E. 557; *Helberg v. Kepler*, 178 Iowa 354, 159 N. W. 972; *Shanahan v. McIntyre*, 169 Ky. 160, 183 S. W. 529; *Pernam v. Wead*, 6 Mass. 131; *Stefanick v. Fortuna*, 222 Mass. 83, 109 N. E. 878; *Hoban v. Cable*, 102 Mich. 206, 60 N. W. 466; *Burnham, Heirs of v. Hitt*, 143 Mo. 414, 45 S. W. 368; *Blackman v. Doughty*, 40 N. J. L. 319; *White v. Williams*, 48 N. Y. 344; *Johns v. City of Pendleton*, 66 Ore. 182, 46 L. R. A. (N. S.) 990, Ann Cas. 1915B, 454, 133 Pac. 817; 134 Pac. 312; *Cox v. Couch*, 8 Pa. St. 147; *Johnson v. Archibald*, 78 Tex. 96, 22 Am. St. Rep. 27, 14 S. W. 266; *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135.

That the line of an adjoining tract given as a means of locating a boundary, whether termed a monument or not, ordinarily controls courses and distances, see *Morrow v. Whitney*, 95 U. S. 551, 24 L. Ed. 456; *Rock Creek*

Property Co. v. Hill, 162 Ky. 324, 172 S. W. 671; *Chapman v. Hamlet*, 100 Me. 454, 62 Atl. 215; *Hill v. McConnell*, 106 Md. 574, 68 Atl. 199; *Percival v. Chase*, 182 Mass. 371, 65 N. E. 80; *Smith v. Catlin Land & Improvement Co.* 117 Mo. 438, 22 S. W. 1083; *Whitaker v. Cover*, 140 N. C. 280, 52 S. E. 581; *Calhoun v. Price*, 17 Ohio St. 96; *Airey v. Kunkle*, 190 Pa. 196, 42 Atl. 533; *Connor v. Johnson*, 59 S. C. 115, 37 S. E. 240; *Pritchard v. Rebori*, 135 Tenn. 328, 186 S. W. 121; *Miller v. Holt*, 47 W. Va. 7, 34 S. E. 956. But see *Kock v. Gordon*, 231 Mo. 645, apparently *contra*.

In some cases it is stated that courses and distances are controlled by natural monuments, as if to imply that they are not controlled by artificial monuments. *Brown v. Huger*, 21 How. (U. S.) 305, 16 L. Ed. 125; *Kimball v. McKee*, 149 Cal. 435, 86 Pac. 1089; *Thompson v. Hill*, 137 Ga. 308, 73 S. E. 640; *Myers v. St. Louis*, 82 Mo. 367; *Hennigan v. Matthews*, (Ore.) 155 Pac. 169; *Maddox v. Fenner*, 79 Tex. 279, 15 S. W. 237.

In North Carolina, only natural monuments, or the established line of another tract, will control courses and distances. *Tate v. Johnson*, 148 N. C. 267, 61 S. E. 741; *Wilson Lumber Co. v. Hutton*, 152 N. C. 537, 68 S. E. 2.

ments must yield to those for courses and distances if it in any way appears that the calls for courses and distances are more to be relied on,⁶⁶ and the courses and distances may at times serve to aid in identifying the monuments.⁶⁷ When the courses and distances conflict, the whole description is to be considered to determine which conforms to the intention of the parties, and there is ordinarily no rule by which preference is to be given to one element as against the other.⁶⁸

Quite frequently the quantity or estimated quantity of the land is named in the conveyance, but this is considered inferior as an indication of the location of the boundaries to the elements above named, and, if inconsistent, must yield to calls for courses and distances,⁶⁹

66. *White v. Luning*, 93 U. S. 514, 23 L. Ed. 938; *Barker v. Mobile Electric Co.*, 173 Ala. 28, 55 So. 364; *United States v. Cameron*,—Ariz.,—21 Pac. 177; *Mathews v. Pursifull*, 29 Ky. L. Rep. 1001, 96 S. W. 803; *Hamilton v. Foster*, 45 Me. 32; *Murdock v. Chapman*, 9 Gray (Mass.) 156; *Jamison v. Fopiano*, 48 Mo. 194; *Buffalo N. Y. & E. R. Co. v. Stigeler*, 61 N. Y. 348; *Christenson v. Simmons*, 47 Ore. 184, 82 Pac. 805; *Southern Realty Inv. Co. v. Keenan*, 99 S. C. 195, 83 S. E. 39; *Smith v. Hutchison*, 104 Tenn. 394, 58 S. W. 226; *Joggers v. Stringer*, 47 Tex. Civ. App. 571, 106 S. W. 151.

67. *Tyler v. Fickett*, 73 Me. 410; *Chisholm v. Thompson*, 233 Pa. 181, 82 Atl. 67.

68. *Preston's Heirs v. Bowmar*, 6 Wheat. (U. S.) 580, 5 L. Ed. 336; *McClintock v. Rogers*, 11 Ill. 279; *Blight v. Atwell*, 4 J. J. Marsh. (Ky.) 278; *Loring v. Norton*, 8 Me. 61; *Hall v. Eaton*, 139 Mass. 217, 29 N. E. 660;

Curtis v. Aaronson, 49 N. J. L. 68, 60 Am. Rep. 584, 7 Atl. 886; *Williams v. Mayfield*, 57 Tex. 364; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877; *Davies v. Wickstrom*, 56 Wash. 154, 105 Pac. 454. But that ordinarily distances yield to courses, see *Paschal v. Swepston*, 120 Ark. 230, 179 S. W. 339; *Ramsay v. Morrow*, 133 Ky. 486, 186 S. W. 296; *May v. Wolf Valley Coal Co.*, 167 Ky. 525, 180 S. W. 781.

69. *Doe d. Phillips' Heirs v. Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Ray v. Pease*, 95 Ga. 153, 22 S. E. 190; *Allen v. Kersey*, 104 Ind. 1, 3 N. E. 557; *Sanders v. Godding*, 45 Iowa, 463; *Rock Creek Property Co. v. Hill*, 162 Ky. 324, 172 S. W. 671; *Sherwin v. Bitzer*, 97 Minn. 252, 106 N. W. 1046; *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364, 83 N. W. 201; *Christian v. Bulbeck*, 119 Va. 74, 90 S. E. 661; *Gilman v. Smith*, 12 Vt. 150; *McIrwin v. Charlebois*, 38 Wash. 151, 80 Pac. 285.

as well as to calls for monuments.⁷⁰ In particular cases, however, when the other calls do not clearly show the intention of the parties, a call for quantity may have a controlling effect.⁷¹

When the description of a boundary line is uncertain and ambiguous, if the parties to the conveyance locate on the ground a certain line as being that described, and the grantee holds possession accordingly, this "practical location" of the line is regarded as showing the meaning of the ambiguous description, and, as such, conclusive on each of them.⁷² Occasionally it has even been decided that a line thus located and acted on is conclusive upon the parties, though the course as given in the conveyance is free from ambiguity, and calls for a different line.⁷³

See *Cecil v. Gray*, 170 Cal. 137, 148 Pac. 935.

70. *Thompson v. Sheppard*, 85 Ala. 611, 5 So. 334; *Dutra v. Perelra*, 135 Cal. 320, 67 Pac. 281; *Cottingham v. Parr*, 93 Ill. 233; *Allen v. Kersey*, 104 Ind. 1, 3 N. E. 557; *Martin v. Frazier*, 172 Iowa 63, 152 N. W. 14; *Emery v. Fowler*, 38 Me. 99; *Sandrett v. Whalston*, 124 Minn. 331, 144 N. W. 1089; *Friesz v. Butcher*, (Mo.), 191 S. W. 66; *Doe d. Arden v. Thompson*, 5 Cow. (N. Y.) 371; *Petts v. Shaw*, 15 Pa. St. 218; *Ayers v. Harris*, 64 Tex. 393.

71. *Montana Mining Co. v. St. Louis Min. & Mill Co.*, 183 Fed. 51, 105 C. C. A. 343; *Winans v. Cheney*, 55 Cal. 567; *Campbell v. Carruth*, 32 Fla. 264, 13 So. 432; *Sanders v. Godding*, 45 Iowa 463; *O'Brien v. Clark*, 104 Md. 30, 64 Atl. 53; *Hoffman v. City of Port Huron*, 102 Mich. 417, 60 N. W. 831; *Davis v. Hess*, 103 Mo. 31, 15 S. W.

324; *Wilson Lumber & Milling Co. v. Hutton & Bourbonnais*, 152 N. C. 537, 68 S. E. 2 McDowell v. Carothers, 75 Ore. 126, 146 Pac. 800; *Holden v. Cantrell*, 100 S. C. 265, 84 S. E. 826; *Virginia Coal & Iron Co. v. Ison*, 114 Va. 144, 75 S. E. 782; *State v. Herold*, 76 W. Va. 537, 85 S. E. 733.

72. *Hastings v. Stark*, 36 Cal. 122; *Raymond v. Nash*, 57 Conn. 447; *Stone v. Clark*, 1 Metc. (Mass.) 381; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235; *Den d. Haring v. Van Houten*, 22 N. J. L. 61; *Meeks v. Willard*, 57 N. J. L. 22, 29 Atl. 318; *Linney v. Wood*, 66 Tex. 22, 17 S. W. 244; *Messer v. Oestreich*, 52 Wis. 684, 18 N. W. 6.

73. *Knowles v. Toothaker*, 58 Me. 172; *Kellogg v. Smith*, 7 Cush. (Mass.) 375. This seems to be an approximation to the view held by some of the courts that adjoining owners may locate the intervening boundary

§ 445. **Boundaries on water.** The question whether land under water belongs, in certain cases, to the state or to individuals, has been before discussed.⁷⁴ The question now arises as to when, in case of land under water not belonging to the state, a conveyance of land as abutting on the water will be construed as including such land under the water as belongs to the grantor. The general rule of construction of a conveyance of land bounded by water is that, unless a contrary intention appears, it passes the soil towards the center of the water as far as the grantor owns.⁷⁵ Accordingly, if the shore of the sea belongs to the owner of the upland, it passes by a conveyance by him of land bounded "by the sea," or "harbor," or other words descriptive of the water.⁷⁶ And a grant of land bounded on a navigable nontidal river, in those states in which the land under such a river is not vested in the state, *prima facie* conveys the whole interest of the grantor so far as he owns, which is usually to the center of the stream.⁷⁷ A conveyance of land bounded on a nontidal, nonnavigable river, the land under which is usually in the abutting owner *ad filum aquae*, that is, to the

line by mere oral agreement.
See *ante*, §§ 294-297.

74. *Ante*, § 300-303.

75. *Cicero v. Chicago*, B. & Q. R. Co. 270 Ill. 606, 110 N. E. 811; *Brophy v. Richeson*, 137 Ind. 114, 36 N. E. 424; *Paine v. Woods*, 108 Mass. 160. See note to *Allen v. Weber*, 80 Wis. 531, 14 L. R. A. 361, 27 Am. St. Rep. 51, 50 N. W. 514..

76. *City of Boston v. Richardson*, 105 Mass. 351; *Winslow v. Patten*, 34 Me. 25; *Partridge v. Luce*, 36 Me. 16; *Harlow v. Fisk*, 12 Cush. (Mass.) 302; *Freeman v. Bellegarde*, 108 Cal. 179, 49 Am. St. Rep. 76, 41 Pac. 289.

77. *Braxon v. Bressler*, 64 Ill. 492; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372, 1 S. W. 765; *Inhabitants of Warren v. Inhabitants of Thomaston*, 75 Me. 329, 46 Am. Rep. 397; *City of Boston v. Richardson*, 105 Mass. 351; *Butler v. Grand Rapids & I. R. Co.*, 85 Mich. 246, 24 Am. St. Rep. 84, 48 N. W. 569; *In re West Farms Road*, 212 N. Y. 325, 106 N. E. 102; *June v. Purcell*, 36 Ohio St. 396; *Jones v. Janney*, 8 Watts & S. (Pa.) 436, 42 Am. Dec. 309; *Richmond v. Thompson's Heirs*, 116 Va. 178, 81 S. E. 105; *Norcross v. Griffiths*, 65 Wis. 599, 66 Am. Rep. 642, 27 N. W. 606.

middle or thread of the stream, *prima facie* passes the soil to such middle line.⁷⁸ In the case of a conveyance of land bounded by a lake or pond, the same general rule, by the weight of authority, applies, and the conveyance *prima facie* passes the soil so far as the the grantor owns, whether this ownership extends to the center of the lake or pond, to the high-water mark, or to an intermediate point.⁷⁹ Occasional decisions to the contrary, that a conveyance of land in terms bounded by a lake or pond of a permanent character does not *prima facie* pass land belonging to the grantor under the water,⁸⁰ appear to be based, to a considerable extent at least, upon the authority of decisions that the state, and not the individual, had title to such land, a very different matter.

The effect thus given to conveyances as passing, *prima facie*, the soil under the water, is based not only

78. Hanlon v. Hobson, 24 Colo. 284, 42 L. R. A. 502, 51 Pac. 433; Stanford v. Mangin, 30 Ga. 355; Kinsella v. Stephenson, 265 Ill. 369, 106 N. E. 50; Foster v. Bussey, 132 Iowa 640, 109 N. W. 1105; State v. Gilmanston, 9 N. H. 461; Canal Fund Com'rs v. Kempshall, 26 Wend. (N. Y.) 404; Wall v. Wall, 142 N. C. 387, 55 S. E. 283; Fulmer v. Williams, 122 Pa. St. 191, 1 L. R. A. 603, 9 Am. St. Rep. 88, 15 Atl. 726; Muller v. Landa, 31 Tex. 265, 98 Am. Dec. 529; State v. Superior Court for Cowlitz County, 84 Wash. 252, 146 Pac. 609.

79. Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428; Johnson v. Elder, 92 Ark. 30, 121 S. W. 1066; Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462; Brophy v. Richeson, 137 Ind. 114, 36 N. E. 424; Stevens v.

King, 76 Me. 197, 49 Am. Rep. 609 (*semble*); Paine v. Woods, 108 Mass. 160; Clute v. Fisher, 65 Mich. 48, 31 N. W. 614; Castle v. Elder, 57 Minn. 289, 59 N. W. 197; Cobb v. Davenport, 32 N. J. L. 360; Gouverneur v. National Ice Co., 134 N. Y. 355, 18 L. R. A. 695, 30 Am. St. Rep. 669; 31 N. E. 865; Lembeck v. Nye, 47 Ohio St. 336, 8 L. R. A. 578, 21 Am. St. Rep. 828, 24 N. E. 686; Conneaut Lake Ice Co. v. Quigley, 225 Pa. 605, 74 Atl. 648; Holden v. Chandler, 61 Vt. 291, 18 Atl. 310; Providence Forge Fishing & Hunting Club v. Miller Mfg. Co., 117 Va. 129, 83 S. E. 1047.

80. Boardman v. Scott, 102 Ga. 404, 51 L. R. A. 178, 30 S. E. 982; Patapsco Guano Co. v. Bowers White Lumber Co., 146 N. Car. 187, 125 Am. St. Rep. 473, 13 L. R. A. (N. S.) 81, 59

on the presumption that the parties intend the ownership thereof to be vested in the person who is alone, usually, in a position to make use of it, and who probably will need to do so, but also, in some decisions, upon the ground of public policy, which renders it desirable to prevent the existence of small strips of land along the margin of streams or other bodies of water, the title to which may remain in abeyance for many years, and which may then be asserted merely in order to harass the owner of the adjoining land.⁸¹ Sometimes, however, in the case of a stream, the rule is stated as being merely an application of the principle that, when a monument is referred to, the land conveyed extends to the center of such monument.⁸²

When the land conveyed is described, not as bounded by a stream, but by or on the "bank," "shore," "margin," or "edge" of the stream, or equivalent terms are used, the land under the water has usually been regarded as intended to be excluded.⁸³ The same view has been adopted in the case of conveyances of land bounded by the margin or shore of a lake.⁸⁴

S. E. 538; *Kanouse v. Slockbower*, 48 N. J. Eq. 42.

81. See dissenting opinion by Redfield, J, in *Buck v. Squiers*, 22 Vt. 484; *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637.

82. *Sleeper v. Laconia*, 60 N. H. 201; *Child v. Starr*, 4 Hill (N. Y.) 369.

83. *Rockwell v. Baldwin*, 53 Ill. 19; *Murphy v. Copeland*, 51 Iowa 515, 43 Am. Rep. 118; *Bradford v. Cressey*, 45 Me. 9; *Child v. Starr*, 4 Hill (N. Y.) 369, reversing 20 Wend. (N. Y.) 149; *Halsey v. McCormick*, 13 N. Y. 296; *Lamb v. Ricketts*, 11 Ohio, 311; *Eddy v. St. Mars*, 53 Vt. 462, 38 Am. Rep. 695; *Whittier v. Montpelier Ice Co.*, 90 Vt. 16, 96 Atl.

378; *Commissioners Commercial Waterway v. Seattle Factory Sites Co.*, 76 Wash. 181, 135 Pac. 1042; *Allen v. Weber*, 80 Wis. 531, 27 Am. St. Rep. 51. *Contra*, *Sleeper v. Laconia*, 60 N. H. 201, 49 Am. Rep. 311.

But that the land is described as being on the side of the stream has not been regarded as excluding the land under the water. *Harlow v. Fish*, 12 Cush. (Mass.) 304; *Hanlon v. Hobson*, 24 Colo. 284, 42 L. R. A. 502; *Miller v. Mann*, 55 Vt. 475; *Morrison v. Keen*, 3 Me. 474; *Carter v. Chesapeake & Ohio R. Co.*, 26 W. Va. 644, 53 Am. Rep. 116.

84. *Axline v. Shaw*, 35 Fla. 305, 28 L. R. A. 391, 17 So. 411; *Brophy v. Richeson*, 137 Ind.

In the absence of anything to show a contrary intention, a call for the bank of a stream as the boundary has been regarded as extending the description as far as the stream itself and not merely to the top of the bank,⁸⁵ and as bounding the land by the low-water mark rather than by the high-water mark.⁸⁶

Whether a boundary on or by "the shore" extends the land conveyed to high or to low water mark, has quite frequently been the subject of judicial discussion. Since the word shore, in its technical sense, describes the land between high and low water mark,⁸⁷ a boundary on or by the shore would seem properly to carry the description as far as high water mark only, and such is the effect which has ordinarily been given thereto.⁸⁸ But it is recognized that a consideration of the whole instrument, and of the monuments referred to therein, or of the point of beginning of the description, may serve to show that the word "shore" was used, in an untechnical sense, as meaning low water mark.⁸⁹ A like view has been taken in the case of a

114, 36 N. E. 424; *Allen v. Weber*, 80 Wis. 531, 14 L. R. A. 361, 27 Am. St. Rep. 51, 50 N. W. 514. But see *Castle v. Elder*, 57 Minn. 289, 59 N. W. 197.

85. *Murphy v. Copeland*, 58 Iowa, 409, 43 Am. Rep. 118, 10 N. W. 786; *Stone v. Augusta*, 46 Me. 127; *Daniels v. Cheshire R. Co.*, 20 N. H. 85.

86. *Murphy v. Copeland*, 58 Iowa, 409, 43 Am. Rep. 118, 10 N. W. 786; *Halsey v. McCormick*, 13 N. Y. 296; *Yates v. Van De Bogert*, 56 N. Y. 526; *Lamb v. Ricketts*, 11 Ohio, 311; *Palmer v. Farrell*, 129 Pa. 162, 15 Am. St. Rep. 708, 18 Atl. 761. *Contra*, *People ex rel Highway Comm'rs v. Madison County*, 125 Ill. 9, 17 N. E. 147; *Stone v. Augusta*,

46 Me. 127. That a different intention may be inferred from the language used, see *Dunlap v. Stetson*, 4 Mason (U. S.) 349; *Palmer v. Farrell*, 129 Pa. 162, 15 Am. St. Rep. 708, 18 Atl. 761.

87. *Ante*, § 300.

88. *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155; *Montgomery v. Reed*, 69 Me. 510; *Brown v. Heard*, 85 Me. 294, 27 Atl. 182; *Galveston City Surf Bathing Co. v. Heidenheimer*, 63 Tex. 559.

89. *Whitmore v. Brown*, 100 Me. 410, 61 Atl. 985; *Oakes v. De Lancey*, 133 N. Y. 227, 28 Am. St. Rep. 628, 30 N. E. 974; *Haskell v. Friend*, 196 Mass. 198, 81 N. E. 962.

boundary on a "beach"⁹⁰ or on "flats."⁹¹

The fact that the description, while stating that the land is bounded "by" a stream, or that it extends "to" a stream, or that a boundary runs "along" the stream, names an object on the shore or bank as a monument, does not ordinarily show an intention to exclude the stream, but this is regarded as merely a statement of the point at which the boundary strikes the stream, it being usually impracticable to place monuments actually in the stream.⁹²

§ 446. **Boundaries on ways.** As before stated, the ownership of land which is subject to use as a highway is, at common law, in individuals, the public having merely the use thereof, but in this country, the ownership of the land, the "fee" as it is called, is quite frequently in the state or municipality in trust for the public. In the latter case, a conveyance of land as bounded "by" or "along" the highway can, of course, vest in the grantee no part of the land occupied by the highway, and he takes merely to the outer edge thereof. When, however, the grantor owns part or the whole of the land subject to the highway use, the question frequently arises whether his conveyance passes land within the highway, and, in deciding this question, the same considerations apply as in the analogous case of a conveyance of land bounded by water, the soil under which belongs to the grantor.

A conveyance of land as bounded "on" or "by," or as running "along" a highway, will convey to the

90. *Litchfield v. Ferguson*, 141 Mass. 97, 6 N. E. 721; *Hathaway v. Wilson*, 123 Mass. 359; *Nixon v. Walter*, 41 N. J. Eq. 103, 3 Atl. 385; *Trustees of East Hampton v. Kirk*, 68 N. Y. 459.

91. *Saltonstall v. Long Wharf*, 7 Cush. (Mass.) 195.

92. *County of St. Clair v.*

Livingston, 23 Wall. (U. S.) 46, 64; *Berry v. Snyder*, 3 Bush (Ky.) 26, 96 Am. Dec. 219; *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751; *Cold Spring Iron Works v. Inhabitants of Tolland*, 9 Cush. (Mass.) 492; *Rex v. Johnson*, 5 N. H. 520, 22 Am. Dec. 472; *Kent v. Taylor*,

center line of the highway, if the grantor owns thereto, unless a contrary intention appears from the conveyance,⁹³ and this, even though the length of the side boundary lines, as given, would carry them only so far as the edge of the highway.⁹⁴ So, when land abutting on a highway is conveyed by terms of description which make no mention of the highway, as when it is conveyed by a number on a plat, the grantor's interest in the land within the highway limits, it has been held, presumably passes.⁹⁵ But if, without any men-

64 N. H. 489, 13 Atl. 419; Luce v. Carley, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; Grant v. White, 63 Pa. St. 271; Noble v. Cunningham McMull Eq. 289.

93. Columbus & W. Ry. Co. v. Witherow, 82 Ala. 190, 3 So. 23; Kittle v. Pfeiffer, 22 Cal. 484; Smith v. Horn, 70 Fla. 484, 70 So. 435; Silvey v. McCool, 86 Ga. 1, 12 S. E. 175; La Salle Varnish Co. v. Glos, 254 Ill. 326, 98 N. E. 538; City of Dubuque v. Maloney, 9 Iowa, 451, 74 Am. Dec. 358; Blalock v. Atwood, 154 Ky. 394, 46 L. R. A. 3, 157 S. W. 694; White v. Godfrey, 97 Mass. 472; Hamlin v. Pairpont Mfg. Co., 141 Mass. 51, 6 N. E. 531; White v. Jefferson, 110 Minn. 276, 32 L. R. A. (N. S.) 778, 784, 124 N. W. 373, 125 N. W. 262; Thomas v. Hunt, 134 Mo. 392, 32 L. R. A. 857, 35 S. W. 581; *In re Ladue*, 118 N. Y. 213, 23 N. E. 465; Paul v. Carver, 26 Pa. 223; Cronin v. Janesville Traction Co. 163 Wis. 436, 158 N. W. 254.

And so a conveyance of land, "south of the road" has been held to convey a part of the highway. *Helmer v. Castle*, 109

Ill. 664.

94. Moody v. Palmer, 50 Cal. 31; Oxtan v. Groves, 68 Me. 371, 28 Am. Rep. 75; Newhall v. Ireson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; McKenzie v. Gleason, 184 Mass. 452, 100 Am. St. Rep. 566, 69 N. E. 1076; Paul v. Carver, 26 Pa. St. 223; Wegge v. Madler, 129 Wis. 412, 109 N. W. 223. But *Chicago v. Rumsey*, 87 Ill. 348 appears to be *contra*.

95. Berridge v. Ward, 10 C. B. N. S. 400; Dickinson v. Arkansas City Imp. Co., 77 Ark. 570, 113 Am. St. Rep. 170, 92 S. W. 21; Champlin v. Pendleton, 13 Conn. 23; Gear v. Barnum, 37 Conn. 229; Florida Southern Railway Co. v. Brown, 23 Fla. 104, 1 So. 512; Owen v. Brookport, 208 Ill. 35, 69 N. E. 952; Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; City of Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358; Grant v. Moon 128 Mo. 43, 30 S. W. 328; White's Bank of Buffalo v. Nichols, 64 N. Y. 65, Dobson v. Hohenadel, 148 Pa. 367, 23 Atl. 1128; Faulkner v. Rocket, 33 R. I. 152, 80 At. 380; Durbin v. Roanoke Bldg. Co., 107 Va. 753, 60 S. E. 86; Kneeland v. Van Valkenburgh, 46 Wis. 434,

tion of the highway, the limits as given clearly exclude it, as when they bound the property conveyed by a fence or wall which, as a matter of fact, coincides with the marginal line of the highway, no land within the highway will, it seems, pass.⁹⁶

A description of the land as bounded by or on the "side," "margin," or "edge" of the highway has more usually been regarded as showing an intention to exclude the land within the highway limits from the operation of the conveyance,⁹⁷ and a reference to the "line" of the road, either without any prefix,⁹⁸ or with a prefix, such as South or West, showing that the side of the road is meant,⁹⁹ has been given a like effect. In some states, however, a different view, that the reference to the side or margin of the road does not exclude the highway, has been adopted.¹

32 Am. Rep. 719, 1 N. W. 63; *Contra*, Sutherland v. Jackson, 32 Me. 80; Hanson v. Campbell's Lessee, 20 Md. 223. Compare Hoboken Land & Improvement Co. v. Kerrigan, 31 N. J. Law 13.

96. Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748; Tyler v. Hammond, 11 Pick. (Mass.) 193.

97. Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530; Baltimore & O. R. Co. v. Gould, 67 Md. 60, 8 Atl. 754; Tyler v. Hammond, 11 Pick. (Mass.) 193; Holmes v. Turner's Falls Co., 142 Mass. 590, 8 N. E. 646; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; Betcher v. Chicago, M. & St. P. Ry. Co., 110 Minn. 228, 124 N. W. 1096; Jackson v. Hathaway, 15 Johns. (N. Y.) 447; Blackman v. Riley, 138 N. Y. 318, 34 N. E. 214; Trowbridge v. Ehrich, 191 N. Y. 361, 84 N. E. 297; Hughes v. Providence & W. R. Co., 2 R.

I. 508; Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 4 L. R. A. 622, 11 S. W. 705; Buck v. Squiers, 22 Vt. 484.

98. Hamlin v. Pairpont Mfg. Co. 141 Mass. 51, 6 N. E. 531; Harriman v. Whitney, 196 Mass. 466, 82 N. E. 671; Lough v. Machlin, 40 Ohio St. 322; Cole v. Haynes, 22 Vt. 588; Clayton v. Gilmer County Court, 58 W. Va. 253, 2 L. R. A. N. S. 598, 52 S. E. 103; *Contra*, Helmer v. Castle, 109 Ill. 664; Kneeland v. Van Valkenburgh, 46 Wis. 434, 32 Am. Rep. 719, 1 N. W. 63.

99. Severy v. Cent. Pac. R. Co., 51 Cal. 594; Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748; Grand Rapids & Ind. R. R. Co. v. Heisel, 38 Mich. 62; Morrow v. Willard, 30 Vt. 118.

1. Johnson v. Anderson, 18 Me. 76 (*semble*); Woodman v. Spencer, 54 N. H. 507; Salter v. Jonas, 39 N. J. Law 469, 23 Am.

By analogy to the rule applied in the case of boundaries on streams, it would seem that a monument at the side or edge of the highway, when referred to as a starting point for a line running along the highway, should not ordinarily exclude the soil within the highway limits, but that it might well be regarded as merely showing the point at which the boundary strikes the highway, since it is not usually practicable to place a monument in the center of the highway. This view has occasionally been indicated,² but usually the naming of a monument at the side or edge of the highway, from which the line is to run along the highway, has been regarded as sufficient to exclude the land within the highway limits.³ Where the latter view prevails, the same result would follow when, as the starting point of such line, there is named, not a monument on the side of the highway, but an imaginary point, such as the intersection of the side line with another line.⁴

Rep. 229; *Humphreys v. Eastlack*, 63 N. J. Eq. 136, 51 Atl. 775; *Paul v. Carver*, 26 Pa. 223; *Cox v. Freedley*, 33 Pa. St. 124, 75 Am. Dec. 584; *Anthony v. City of Providence*, 18 R. I. 699, 28 Atl. 766. Compare *Hobson v. Philadelphia*, 150 Pa. St. 595, 24 Atl. 1048.

And the fact that the length of the side lines of the property as given would carry them to the centre of the highway has been regarded as immaterial. *Baker v. Mobile Electric Co.*, 173 Ala. 28, 55 So. 364.

2. *Moody v. Palmer*, 50 Cal. 31; *Cattle v. Young*, 59 Me. 105; *Low v. Tibbetts*, 72 Me. 92.

3. *Peabody Heights Co. of Baltimore v. Sadtler*, 63 Md. 533; *Hunt v. Brown*, 75 Md. 481, 23 Atl. 1029; *Sibley v. Holden*, 10 Pick. (Mass.)

249; *Smith v. Slocomb*, 9 Gray (Mass.) 36; *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287. And see *Peck v. Denniston*, 121 Mass. 17; *Chadwick v. Davis*, 143 Mass. 7, 8 N. E. 601; *Hoboken Land & Improvement Co. v. Kerrigan*, 31 N. J. Law 13; *Van Winkle v. Van Winkle*, 184 N. Y. 193, 77 N. E. 33, appears to be *contra*.

4. *Smith v. Slocomb*, 9 Gray (Mass.) 36; *Rieman v. Baltimore Belt Ry. Co.*, 81 Md. 68, 31 At. 444; *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65; *Blackman v. Riley*, 138 N. Y. 318, 34 N. E. 214. See *Hoboken Land Co. v. Kerrigan*, 31 N. J. L. 13.

The words "beginning on the southerly side of" the road, or "at a point" on such side, and like expressions, have been, in at

In applying the foregoing rules, the highway or street referred to is the highway as opened or defined by use, rather than the highway as platted or recorded.⁵ A change in the location or limits of the highway after the making of the conveyance would seem not to affect the boundaries of the abutting land.⁶

In some jurisdictions a conveyance is not regarded as including any part of land which is merely intended to be dedicated as a highway in the future, or which is merely marked on a plat as such, although the land conveyed is described as bounded on such intended highway as if it actually existed.⁷ In other jurisdictions it is considered that such a reference to land as a highway raises the same presumption of an intention to convey the land to the center of the proposed highway as if the highway actually existed.⁸

least two states, construed as merely indicating the side of the road on which the land lies and not as locating a corner of the land at the edge of the road. *O'Connell v. Bryant*, 121 Mass. 557; *Hamlin v. Attorney General*, 195 Mass. 309, 81 N. E. 275; *Salter v. Jonas*, 39 N. J. L. 469, 23 Am. Rep. 229. And see *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 32 Am. Rep. 719, 1 N. W. 63. But a contrary view has also been taken. *Walker v. Pearson*, 40 Me. 152; *In re Parkway* 209 N. Y. 344, 103 N. E. 508; *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287; *Lankin v. Terwilliger*, 22 Ore. 97, 29 Pac. 268. And see *Paul v. Carver*, 26 Pa. 223.

5. *Southern Iron Works v. Central of Georgia Rwy. Co.*, 131 Ala. 649, 31 So. 723; *Orena v. City of Santa Barbara*, 91 Cal. 621, 28 Pac. 268, *Falls Village*

Water Power Co. v. Tibbetts, 31 Conn. 165; *Winter v. Payne*, 33 Fla. 470, 15 So. 211; *Cleveland v. Obenchain*, 107 Ind. 591, 8 N. E. 624; *Brown v. Heard*, 85 Me. 294, 27 Atl. 182; *Wilmarth v. Woodcock*, 66 Mich. 331, 33 N. W. 400; *O'Brien v. King*, 49 N. J. Law 79, 7 Atl. 34; *Blackman v. Riley*, 138 N. Y. 318, 34 N. E. 214.

6. *Brantley v. Huff*, 62 Ga. 532; *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65. *Contra*, *Williams v. Johnson*, 149 Ky. 409, 149 S. W. 821.

7. *Leigh v. Jack*, 5 Exch. Div. 264; *Bangor House Proprietary v. Brown*, 33 Me. 309; *Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636; *Robinson v. Myers*, 67 Pa. St. 9; *Spackman v. Steidel*, 88 Pa. St. 453; *Clymer v. Roberts*, 220 Pa. 162, 69 Atl. 548.

8. *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61; *In re Ladue*, 118 N. Y. 213, 23 N. E. 465;

The fact that the land as described borders on a strip which had previously been a highway, but which is no longer such, the highway having been vacated before the delivery of the conveyance, has been held not to make the conveyance effective to pass any part of that strip.⁹

If the owner owns the whole of the bed of the highway, and no land on the other side thereof, his conveyance of land on the highway will, it has been held, *prima facie* pass all the land within the highway limits,¹⁰ and this has occasionally been held to be so although the ownership of the further half of the highway involved riparian rights.¹¹

When the land conveyed is described as extending a certain distance from the highway, without other means of determining its location, the line is ordinarily to be measured, it has been decided, from the center line of the highway.¹²

Whether, when the land is described as bounded on a private way, the same rule applies as in the case of a

Anthony v. City of Providence, 18 R. I. 699, 28 Atl. 766; Johnson v. Arnold, 91 Ga. 659, 18 S. E. 370; Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236. See Peck v. Denniston, 121 Mass. 17.

9. White v. Jefferson, 110 Minn. 276, 32 L. R. A. N. S. 778, 124 N. W. 373, 125 N. W. 262; *In re* Schmeidel's Estate, 119 Minn. 186, 137 N. W. 1110; Brown v. Taber, 103 Iowa, 1, 72 N. W. 416. Compare Paine v. Consumers F. & S. Co., 71 Fed. 626, 19 C. C. A. 99.

10. Taylor v. Armstrong, 24 Ark. 102; Johnson v. Arnold, 91 Ga. 659, 18 S. E. 370; *In re* Robbins, 34 Minn. 99, 57 Am. Rep. 40, 24 N. W. 356; Thompson v. Major, 58 N. H. 242; Haber-

man v. Baker, 128 N. Y. 253, 13 L. R. A. 611, 28 N. E. 370; Healey v. Babbitt, 14 R. I. 533.

11. Wait v. May, 48 Minn. 453, 51 N. W. 471; Johnson v. Grenell, 188 N. Y. 407, 81 N. E. 161; Gifford v. Horton, 54 Wash. 595, 103 Pac. 988. And see Irvin v. Crammond, 58 Ind. App. 540, 108 N. E. 539. But Banks v. Ogden, 2 Wall. (U. S.) 57, 17 L. Ed. 818; Demopolis v. Webb, 87 Ala. 659, 6 So. 408; Illinois etc. Canal v. Haven, 11 Ill. 554; Brisbane v. Railway Co., 23 Minn. 114; Ocean City Hotel Co. v. Sory, 77 N. J. L. 527, 73 At. 236, are apparently *contra*.

12. Dodd v. Witt, 139 Mass. 63, 52 Am. Rep. 700, 29 N. E. 475.

public way, so as to give to the grantee the land to the center line thereof, in the absence of the expression of a contrary intention, is a question on which the cases are not in accord.¹³ In one state in which the same rule of presumption is held to apply in the case of a private way, it has been said that an intention not to grant to the center of such a way is more readily indicated than in the case of a public way.¹⁴

§ 447. Sufficiency of description. It is impossible to give any general rules by which to determine whether, in the case of any particular conveyance, the description is sufficiently definite to render the instrument operative. The court will, if possible, with the aid of evidence introduced for the purpose, find a particular piece of land which the description serves to differentiate from other land. A case of insufficiency of description would ordinarily arise whenever the conveyance is in terms merely of a tract, or of a tract of a certain size lying in a certain region or neighborhood, without anything to indicate its exact location.¹⁵ And a case of insufficiency of description quite frequently arises by reason of a conveyance in terms of a

13. In Massachusetts and Pennsylvania the same rule has been held to apply in the case of a private way. *Fisher v. Smith*, 9 Gray (Mass.) 441; *Gould v. Eastern R. R.*, 142 Mass. 85, 7 N. E. 543; *Saccone v. West End Trust Co.*, 224 Pa. 554, 73 At. 971. See also *Witter v. Harvey*, 1 McCord, (S. C.) 67, 10 Am. Dec. 650. But a contrary intention may of course appear from the terms of the conveyance. *Codman v. Evans*, 1 Allen (Mass.) 443; *Crocker v. Cotting*, 166 Mass. 183, 33 L. R. A. 245, 44 N. E. 214. And see *Cushing v. Hathaway*, 10 R. I. 514.

In Connecticut and Maine the same rule does not apply to private ways. *Seery v. Waterbury*, 82 Conn. 567, 74 At. 908; *House Proprietary v. Brown*, 33 Me. 309; *Ames v. Hilton*, 70 Me. 36.

As to the rule in New York, see *Mott v. Mott*, 68 N. Y. 246.

14. *Gray v. Kelley*, 194 Mass. 533, 80 N. E. 651.

15. *Lewis v. Owen*, 64 Ind. 446; *Brock v. McIlhenny's Son*, 136 La. 903, 67 So. 951; *Bell v. Dawson*, 32 Mo. 79; *Dickens v. Barnes*, 79 N. Car. 490; *George v. Bates*, 90 Va. 839, 20 S. E. 828; *Coker v. Roberts*, 71 Tex. 597, 9 S. W. 665.

part of a tract, without any indication of its position in such tract.¹⁶ And even though its general position in the larger tract may be indicated, the description may be insufficient by reason of a failure to state its extent.¹⁷ But not infrequently, if both the position of the smaller tract and its extent is stated, the description may be regarded as intended to cover a rectangular piece of land in the location named, as for instance upon a conveyance of the South ten acres, or the Southwest fifteen acres of a quarter quarter section.¹⁸ So a description of a certain number of acres to be taken off of one side of a tract of a triangular shape has been regarded as sufficient.¹⁹ Occasionally a conveyance in terms of a certain number of acres out of a larger tract, without any indication that they are to be laid off in any particular part of the tract has been upheld as a conveyance of an undivided interest in the whole tract, in the proportion which the number of acres named bears to the number comprised in the whole tract.²⁰

16. *Graysonia Nashville Lumber Co. v. Wright*, 117 Ark. 151, 175 S. W. 405; *Cooper v. Newton*, 68 Ark. 150, 56 S. W. 867; *James v. Hamil*, 140 Ga. 168, 78 S. E. 721; *Hanna v. Palmer*, 194 Ill. 41, 56 L. R. A. 93, 61 N. E. 1051; *Craven v. Butterfield*, 80 Ind. 503; *Brown v. Guice*, 46 Miss. 299; *Smith v. Proctor*, 139 N. Car. 314, 2 L. R. A. N. S. 172, 51 S. E. 889; *Herman v. Likens*, 90 Tex., 448, 39 S. W. 282.

17. *Carter v. Barnes*, 26 Ill. 454; *Morse v. Stockman*, 73 Wis. 89, 40 N. W. 679.

18. *Carling v. Wilson*, 177 Ala. 85, 58 So. 417; *Daniel v. Williams*, 177 Ala. 140, 58 So. 419; *Payton v. McPhaul*, 128 Ga. 510, 11 A. & E. Ann. Cas. 163, 58

S. E. 50; *Evans v. Gerry*, 174 Ill. 595, 51 N. E. 615; *Early & Co. v. Long*, 89 Miss. 285, 42 So. 348; *Smith v. Nelson*, 110 Mo. 552, 19 S. W. 734; *Walsh v. Ringer*, 2 Ohio 327, 15 Am. Dec. 327; *Jackson v. Vickory*, 1 Wend. (N. Y.) 406, 19 Am. Dec. 552; *Lewellyn v. Gardner* 13 Rich. (S. C.) 242; *Mendota Club v. Anderson*, 101 Wis. 479, 78 N. W. 185.

So in the case of an exception of a named quantity. *Watson v. Crutcher*, 56 Ark. 44, 19 S. W. 98; *Sweat v. Mullis* 145 Ga. 450, 89 S. E. 422.

19. *Ne-Ha-Sa-Ne Park Ass'n v. Lloyd* 25 N. Y. Misc. 207, 55 N. Y. Supp. 108; *Wells v. Heddenberg*, 11 Tex. Civ. App. 3, 30 S. W. 702.

20. *Cullen v. Sprigg*, 83 Cal.

The insufficiency of the description may arise from a failure to name any point with reference to which the courses and distances of the boundaries are to be referred for the purpose of location on the land.²¹ And an attempted description by reference to the government survey may be insufficient by reason of a failure to name some essential element such as range or township.²²

It has been decided that a description of the property as a house and lot on a particular street is sufficient, it being shown that the grantor owned but one house and lot on that street.²³ And the same view was taken in the case of the conveyance of a lot of a named measurement on a certain street, the grantor owning a lot of that measurement on the street and no other.²⁴ And in a number of other cases the court has referred to the fact of ownership by the grantor of particular land as tending to show that the conveyance, otherwise lacking in definiteness of description, was intended to apply to that land.²⁵ But thus to consider the question of the grantor's ownership of property in order to identify a description which makes no

56, 23 Pac. 222; *Gibbs v. Swift*, 12 Cush. (Mass.) 393; *Pipkin v. Ullen*, 29 Mo. 229; *Moorehead v. Hall*, 126 N. Car. 213, 35 S. E. 428; *Grider v. Wood*, 178 Fed. 908, 102 C. C. A. 109.

21. *Le France v. Richmond*, Fed. Cas. No. 8209, 5 Sawy. 601; *Pry v. Pry*, 109 Ill. 466; *Kennedy v. Maness*, 138 N. Car. 35, 50 S. E. 450; *Barker v. Southern Rwy. Co.*, 125 N. Car. 596, 74 Am. St. Rep. 658, 34 S. E. 701.

22. *Fuller v. Fellows*, 30 Ark. 657; *Hartigan v. Hoffman*, 16 Wash. 34, 47 Pac. 217.

23. *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671 (contract

of sale); *Mead v. Parker*, 115 Mass. 413, 20 Am. Rep. 110.

24. *Burton v. Mullenary*, 147 Cal. 259, 81 Pac. 844. And see *Walker v. David*, 68 Ark. 544, 60 S. W. 418.

25. *Jenkins v. Woodward Iron Co.*, —(Ala.)— 69 So. 646; *Piper v. True*, 36 Cal. 606; *Derham v. Hill*, 57 Colo. 345, 142 Pac. 181; *Hornet v. Dumbeck*, 39 Ind. App. 482, 78 N. E. 691; *Harris v. Byers*, 112 Miss. 651, 73 So. 614; *Loomis v. Jackson*, 19 Johns. (N. Y.) 449; *Lush v. Druse*, 4 Wend. (N. Y.) 313; *State v. Herold*, 76 W. Va. 537, 85 S. E. 733; *Davis Colliery Co. v. Westfall*, 78 W. Va. 735, 90 S. E. 328.

reference to ownership apparently involves the insertion by implication in the conveyance of a word or words, such as "my" or "belonging to me" and this would seem to transcend the limits of construction.²⁶ A conveyance of *my* tract of land in X county would presumably be sufficiently definite, provided the grantor has only one tract in that county, but a conveyance, under the same circumstances, of *a* tract of land in X county, might well be differently regarded. In accordance with the cases previously referred to, however, are a number of decisions that, in the apparently analogous case of a will, evidence of testator's ownership of particular land is admissible to aid the description.²⁷

Provided the property is otherwise sufficiently described, the fact that there is an incorrect element in the description, or incorrect addition thereto, will not invalidate the description, but such incorrect element will be ignored.²⁸ This rule is ordinarily asserted in the form of the maxim *falsa demonstrato non nocet*. So if the land is otherwise identified, a mistake in the name of the town or county in which it lies may be immaterial.²⁹

26. See 4 Wigmore, Evidence §§ 2476, 2477.

27. Patch v. White, 117 U. S. 210, 29 L. Ed. 860; Higgin v. Tennessee Coal, Iron & R. Co., 183 Ala. 639, 62 So. 774; Collins v. Capes, 235 Ill. 560, 85 N. E. 934; Graves v. Rose, 246 Ill. 76, 92 N. E. 601; Pate v. Bushong, 161 Ind. 533, 63 L. R. A. 593, 100 Am. St. Rep. 287, 69 N. E. 296; Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447; Pring v. Swann, 176 Iowa, 153, 157 N. W. 734; McMahan v. Hubbard, 217 Mo. 624, 118 S. W. 481; Pemberton v. Perrin, 94 Neb. 718, Ann. Cas. 1916B, 68, 144 N. W.

164; Winkley v. Kaime, 32 N. H. 268; Moreland v. Brady, 8 Ore. 303, 34 Am. Rep. 581; *In re* Gaston's Estate, 188 Pa. 374, 68 Am. St. Rep. 874, 41 Atl. 526. As to the Illinois decisions see 5 Wigmore, Evidence § 2477.

28. See 4 Wigmore, Evidence § 2476.

29. Perry v. Clark, 157 Mass. 330, 32 N. E. 226; Lambert v. Murray, 52 Colo. 156, 120 Pac. 415; Borchard v. Eastwood, 123 Cal. XIX, 65 Pac. 1047; Black v. Skinner Mfg. Co., 53 Fla. 1088, 1090, 43 So. 919, 922; Risch v. Jensen, 92 Minn. 107, 99 N. W. 628.

And a monument,³⁰ course,³¹ distance,³² or statement of quantity,³³ may, in particular cases, be disregarded, as may a statement as to the source of title to the property,³⁴ or as to the present occupancy thereof.³⁵

It has been quite frequently said that as between a general description and a particular description in the same conveyance, the latter will ordinarily control.³⁶ It would seem questionable, however, whether this statement properly means anything more than that a description which does not undertake to give the exact location of the land conveyed will yield to a description which does give its exact location.³⁷ It can hardly mean that a detailed description by metes and bounds or courses and distances, or by naming constituent parts of the property, will take priority over a description which does not enter into such details. A description of the property as the "X" place or the "Y" farm is not in its nature any more general than a description by

30. *Ayers v. Watson*, 113 U. S. 594, 28 L. Ed. 1093; *Sanborn v. Rice*, 129 Mass. 387; *Zeibold v. Foster*, 118 Mo. 349, 24 S. W. 155; *Upton v. Santa Rita Min. Co.* 14 N. Mex. 96, 89 Pac. 275; *Stearns v. McHugh*, 35 S. Dak. 185, 151 N. W. 888.

31. *Ante*, § 444, note 66.

32. *Ante*, § 444 notes 65, 68.

33. *Ante*, § 444, note 69.

34. *Jay v. Michael*, 82 Md. 1, 33 Atl. 322; *Hastings v. Hastings*, 110 Mass. 280; *Drew v. Drew*, 28 N. H. 489.

35. *Stewart v. Davis*, 63 Me. 539; *Stone v. Stone*, 116 Mass. 279; *Hibbard v. Hurlburt*, 10 Vt. 173.

36. *Guilmartin v. Wood*, 76 Ala. 204; *Gano v. Aldridge*, 27 Ind. 489; *Kendrick v. Burchett*, 28 Ky. L. Rep. 342, 89 S. W. 239; *Pendergrass v. Butcher*, 158

Ky. 321, 164 S. W. 949; *Perry v. Buswell*, 113 Me. 399, 99 Atl. 483; *Savage v. Kendall*, 10 Cush. (Mass.) 241; *McGowen v. Lewis*, 26 N. J. L. 451; *Peaslee v. Gee*, 19 N. H. 273; *Bogges v. Allen*,—(Tex. Civ. App.)—56 S. W. 195; *Ridgell v. Atherton*—(Tex. Civ. App.)—107 S. W. 129; *Spiller v. Cribner*, 36 Vt. 245, 2 Devlin Deeds, § 1039.

37. See *Barney v. Miller*, 18 Iowa, 460; *Black v. Skinner Mfg. Co.*, 53 Fla. 1090, 43 So. 919; *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163; *Jones v. Smith*, 73 N. Y. 205; *Cullers v. Platt*, 81 Tex. 258, 16 S. W. 1003; *Hunter v. Hume*, 88 Va. 24, 13 S. E. 305; *South Penn Oil Co. v. Knox*, 68 W. Va. 362, 69 S. E. 1020; *Pardee v. Johnston*, 70 W. Va. 347, 74 S. E. 721.

metes and bounds, and there does not seem any plausible reason for regarding the former as less likely than the latter to represent the grantor's intention. Indeed it appears to be the general rule that if the conveyance describes the property with sufficient definiteness by language which does not enter into details, this description will not be cut down by a subsequent clause which does attempt to give in detail the boundaries³⁸ or numbers of the constituent lots,³⁹ or other elements of description.⁴⁰ So it has been decided that a description of a town lot by its number and the number of its block, includes the whole lot, though it is followed by a description by metes and bounds which covers only a part of the lot,⁴¹ and a description of the land as the grantor's home farm was regarded as unaffected by an attempt to give the constituent parts of the farm, which omitted several acres.⁴²

As a description, definite in itself,⁴³ is not cut down by subsequent words attempting to give a more detailed description, so it is not cut down by subsequent words of reference or explanation, such for instance, as indicate the source of title,⁴⁴ or previous

38. *Haley v. Amestoy*, 44 Cal. 132; *Rutherford v. Tracy*, 48 Mo. 325, 8 Am. Rep. 105; *Lodge v. Lee*, 6 Cranch (U. S.) 237, 3 L. Ed. 210; *Keith v. Reynolds*, 3 Greenl. (Me.) 393; *Jackson v. Barringer*, 15 Johns. (N. Y.) 471; *Quelch v. Futch*, 172 N. C. 316, 90 S. E. 259; *Birch v. Hutchings*, 144 Mass. 561, 12 N. E. 192; *Barney v. Miller*, 18 Iowa, 460; *Gish v. Roanoke*, 119 Va. 519, 89 S. E. 970.

39. *Sumner v. Hill*, 157 Ala. 230, 47 So. 565; *Andrews v. Pearson*, 68 Me. 19; *Marshall v. McLean*, 3 G. Greene—(Iowa),—363; *Whitaker v. Whitaker*, 175 Mo. 1, 74 S. W. 109.

40. *Stukeley v. Butler* Hob. 172.

41. *Rutherford v. Tracy*, 48 Mo. 325, 8 Am. Rep. 104; *Masterson v. Munroe*, 105 Cal. 431, 45 Am. St. Rep. 57, 38 Pac. 1106; *Moore v. Minnesota & St. P. S. R. Co.*, 129 Minn. 237, 152 N. W. 405.

42. *Andrews v. Pearson*, 68 Me. 19.

43. See *Weller v. Barber*, 110 Mass 44; *Hathorn v. Hinds*, 69 Me. 326.

44. *Maker v. Lazell*, 83 Me. 562, 23 Am. St. Rep. 795, 22 Atl. 474; *Wilder v. Davenport*, 58 Vt. 642. See *Lovejoy v. Lovett*, 124 Mass. 270.

occupancy,⁴⁵ or the name by which the property is ordinarily known.⁴⁶

A description of the property conveyed as all that part of a particular tract which the grantor has not previously sold or conveyed is sufficient, it being possible to apply the description by the introduction of evidence of what had been previously sold or conveyed.⁴⁷

Even a conveyance of a certain number of acres, to be selected by the grantee,⁴⁸ or by the grantor,⁴⁹ out of a larger tract belonging to the grantor, would seem to be sufficient, in case the selection is duly made. The only possible objection to such a conveyance appears to be that the election constitutes a condition precedent to the vesting of an estate, and that this would involve a violation of the Rule against Perpetuities unless there were some restriction as regards the time of election.⁵⁰ Such a restriction, however, might be supplied by the implication of a requirement that the election be made by the grantor or grantee personally, in which case it must be made within a life in being.

It is said that, when there are two conflicting descriptions in the conveyance, the grantee may elect as between them,⁵¹ and that when the description is am-

45. *Hobbs v. Payson*, 85 Me. 498, 27 Atl. 519, *Kimball v. Schoff*, 40 N. H. 190 (*semble*).

46. *Barksdale v. Barksdale*, 92 Miss. 166, 45 So. 615.

47. *Maier v. Joslin*, 46 Minn. 228, 48 N. W. 909; *Baker v. Clay*, 101 Mo. 553, 14 S. W. 734; *Duncan v. Madora*, 106 Pa. St. 562; *Falls Land & Cattle Co. v. Chisholm*, 71 Tex. 523, 9 S. W. 479; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 26 Am. St. Rep. 831, 17 S. E. 52.

48. *Hungerford's Case* 1 Leon 30; *Marshall v. Marshall Moore*,

602. So in the case of a devise, 1 Jarman, Wills 331.

49. See *Indianapolis Natural Gas Co. v. Spaugh*, 17 Ind. App. 683, 46 N. E. 691; *Indianapolis Natural Gas Co. v. Pierce*, 25 Ind. App. 116, 56 N. E. 137; *Hunt v. Campbell*, 83 Ind. 48.

50. See *Savill Bros Ltd. v. Bethell* [1902] 2 Ch. 523.

51. *Vance v. Fore*, 24 Cal. 435; *Merwin v. Backer*, 80 Conn. 338, 68 Atl. 373; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61; *Hornet v. Dumbeck*, 39 Ind. App. 482, 78 N. E. 691; *Melvin v.*

biguous, it will, in the absence of evidence to remove the ambiguity, be construed in favor of the grantee.⁵²

§ 448. **Appurtenances.** The effect of a conveyance of land in certain cases as creating an easement corresponding to a pre-existing *quasi* easement has been previously considered.⁵³ As to the effect of a conveyance of land, not as creating an easement, but as conveying an easement already existing, it is well settled that such an easement will pass on a conveyance of the land to which it appertains,—that is, the dominant tenement,—even though there is no reference to the specific easement, or any statement that all the “appurtenances” or “privileges” belonging to the land shall pass therewith.⁵⁴

The word “appurtenance” is properly confined to things of an incorporeal character, such as easements or profits *a prendre*, and a conveyance of land “with the appurtenances” will not pass land other than that described, on the theory that it is appurtenant thereto, or, as the rule is usually expressed, “land cannot be appurtenant to land.”⁵⁵ The word “ap-

Merrimack River Locks, 5 Metc. (Mass.) 27; *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616.

52. *Black v. Skinner Mfg. Co.*, 53 Fla. 1090, 43 So. 919; *Quade v. Pillard*, 135 Iowa, 359, 112 N. W. 646; *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751; *Hastings v. Hastings*, 110 Mass. 280; *Cole v. Mueller*, 187 Mo. 638, 86 S. W. 193; *Sanborn v. Clough*, 40 N. H. 316; *Waterman v. Andrews*, 14 R. I. 589; *Green Bay & M. Canal Co. v. Hewitt*, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382.

53. *Ante*, § 363(b).

54. *Sheppard's Touchstone*, 89; Co. Litt. 121b; *Crosby v. Bradbury*, 20 Me. 61; *Shelby v. Chicago & E. I. R. Co.*, 143 Ill. 385, 32 N. E. 438; *Lide v. Hadley*,

36 Ala. 627, 76 Am. Dec. 338; *Jackson v. Trullinger*, 9 Or. 393; *National Exchange Bank v. Cunningham*, 46 Ohio St. 575; *Winslow v. King*, 14 Gray (Mass.) 323; *Bowling v. Burton*, 101 N. C. 176, 2 L. R. A. 285, 7 S. E. 701; *Cope v. Grant*, 7 Pa. St. 488.

Occasionally, however, the courts speak as if it were by reason of the use of the word “appurtenances” that an appurtenant easement passes. *Whittlesey v. Porter*, 82 Conn. 95, 72 Atl. 593; *Swartz v. Swartz*, 4 Pa. 353.

55. Co. Litt. 121b; *Harris v. Elliott*, 10 Pet. (U. S.) 25, 9 L. Ed. 333; *Humphreys v. McKissock*, 140 U. S. 304, 35 L. Ed. 473; *Evans v. Welch*, 29 Colo.,

purtenances" may, however, it appears, be shown not to have, in the particular case, its legal meaning, but to be used in a different sense, such as "usually enjoyed with," and so to pass land other than that specifically described.⁵⁶ And so, while the word "appurtenances" will not usually extend the scope of the conveyance so as to include things of a chattel character, which are not legally part of the land conveyed,⁵⁷ but they may, it has been held, be shown to have been intended to be covered by the term.⁵⁸ Occasionally materials placed on land for the purpose of subsequent incorporation in a structure thereon, a building or fence, for instance, have been regarded as passing on a conveyance in terms of the land, on the

355, 68 Pac. 776; *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Whitmore v. Brown*, 100 Me. 410, 61 Atl. 985; *Leonard v. White*, 7 Mass. 8, 5 Am. Dec. 19; *Oliver v. Dickinson*, 100 Mass. 114; *Wilson v. Beckwith*, 117 Mo. 61, 22 S. W. 639; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Geneva v. Henson*, 195 N. Y. 447, 88 N. E. 1104; *Latta v. Catawba Electric Co.*, 146 N. C. 285, 59 S. E. 1028; *Cole v. Haynes*, 22 Vt. 588.

56. *Hill v. Grange*, 1 Plowd. 164; *Whitney v. Olney*, 3 Mason, 280, Fed. Cas. No. 17,595; *Hearn v. Allen*, Cro. Car. 57; *Thomas v. Owen*, 20 Q. B. Div. 225; *Crozer v. White*, 9 Cal. App. 612, 100 Pac. 130; *Hill's Lessee v. West*, 4 Yeates (Pa.) 142; *Ammidown v. Granite Bank*, 8 Allen (Mass.) 285. See *Missouri Pac. R. Co. v. Maffitt*, 94 Mo. 56, 6 S. W. 600.

In some cases the use of the word "appurtenances" in connection with the conveyance of a

building has been referred to as extending the import of the conveyance, as where there was a conveyance of a house or mill "with appurtenances," in which cases the inclosure and small outbuildings were held to pass. *Ammidown v. Ball*, 8 Allen (Mass.) 293; *State v. Burke*, 66 Me. 127; *Cunningham v. Webb*, 69 Me. 92. Compare *Frey v. Drahos*, 6 Neb., 39 Am. Rep. 353. But in these cases the effect would, it seems, under the rule previously stated (see § 441, note 48), have been the same if the conveyance had contained no reference to the "appurtenances." Likewise a water pipe leading to the property conveyed has been held to pass under that description. *Mulrooney v. Obeare*, 171 Mo. 613, 71 S. W. 1019.

57. *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Frey v. Drahos*, 6 Neb. 1; *Scheidt v. Belz*, 4 Ill. App. 431.

58. *Redlon v. Barker*, 4 Kan.

theory that they had, by reason of their destination, become legally a part of the land or as being intended to be included in the description of the land.⁵⁹

IV. COVENANTS FOR TITLE.

§ 449. **General considerations.** In most conveyances of land there are one or more covenants by the grantor as to the title to the premises, under which the grantee may, in case of failure of title, obtain indemnity in damages. These covenants are of certain recognized classes, having, as a rule, fixed legal effects, though these may be varied by the construction placed upon the covenant in the particular case.⁶⁰

In the earlier stages of the common law no such personal covenants were recognized, but the feoffment was usually attended with a "warranty." This common-law warranty, which, taking its origin in the obligation of the feudal lord to protect the holding of his tenant, continued, even after the statute of *Quia Emptores*, to be a usual incident of a feoffment, was in its nature a "covenant real," that is, compensation for its breach was awarded, not in damages, but in

445; *Badger Lumber Co. v. Marion Water Supply, Electric Light & Power Co.*, 48 Kan. 182, 15 L. R. A. 652, 30 Am. St. Rep. 301, 29 Pac. 476; *Gorham v. Eastchester Electric Co.*, 31 Abb. N. C. 198, 29 N. Y. Supp. 1094.

59. It was so held as to fencing materials. *McLaughlin v. John*, 46 Ill. 163; *Ripley v. Paige*, 12 Vt. 533; *Hackett v. Amsden*, 57 Vt. 432; *Conklin v. Parsons*, 2 Pinney (Wis.) 264; *Contra*, *Cook v. Whiting*, 16 Ill; *Hinkle v. Hinkle*, 69 Ind. 134; *Longino v. Webster*—(Tex. Civ. App.)—88 S. W. 445. As to railroad materials. *Palmer v. For-*

bes, 23 Ill. 301, and as to building materials. *Byrne v. Werner*, 138 Mich. 328, 69 L. R. A. 900, 110 Am. St. Rep. 315, 101 N. W. 555; *Contra*, *Hinkle v. Hinkle*, 69 Ind. 134; *Woodman v. Pease*, 17 N. H. 282; *Peck v. Batchelder*, 40 Vt. 233, 94 Am. Dec. 392; *Blue v. Gunn*, 114 Tenn. 414, 69 L. R. A. 892, 108 Am. St. Rep. 912, 4 Ann. Cas. 1157, 108 S. W. 408.

60. See Rawle, *Covenants for Title*, § 57. The following outline of the law of covenants for title is based almost entirely upon this most admirable work.

kind, by a judgment in favor of the warrantee or his heirs, against the original warrantor or his heirs, for the recovery of other lands equal in value to those of which the warrantee had been deprived. A warranty, operating, as it did, against the heir of the warrantor, was, after the statute *De Donis* and before the decision in *Taltarum's Case*, utilized for the purpose, in particular cases, of barring estates tail, and in the efforts to extend its effectiveness in this direction the law of the subject was immensely extended and complicated.⁶¹ The remedy on a warranty was available only in connection with freehold estates, and consequently, if the warranty was attached to a term of years, or if the grantee of a freehold estate was evicted for a term, the warrantee could not recover.⁶² In the later history of the subject, however, there was a relaxation of this rule to the extent that when, in such a case, the warranty failed as a covenant real, it might be construed as a personal covenant on which an action for damages might be brought.⁶³

After the introduction of conveyances under the Statute of Uses, warranty, which was in its origin associated with the transfer by feoffment, was gradually supplanted by personal covenants, the purpose of which was to give a remedy in damages against the covenantor in case of failure of title, and which were available in connection with leasehold, as well as freehold, estates, and warranty was finally abolished by statute in England in the nineteenth century.⁶⁴

In this country, settled after the common-law warranty had lost, to a considerable extent, its importance in England, that method of securing the grantee against

61. See Rawle, *Covenants*, c. 1, where the nature of warranty at common law is clearly stated. See, also, 1 Smith, *Lead. Cas. Eq.* (8th Ed.) 213, *American notes to Spencer's Case*.

62. Rawle, *Covenants*, §§ 12,

113; 1 Smith, *Lead. Cas.* 214.

63. *Pincombe v. Rudge*, Hob. 3g; *Williams v. Burrell*, 1 C. B. 402.

64. See Rawle, *Covenants*, §§ 9-14; 8 *Am & Eng. Encyc. Law* (2nd Ed.) 58, 78.

loss from failure of title was never, to any extent, utilized, but the law of personal covenants for title has been developed and extended to a greater extent even than in England, where the particularity with which intending purchasers examine the title has rendered them comparatively superfluous.

By statute in some states, certain covenants for title are implied from the use of particular operative words in a conveyance, usually "grant, bargain, and sell,"⁶⁵ and occasionally a covenant in form one of warranty merely is by statute declared to imply certain other covenants for title.⁶⁶ In some states, on the other hand, it is enacted that no covenants shall be implied in a conveyance of real estate.⁶⁷

The covenants of title considered in the following sections are "general" covenants, that is, they are in terms sufficient to protect the covenantee against the claims of all persons whomsoever. Covenants may be, however, and frequently are, "special" in character, that is, they are so expressed as to afford protection against the acts of the covenantor only, or of persons claiming under him.⁶⁸

A covenant for title, in the case of land conveyed by metes and bounds, is not broken by reason of a deficiency in the quantity stated to be conveyed thereby. The statement of the quantity is controlled by the description by metes and bounds, and the covenants

65. Stimson, Am. Stat. Law, § 1501; Rawle, Covenants, §§ 285, 286; Polak v. Mattson, 22 Idaho 727, 128 Pac. 89; Maitlen v. Maitlen, 44 Ind. App. 559, 89 N. E. 966; Faller v. Davis, 30 Okla. 56, Ann. Cas. 1913B, 1181, 118 Pac. 382; George A. Lowe Co. v. Simmons Warehouse Co., 39 Utah 395, Ann. Cas. 1913E, 246, 117 Pac. 874.

66. See Mackintosh v. Stewart, 181 Ala. 328, 61 So. 956; Sher-
D. P.—31.

man v. Goodwin, 11 Ariz. 141, 89 Pac. 517; Crawford v. McDonald, 84 Ark. 415, 106 S. W. 206; Polak v. Mattson, 22 Idaho 727, 128 Pac. 89; Waldermeyer v. Loebig, 222 Mo. 540, 121 S. W. 75; Waslee v. Rossman, 231 Pa. 219, 80 Atl. 643.

67. 1 Stimson's Am. Stat. Law, § 1500; Rawle, Covenants, § 286. *Ante*, § 49.

68. Rawle, Covenants, §§ 28, 29, 126.

are construed as referring to the land conveyed.⁶⁹ The case is different however, when there is no description by metes and bounds, and there is a conveyance of a named quantity of land, a certain number of acres, for instance, in a particular locality.⁷⁰

The grantee in a conveyance cannot assert that there is a breach of the grantor's covenant for title by reason of the fact that the title was, at the time of the conveyance, in himself and not in the grantor. The covenant extends only to the case of a title or right in a third person.⁷¹

The doctrine, so frequently asserted,⁷² that a title subsequently acquired by a grantor enures by operation of law to the person claiming under the conveyance, has been applied in connection with covenants for title, with the effect of wholly defeating the right of action on the covenant, or of mitigating the damages recoverable thereunder, usually to the extent of excluding all substantial damages.⁷³ The covenantor has not ordinarily, however, been allowed to assert this

69. Rawle, Covenants, § 297; Gulf Coal & Coke Co. v. Musgrove, 195 Ala. 219, 70 So. 179; Ryan v. Batchelor, 95 Ark. 375, 129 S. W. 787; Littleton v. Green, 130 Ga. 692, 61 S. E. 593; Burton v. Cowles' Admx, 156 Ky. 100, 160 S. W. 782; Mann v. Pearson, 2 Johns. (N. Y.) 37; McArthur v. Morris, 84 N. C. 405; Mosteller v. Astin, 61 Tex. Civ. App. 455, 129 S. W. 1136; Brown v. Yoakum, — Tex. Civ. App.—, 170 S. W. 803. But see Morris v. Owens, 3 Strobb. (S. C.) 99.

70. Pecare v. Chouteau, 13 Mo. 527; Smith v. McGlothlin, —Tex. Civ. App.—, 153 S. W. 655.

71. Beebe v. Swartout, 3 Gil.

(Ill.) 162; Smiley v. Fries, 104 Ill. 416; Harrigan v. Rice, 39 Minn. 49, 38 N. W. 765; Fitch v. Baldwin, 17 Johns. (N. Y.) 161; Eames v. Armstrong, 146 N. C. 1, 125 Am. St. Rep. 436, 59 S. E. 165; Holt v. Ruleau, 83 Vt. 151, 74 Atl. 1005.

72. Post, § 545.

73. Sayre v. Sheffield Land, Iron & Coal Co., 106 Ala. 440, 18 So. 101; King v. Gilson's Adm'x, 32 Ill. 348; Baxter v. Bradbury, 20 Me. 260; Hartford Ore Co. v. Miller, 41 Conn. 112; Southern Plantations Co. v. Kennedy Heading Co., 104 Miss. 131, 61 So. 166; Reese v. Smith, 12 Mo. 344; Morrison v. Underwood, 20 N. H. 269; Farmers' Bank v. Glenn, 68 N. C. 35; Cross v.

after acquired title by way of defense or in mitigation of damages, if the title was not acquired by him until after eviction,⁷⁴ or until after the action on the covenant was commenced.⁷⁵ The propriety of allowing a vendor, in any case, after having purported to convey when he had no title, to force upon an unwilling vendee a title subsequently acquired by him, after the property has deteriorated in value, has been strongly questioned.⁷⁶

§ 450. **Covenant for seisin.** The covenant by the grantor that he is lawfully seised of the premises, called the "covenant of or for seisin," has different effects in different jurisdictions. "Seisin" originally, as before stated, meant the possession of land by one having or claiming a freehold estate therein, either by himself or by another in his behalf.⁷⁷ This meaning of "seisin" has been adopted in two or three states in determining the effect of the covenant, and the covenant is there regarded as a declaration by the grantor that he is in possession, claiming such an estate as he undertakes to convey, ordinarily a fee simple estate, so that the fact that his possession is tortious does not

Martin, 46 Vt. 14; Building Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. 58; McLennan v. Prentice, 85 Wis. 427, 55 N. W. 764.

74. Burton v. Reeds, 20 Ind. 87; Bethell v. Bethell, 92 Ind. 318; Blanchard v. Ellis, 1 Gray (Mass.) 193; Resser v. Carney, 52 Minn. 397, 54 N. W. 89; Southern Plantations Co. v. Kennedy Heading Co., 104 Miss. 131, 61 So. 166; Jones v. Gallagher, 54 Okla. 611, 154 Pac. 552; Nichol v. Alexander, 28 Wis. 128; McInnis v. Lyman, 62 Wis. 191, 22 N. W. 405.

75. Resser v. Carney, 52 Minn.

397, 54 N. W. 89; Southern Plantations Co. v. Kennedy Heading Co., 104 Miss. 131, 61 So. 166; Morris v. Phelps, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; Tucker v. Clark, 2 Sandf. Ch. 96; Rombough v. Koons, 6 Wash. 558, 34 Pac. 135; McLennan v. Prentice, 85 Wis. 427, 55 N. W. 764; *Contra*, Boulter v. Hamilton, 15 Up. Can. C. P. 125; Looney v. Reeves, 5 Kan. App. 279, 48 Pac. 606.

76. See Rawle, Covenants, §§ 179-182; Sedgwick, Damages (9th Ed.) § 977.

77. *Ante*, § 14.

involve a breach of the covenant, though there is a breach if another is in adverse possession.⁷⁸ The covenant, though thus limited in effect, may nevertheless be of great advantage to the grantee in any state which still recognizes the doctrine that a conveyance of land in the adverse possession of another is void;⁷⁹ and this construction of the covenant presumably owes its origin to the recognition by the courts of the probability that it was intended to secure the grantee against the possible failure of the conveyance for this cause.⁸⁰

In a majority of the states, as in England, the above view of the covenant of seisin has not been accepted, but it has been construed with reference to the meaning which the words "seisin" and "seised" acquired after the Statute of Uses⁸¹ as equivalent to a declaration that the grantor has an estate, of the *quantum* which he undertakes to convey, in the whole land covered by the conveyance.⁸² Accordingly the covenant has been held to be broken when the grantor

78. *Stearns v. Jewell*, 27 Colo. App. 390, 149 Pac. 846; *Cushman v. Blanchard*, 2 Me. 268, 11 Am. Dec. 76; *Wilson v. Widenham*, 51 Me. 566; *Marston v. Hobbs*, 2 Mass. 439, 3 Am. Dec. 61; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Backus' Adm'rs v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585; *Stambaugh v. Smith*, 23 Ohio St. 584; *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004. See also, *Bottorf v. Smith*, 7 Ind. 673; *Axtel v. Chase*, 77 Ind. 74; *Scott v. Twiss*, 4 Neb. 133; *Webb v. Wheeler*, 80 Neb. 438, 17 L. R. A. (N. S.) 1178, 114 N. W. 636.

79. See *post*, § 590.

80. *Rawle, Covenants*, §§ 47-54.

81. *Ante*, § 14.

82. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *Lockwood v. Sturdevant*, 6 Conn. 385; *Efta v. Swanson*, 115 Minn. 373, 132 N. W. 335; *Real v. Hollister*, 20 Neb. 112, 29 N. W. 189; *Parker v. Brown*, 15 N. H. 186; *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; *Fishel v. Browning*, 145 N. Car. 71, 58 S. E. 759; *Joiner v. Ardmore Loan & Trust Co.*, 33 Okla. 266, 124 Pac. 1073; *Cobb v. Klosterman*, 58 Ore. 211, 114 Pac. 96; *Pringle v. Witten's Ex'rs*, 1 Bay (S. C.) 256, 1 Am. Dec. 612; *Woods v. North*, 6 Humph. (Tenn.) 309, 44 Am. Dec. 312; *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462. It is "an assurance to the purchaser that the grantor has the very estate

had no title to the land, that is, no rightful estate therein,⁸³ and likewise when one tenant in common purported to convey an estate in severalty in the land.⁸⁴ It has also been regarded as broken by the fact that things annexed to the premises are subject to a right of removal in a third person,⁸⁵ and by the fact that rights properly appurtenant to the land, or which purport to be conveyed therewith, such as a right of flowage, are not vested in the grantor so as to pass with the land.⁸⁶ The covenant is not broken by the existence of a lien on the land,⁸⁷ or of a right of use in a third person or in the public.⁸⁸

Whether, in states in which an outstanding title is regarded as involving a breach,⁸⁹ apart from any

in quantity and quality which he purports to convey." Howell v. Richards, 11 East. 641, per Lord Ellenborough.

83. *Anderson v. Knox*, 20 Ala. 156; *Abbott v. Rowan*, 33 Ark. 593; *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 44; *Zent v. Picken*, 54 Iowa, 535, 6 N. W. 750; *Allen v. Allen*, 48 Minn. 462, 51 N. W. 473; *Cockrell v. Proctor*, 65 Mo. 41; *Arnold v. Joines*, 50 Okla. 4, 150 Pac. 130.

84. *Hartford Ore Co. v. Miller*, 41 Conn. 112; *Hencke v. Johnson*, 62 Iowa, 555, 17 N. W. 766; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Downer's Adm'r v. Smith*, 33 Vt. 464.

85. *Van Wagner v. Van Nostrand*, 19 Iowa, 427; *Mott v. Palmer*, 1 N. Y. 564; *Herzog v. Marx*, 202 N. Y. 94 N. E. 1063.

86. *Seyfried v. Knoblauch*, 44 Colo. 86, 96 Pac. 993; *Traster v. Nelson's Adm'r*, 29 Ind. 96; *Ballard v. Child*, 34 Me. 355; *Adams v. Conover*, 87 N. Y. 422, 41 Am. Rep. 381; *Walker v.*

Wilson, 13 Wis. 522.

In *Clark v. Conroe*, 38 Vt. 469, it was held that the fact that a third person had been given the right to divert the water from a spring on the premises involved a breach of the covenant, upon the somewhat doubtful ground that this involved the grant to another of a part of the land itself.

87. *Fitzhugh v. Croghan*, 2 J. J. Marsh (Ky.) 429, 19 Am. Dec. 139; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Zerfing v. Seelig*, 14 S. Dak. 303, 85 N. W. 585 (taxes).

88. *Moore v. Johnston*, 87 Ala. 220, 6 So. 50; *Douglass v. Thomas*, 103 Ind. 187, 2 N. E. 562; *Ginn v. Hancock*, 31 Me. 42; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Blondeau v. Sheridan*, 81 Mo. 545; *Contra*, *Haynie v. American Trust Invest. Co.*, (Tenn. Ch.), 39 S. W. 860; *Perry v. Williamson*, (Tenn. Ch.), 47 S. W. 189.

89. *Ante*, this section, note 82.

question of the right to convey land in another's adverse possession, the mere fact that the land is in another's possession constitutes a breach of the covenant does not clearly appear.⁹⁰ There is a breach, it seems evident, if the adverse possession has already continued for such a length of time as to give title.⁹¹

That the grantor had a life estate merely in the land has been held to involve a breach of the covenant for seisin,⁹² but in each of the cases to this effect the covenant was in express terms for seisin in fee simple. That his estate in fee simple was subject to a life estate in another has also been regarded as involving a breach.⁹³ An outstanding inchoate right of dower does not involve a breach.⁹⁴

Whether an outstanding term of years created by lease involves a breach of the covenant is a matter upon which the decisions, few in number, are not entirely in accord.⁹⁵ The solution of the question in any particular case may depend, it has been suggested, to some extent at least, upon the surrounding circumstances, as showing the intention of the parties in this regard.⁹⁶

90. See Rawle, Covenants, § 54, note. That it is a breach appears to be asserted in *Lindsay v. Veasy*, 62 Ala. 421; *Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956; *Fitzhugh v. Croghan*, 2 J. Marsh (Ky.) 430, 19 Am. Dec. 139; *Thomas v. Perry*, Peters C. C. 49.

91. *Wilson v. Forbes*, 2 Dev. (N. Car.) 30. See *Larson v. Goettl*, 103 Minn. 272, 114 N. W. 840, commented on in 21 Harv. Law Rev. 628.

92. *Frazer v. Board of Supervisors*, 74 Ill. 282; *Lockwood v. Sturdevant*, 6 Conn. 373; *Tanner v. Livingstone*, 12 Wend. (N. Y.) 83.

93. *Mills v. Catlin*, 22 Vt. 106.

94. *Fitzhugh v. Croghan*, 2 J.

J. Marsh (Ky.) 429, 19 Am. Dec. 139; *Whisler v. Hicks*, 5 Blackf. (Ind.) 100, 33 Am. Dec. 454; *Kuntzman v. Smith*, 77 N. J. Eq. 30, 75 Atl. 1009; *Lewis v. Lewis*, 5 Rich. Law (S. Car.) 12; *Building, Light & Water Co. v. Fray*, 96 Va. 559, 32 S. E. 58; Nor a right of dower consummate before assignment of dower. *Fishel v. Browning*, 145 N. C. 71, 58 S. E. 759.

95. That it is not within the covenant, see *Lindley v. Dakin*, 13 Ind. 389; *Kellum v. Berkshire Life Ins. Co.*, 101 Ind. 455. That it is, see *Langenberg v. Herr Dry Goods Co.*, 74 Mo. App. 12.

96. See Rawle, Covenants, § 58, note.

§ 451. **Covenant for right to convey.** The covenant that the grantor has a right to convey the land is usually equivalent to the covenant for seisin, whichever view of the operation of the latter covenant may be taken in the particular jurisdiction, and similar considerations determine the question of breach in the case of each covenant.⁹⁷ There may, however, be a right to convey, though there is no seisin or title, as when the conveyance is under a power.⁹⁸

§ 452. **Covenant against incumbrances.** An "incumbrance," as the term is used in a covenant that the premises are free and clear of all incumbrances, has been defined, in a general way, as "every right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance."⁹⁹

A lien¹ is ordinarily an incumbrance, whether it is

97. *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91; *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; *Adams v. Schiffer*, 11 Colo. 15, 7 Am. St. Rep. 202; *Mitchell v. Kepler*, 75 Iowa, 207, 39 N. W. 241; *Allen v. Sayward*, 5 Me. 227; *Baldwin v. Timmins*, 3 Gray. (Mass.) 302; *Willard v. Twitshell*, 1 N. H. 177; *Faller v. Davis*, 30 Okla. 56, Ann. Cas. 1913B, 1181, 118 Pac. 382; *Building, Light & Water Co. v. Fray*, 96 Vt. 559, 32 S. E. 58.

98. *Rawle, Covenants*, § 66. See *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442; *Slater v. Rawson*, 6 Metc. (Mass.) 439.

99. *Rawle, Covenants*, § 75; *Tuskegee Land & Security Co. v. Birmingham Realty Co.*, 161 Ala. 542, 49 So. 378, 23 L. R. A. (N. S.) 992; *Fraser v. Bentel*, 161 Cal. 390, 119 Pac. 509, Ann. Cas. 1913B, 1062; *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Prescott v. Trueman*, 4 Mass. 630, 3 Am. Dec. 246; *Simons v. Diamond Datch Co.*, 159 Mich. 241, 123 N. W. 1132; *Carter v. Denman's Ex'rs*, 23 N. J. L. 260; *Huyck v. Andrews*, N. Y. 81, 10 Am. St. Rep. 432; *Lafferty v. Milligan*, 165 Pa. St. 534, 30 Atl. 1030.

1. See *post*, Part 6.

a mortgage,² a judgment lien,³ a lien for taxes,⁴ or any other of the various classes of liens.⁵

An easement is, generally speaking, an incumbrance,⁶ as has been recognized, for instance, in the

2. *Bean v. Mayo*, 5 Me. 94; *Brooks v. Moody*, 25 Ark. 452; *McLaughlin v. Rice*, 108 Iowa, 254, 78 N. W. 1105; *Wyman v. Ballard*, 12 Mass. 304; *Hasselbuch v. Mohm-King*, 76 N. J. L. 691, 73 Atl. 961; *Corbett v. Wrenn*, 25 Or. 305, 35 Pac. 658; *Funk v. Voneida*, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617.

3. *Jenkins v. Hopkins*, 8 Pick. (Mass.) 346; *Holman v. Creagmiles*, 14 Ind. 177; *Hall v. Dean*, 13 Johns. (N. Y.) 105; *Jones v. Davis*, 24 Wis. 229.

4. *Fuller v. Jillett* (C. C.), 2 Fed. 30; *Crowell v. Packard*, 35 Ark. 348; *Almy v. Hunt*, 48 Ill. 45; *Cochran v. Guild*, 106 Mass. 29, 8 Am. Rep. 296; *Eaton v. Chesebrough*, 82 Mich. 214, 46 N. W. 365; *Campbell v. McClure*, 45 Neb. 608, 63 N. W. 920; *Cadmus v. Fagan*, 47 N. J. Law 549, 4 Atl. 323; *Plowman v. Williams*, 6 Lea (Tenn.) 268; *George A. Lowe Co. v. Simmons Warehouse Co.*, 39 Utah 395, 117 Pac. 874, Ann. Cas. 1913E, 246.

So the lien of a special assessment for the benefits of a municipal improvement. *Maloy v. Hall*, 190 Mass. 277, 76 N. E. 452; *Real Estate Corp. of New York City v. Harper*, 174 N. Y. 123, 66 N. E. 660; *Green v. Tidball*, 26 Wash. 338, 55 L. R. A. 879, 67 Pac. 84.

Under some tax systems, taxes may be an incumbrance within the covenant although the amount

thereof has not been ascertained at the time of conveyance. *Hill v. Bacon*, 110 Mass. 387; *Pierse v. Brounenberg's Estate*, 40 Ind. App. 662, 81 N. E. 739, 82 N. E. 126; *George A. Lowe Co. v. Simmons Warehouse Co.*, 39 Utah 395, 117 Pac. 874, Ann. Cas. 1913E, 246; *Peters v. Myers*, 22 Wis. 602. And likewise liability to payment of benefits for a municipal improvement may constitute an incumbrance even before the amount of the benefits is ascertained. See *First Church of Christ, Scientists, of New Albany, v. Cox*, 47 Ind. App. 536, 94 N. E. 1048; *Cotting v. Commonwealth*, 205 Mass. 523, 91 N. E. 900; *Hartshorn v. Cleveland*, 52 N. J. L. 473, 19 Atl. 974; *Lafferty v. Milligan*, 165 Pa. 534, 30 Atl. 1030; *Bowers v. Narragansett Real Estate Co.*, 28 R. I. 365, 67 Atl. 521; *Knowles v. Temple*, 49 Wash. 595, 96 Pac. 1.

5. So, an attachment lien (*Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638, and *Norton v. Babcock*, 2 Metc. [Mass.] 510); a vendor's lien (*Thomas v. St. Paul's M. E. Church*, 86 Ala. 138, 5 So. 508).

6. *Weiss v. Binnian*, 178 Ill. 241, 52 N. E. 969, *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. 702; *Jarvis v. Buttrick*, 1 Metc. (Mass.) 480; *Smith v. Davis*, 44 Kan. 362, 24 Pac. 428; *Huyck v. Andrews*, 113 N. Y.

case of a private right of way over the land conveyed,⁷ a right to maintain a drain or artificial water course thereon,⁸ or a right to flow the land.⁹ An easement, however, created by "implication" upon the conveyance of a *quasi* servient tenement, has been regarded as not within a covenant against incumbrances in such a conveyance, or as in any way affected by such covenant.¹¹ A natural right in the owner of neighboring land, such as a right to the uninterrupted flow of a stream,¹² is not within such a covenant,¹³ but a privilege in a third person to interfere with such a natural right, being in the nature of an easement,¹⁴ is within it,¹⁵ as is the privilege of taking water from a spring or stream on the land.¹⁶

A covenant as to the use of land, or a restriction

81. 3 L. R. A. 789, 10 Am. St. Rep. 432, 20 N. E. 581; Smith v. White, 71 W. Va. 639, 48 L. R. A. (N. S.) 623, 78 S. E. 378.

7. Mitchell v. Warner, 5 Conn. 497; Newmyer v. Roush, 21 Idaho, 106 Ann Cas. 1913D, 433, 120 Pac. 464; McGowen v. Myers, 60 Iowa 256; 14 N. W. 788; Blake v. Everett, 1 Allen (Mass.) 248; Wilson v. Cochran, 46 Pa. St. 229.

8. Prescott v. White, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; Johnson v. Knapp, 146 Mass. 70, 15 N. E. 134; McMullin v. Wooley, 2 Lans. (N. Y.) 394; Smith v. Sprague, 40 Vt. 43.

9. Scriver v. Smith, 100 N. Y. 471, 53 Am. Rep. 224; Lamb v. Danforth, 59 Me. 322; Isele v. Arlington Five Cent Savings Bank, 135 Mass. 142; Patterson v. Sweet, 3 Ill. App. 550. But see as to the rule in Maine and Massachusetts, as affected by the flowage acts of those states, Rawle, Covenants, § 83.

10. *Ante*, § 363(b).

11. Cary v. Daniels, 8 Metc. (Mass.) 466, 41 Am. Dec. 532; Dunklee v. Wilton R. Co., 24 N. H. 489; Harwood v. Benton, 32 Vt. 724; Bennett v. Booth, 70 W. Va. 264, 39 L. R. A. (N. S.) 618, 73 S. E. 909; Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85. See Rawle, Covenants, § 85. Compare Denman v. Mentz, 63 N. J. Eq. 613, 52 Atl. 1117.

12. *Ante*, §§ 335-347.

13. Prescott v. Williams, 5 Metc. (Mass.) 429. See Corse v. Dexter, 202 Mass. 31, 88 N. E. 332.

14. *Ante*, §§ 351, 352.

15. Huyck v. Andrews, 113 N. Y. 81, 3 L. R. A. 789, 10 Am. St. Rep. 432, 20 N. E. 581; Morgan v. Smith, 11 Ill. 199. But see Cary v. Daniels, 8 Metc. (Mass.) 466, 41 Am. Dec. 532.

16. Morgan v. Smith, 11 Ill. 194; Mitchell v. Warner, 5 Conn. 497.

upon its use, whether enforceable at law or in equity, is a breach of the covenant against incumbrances,¹⁷ as is an obligation upon the owner of the land to maintain a fence.¹⁸ A right to take profits from the land is also an incumbrance.¹⁹

A public highway has in some cases been regarded as within the covenant,²⁰ though in others a different view has been adopted as to a rural highway, on the theory, either that the existence of the highway, or of the system of which it forms a part, is presumably a benefit to the property, or that it may be presumed to have been known to the purchaser and considered in adjusting the price paid for the land.²¹ Likewise a

17. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509; *Hatcher v. Andrews*, 5 Bush (Ky.) 561; *Halle v. Newbold*, 69 Md. 265, 14 Atl. 662; *Locke v. Hale*, 165 Mass. 20, 42 N. E. 331; *Foster v. Foster*, 62 N. H. 46; *Roberts v. Levy*, 3 Abb. Pr. Rep. (N. S.) 311; *Docter v. Darling*, 68 Hun N. Y.) 70; *Greene v. Creighton*, 7 R. I. 1; *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496. But see *Thurgood v. Spring*, 139 Cal. 596, 73 Pac. 456.

18. *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633.

19. *Brodie v. New England Mortg. Sec. Co.*, 166 Ala. 170, 51 So. 861; *Weiss v. Binman*, 178 Ill. 241 (right to cut ice); *Spurr v. Andrew*, 6 Allen (Mass.) 420; *Stambaugh v. Smith*, 23 Ohio St. 584. *Kreinbring v. Matthews*, 81 Ore. 243, 159 Pac. 75; *Cathcart v. Bowman*, 5 Pa. St. 317; *Gadow v. Hunhaltz*, 160 Wis. 293, 151 N. W. 810 (right to cut ice).

20. *De Jarnette v. Dreyfus*, 166 Ala. 138, 51 So. 932; *Hubbard v. Norton*, 10 Conn. 423; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Herrick v. Moore*, 19 Me. 313; *Kellogg v. Ingerson*, 2 Mass. 101; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Butler v. Gale*, 27 Vt. 739; *Trice v. Kayton*, 84 Va. 217, 10 Am. St. Rep. 836, 4 S. E. 377. See in support of such a view, editorial notes 13 Columbia Law Rev. 655, 27 Harv. Law Rev. 386.

21. *Des Vergers v. Willis*, 56 Ga. 515, 21 Am. Rep. 289; *Harrison v. Des Moines & Ft. D. Ry. Co.*, 91 Iowa 114, 58 N. W. 1081; *Sandum v. Johnson*, 122 Minn. 368, 48 L. R. A. N. S. 619, 142 N. W. 878; *Killen v. Funk*, 83 Neb. 622, 131 Am. St. Rep. 658, 120 N. W. 189; *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432, 3 L. R. A. 789, 20 N. E. 581; *Patterson v. Arthurs*, 9 Watts (Pa.) 152; *Wilson v. Cochran*, 46 Pa. St. 233; *Deacons v. Doyle*, 75 Va. 258; *Barre v.*

railroad right of way has in some cases been regarded as an incumbrance for this purpose,²² and in some cases has not been so regarded.²³

The existence of a right of dower, whether inchoate or consummate, has been regarded as involving a breach of the covenant,²⁴ as has a lease for years outstanding in a third person.²⁵ Occasionally the fact that by reason of a release, or by legislation of a particular character, the grantee will be unable to recover the normal damages for the making of a

Fleming, 29 W. Va. 314, 325, 1 S. E. 731; Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85.

A like view, that it is not an incumbrance, has been taken as regards a county drainage ditch, *Stuhr v. Butterfield*, 151 Iowa 736, 36 L. R. A. N. S. 321, 130 N. W. 897, an irrigation ditch authorized by Congress for reclamation of arid land. (*Schurger v. Mooreman* 20 Idaho 97, 36 L. R. A. N. S. 313, A. & E. Ann. Cas. 1912D, 1114, 117 Pac. 122. Compare *Feldhut v. Brummitt*, 96 Kan. 127, 150 Pac. 549). And a public sewer. *First Unitarian Society of Iowa City v. Citizens Sav. & Trust Co.*, 162 Iowa, 389, 51 L. R. A. (N. S.) 428, Ann. Cas. 1916B, 575, 142 N. W. 87, commented on in editorial notes 13 *Columbia Law Rev.* 655, 1 *Virginia Law Rev.* 79.

Such a view has, however, been regarded as not applicable when the public easement was not apparent. *Hymes v. Estey*, 116 N. Y. 501, 15 Am. St. Rep. 421, 22 N. E. 1087; *Howell v. Northampton Railway Co.*, 211 Pa. 284, 60 Atl. 793. *Contra*, *Sandum v. Johnson*, 122 Minn. 368, 48 L. R.

A. N. S. 619, 142 N. W. 878.

22. *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Wadhams v. Swan*, 109 Ill. 46; *Quick v. Taylor*, 113 Ind. 540, 16 N. E. 588; *Barlow v. McKinley*, 24 Iowa 69; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Pritchard v. Rebori*, 135 Tenn. 328, 186 S. W. 121; *Farrington v. Turtelott* (C. C.) 39 Fed. 738.

23. *Geren v. Caldarara*, 99 Ark. 260, 138 S. W. 335; *Van Ness v. Royal Phosphate Co.*, 60 Fla. 284, 30 L. R. A. N. S. 833, Ann. Cas. 1912C, 647, 53 So. 381; *Goodman v. Heilig*, 157 N. C. 6, 36 L. R. A. N. S. 1004, 72 S. E. 866.

24. *Barnett v. Gaines*, 8 Ala. 373; *McCord v. Massey*, 155 Ill. 123, 39 N. E. 592; *Porter v. Noyes*, 2 Me. 22, 11 Am. Dec. 30; *Runnels v. Webber*, 59 Me. 488; *Bigelow v. Hubbard*, 97 Mass. 195; *Crowley v. C. N. Nelson Lumber Co.*, 66 Minn. 400, 69 N. W. 34; *Walker's Adm'r v. Deaver*, 79 Mo. 664; *Russ v. Perry*, 49 N. H. 547; *Carter v. Denman's Ex'rs*, 23 N. J. Law 260; *Flshel v. Browning*, 145 N. Car. 71, 58 S. E. 759.

25. *Crawford v. McDonald*, 84

public improvement, has been viewed as involving a breach of the covenant.²⁶

It is stated by the leading authority on the subject that the character of the outstanding right or interest is not always sufficient to determine whether it constitutes an incumbrance, within the particular covenant in question, but in some cases the question must be determined by reference to "the subject-matter of the contract, the relation of the parties to it and to each other, the notice on the part of the purchaser, and, to some extent, the local usage and habit of the country."²⁷ So, in determining whether a certain incumbrance is within the covenant, the whole conveyance is to be considered and not merely the clause containing the covenant. Thus, when the conveyance expressly provides that the grantee will pay the mortgage debt²⁸ or that he takes subject to the mortgage,²⁹ the existence of the mortgage is not a breach of the covenant, though not expressly excepted therefrom, and

Ark. 415, 106 S. W. 206; Musial v. Kudlik, 87 Conn. 164, 87 Atl. 551; Wragg & Son v. Mead, 120 Iowa 319, 94 N. W. 856; Barker v. Denning, 91 Kan. 485, 138 Pac. 573; Batchelder v. Sturgis, 3 Cush. (Mass.) 201; Simons v. Diamond Match Co., 159 Mich. 241, 123 N. W. 1132; Fritz v. Pusey, 31 Minn. 368, 18 N. W. 94; Brass v. Vandecar, 70 Neb. 35, 96 N. W. 1035; Malsbary v. Jacobuis, 88 Neb. 751, 130 N. W. 424; Demars v. Koehler, 62 N. J. L. 203, 72 Am. St. Rep. 642, 41 Atl. 720; Grice v. Scarborough, 2 Speers (S. C.) 649, 42 Am. Dec. 391; Brown v. Taylor, 115 Tenn. 1, 4 L. R. A. N. S. 309, 112 Am. St. Rep. 811, 88 S. W. 933; Sawyer v. Little, 4 Vt. 414;

O'Connor v. Enos, 56 Wash. 448, 105 Pac. 1039.

26. Tuskegee Land & Security Co. v. Birmingham Realty Co., 161 Ala. 542, 23 L. R. A. (N. S.) 992, 49 So. 378; Forster v. Scott, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976; Evans v. Taylor, 177 Pa. 286, 69 L. R. A. 790, 35 Atl. 635.

27. Rawle, Covenants, § 76.

28. Watts v. Welman, 2 N. H. 458.

29. Freeman v. Foster, 55 Me. 508; Drury v. Holden, 121 Ill. 130, 13 N. E. 547; Johnson v. Nichols, 105 Iowa, 122; Walther v. Briggs, 69 Minn. 98; Jackson v. Hoffman, 9 Cow. (N. Y.) 271; Brown v. South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382.

even in states where a highway is regarded as an incumbrance, though a conveyance of land as bounded by a highway passes the land to the center of the highway, subject to the highway use, the grantor is not liable under his covenant on account of such highway.³⁰ Likewise, if the conveyance is expressed to be subject to an easement, the covenantee cannot assert that the easement constitutes a breach of the covenant.³¹ And while ordinarily an outstanding lease on the premises has been regarded as an incumbrance,³² a different view has occasionally been taken when the grantor in terms transferred to the grantee and the grantee accepted the benefit of the lessee's stipulations as to rent and the like.³³

In several cases, the fact that the grantee had orally agreed to pay the taxes has been held to show that the lien for taxes was not within the operation of the covenant,³⁴ and a like view has been taken as to a mortgage the payment of which the grantee had, by an extraneous agreement, assumed.³⁵ In some cases the fact that the grantee had notice, actual or constructive, of a highway upon the land, has been regarded as taking such incumbrance out of the operation of the covenant.³⁶ In two or three

30. *Frost v. Angier*, 127 Mass. 212; *Patten v. Fitz*, 138 Mass. 456; *Holmes v. Danforth*, 83 Me. 139, 21 Atl. 845; *City of Cincinnati v. Brachman*, 35 Ohio St. 289.

31. *Pettee v. Hawes*, 13 Pick. (Mass.) 323.

32. *Ante*, this section, note 25.

33. *Mann v. Montgomery*, 6 Cal. App. 646, 92 Pac. 875; *Haldane v. Sweet*, 55 Mich. 196, 20 N. W. 902; *Pease v. Christ*, 31 N. Y. 141. See *Musial v. Kudlik*, 87 Conn. 164, 87 Atl. 551. And compare *Simons v. Diamond Match Co.*, 159 Mich. 241, 123 N.

W. 1132.

34. *Fitzer v. Fitzer*, 29 Ind. 468; *Blood v. Wilkins*, 43 Iowa 565; *Gill v. Ferrin*, 71 N. H. 421, 52 Atl. 558. *Contra*, *Pierse v. Bronnenberg*, 40 Ind. App. 662, 81 N. E. 739; 82 N. E. 126.

35. *Watts v. Welman*, 2 N. H. 458; *Reid v. Sycks*, 27 Ohio St. 285. And see *post*, this section, note 42.

36. *Des Vergers v. Willis*, 56 Ga. 515, 21 Am. Rep. 289; *Crans v. Durdall*, 154 Iowa 468, 134 N. W. 1068; *Weller v. Fidelity Trust & S. V. Co.*, 23 Ky. L. Rep. 1136, 64 S. W. 843; *Hymes v. Estey*,

cases the fact that the existence of an incumbrance in favor of an individual was apparent upon an inspection of the land, and that consequently the grantee might be presumed to have known thereof, has been regarded as showing that it was not intended to be covered by the covenant,³⁷ but these cases are exceptional. That the grantee's knowledge of an existing incumbrance in no way relieves him of liability under the covenant by reason thereof has been frequently decided, without any suggestion that such knowledge may be considered for the exclusive purpose of showing that the particular incumbrance was not intended to be covered by the covenant.³⁸

The cases are generally to the effect that extraneous evidence is not admissible at law to show an agreement that a certain incumbrance was not to in-

116 N. Y. 501, 15 Am. St. Rep. 421, 22 N. E. 1087; Ake v. Mason, 101 Pa. 17; Trice v. Kayton, 84 Va. 217, 10 Am. St. Rep. 836, 4 S. E. 377. So in the case of a public levee, Ireton v. Thomas, 84 Kan. 70, 113 Pac. 306. But that notice of the highway has no such effect, see Copeland v. McAdory, 100 Ala. 553, 13 So. 545; Hubbard v. Norton, 10 Conn. 423; De Long v. Spring Lake Beach Improvement Co., 72 N. J. L. 125 59 Atl. 1034. And see *ante*, this section, notes 20, 21.

37. Janes v. Jenkins, 34 Md. 1; Memmert v. McKen, 112 Pa. St. 315, 4 Atl. 542; Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85.

38. Anniston Lumber & Mfg. Co. v. Griffiths, —Ala.—, 73 So. 418; Eriksen v. Whitescarver, 57 Colo. 409, 142 Pac. 413; Hubbard v. Norton, 10 Conn. 422, 431; Godwin v. Maxwell, 106 Ga. 194,

32 S. E. 114; Newmyer v. Roush, 21 Idaho, 106 Ann. Cas. 1913D, 433, 120 Pac. 464; Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731; Yancey v. Tatlock, 93 Iowa, 386, 61 N. W. 997; Helton v. Asher, 135 Ky. 751, 123 S. W. 285; Edwards v. Clark, 83 Mich. 246, 10 L. R. A. 659, 47 N. W. 112; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Burr v. Lamaster, 30 Neb. 688, 9 L. R. A. 637, 27 Am. St. Rep. 428, 46 N. W. 1015; Demars v. Koehler, 62 N. J. L. 203, 72 Am. St. Rep. 642, 41 Atl. 720; Huyck v. Andrews, 113 N. Y. 81, 3 L. R. A. 789, 10 Am. St. Rep. 432, 20 N. E. 581; Long v. Moler, 5 Ohio St. 272; Corbett v. Wrenn, 25 Ore. 305, 35 Pac. 658; Funk v. Voneida, 11 Serg. & R. (Pa.) 112, 14 Am. Dec. 617; Grice v. Scarborough, 2 Speers (S. C.) 649, 42 Am. Dec. 391. Brown v.

volve a violation of the covenant.³⁹ That the parties failed, however, by mistake, to insert such agreed exception in the covenant as written, has been regarded as ground for reformation in a court of equity,⁴⁰ and occasionally equity has interposed by injunction, on the theory of fraud or mistake, to restrain an action at law on the covenant, when the asserted breach consisted of an incumbrance which the parties had agreed to except from the operation of the covenant.⁴¹ Nor, it seems, does the rule excluding evidence of an extraneous agreement excepting an incumbrance from the operation of the covenant necessarily exclude evidence of an agreement by the covenantee assuming an incumbrance, although the effect thereof may be to show that such incumbrance is not within the covenant. Oral evidence is always admissible to aid in the interpretation of a writing, and so, it seems, oral evidence of the assumption is admissible to aid in the interpretation of the covenant, as showing that the covenant was not intended to cover the incumbrance assumed. As before indicated, the admissibility of the oral assumption has occasionally been sustained on the ground that it is introduced merely to show the real considera-

Taylor, 115 Tenn. 1, 112 Am. St. Rep. 811, 4 L. R. A. N. S. 309, 88 S. W. 933; O'Connor v. Enos, 56 Wash. 448, 105 Pac. 1039; Levett v. Withrington, Lutw. 97.

39. Rawle, Covenants, § 88, p. 113, note; Holley v. Young, 27 Ala. 203; Doyle v. Emerson, 145 Iowa, 358, 124 N. W. 176; Spurr v. Andrew, 6 Allen (Mass.) 420; Flynn v. Bourneuf, 143 Mass. 277, 58 Am. Rep. 135, 9 N. E. 650; Simons v. Diamond Match Co., 159 Mich. 241, 123 N. W. 1132; Long v. Moler, 5 Ohio St. 271; Grice v. Scarborough, 2 Speers (S. C.) 649, 42 Am. Dec. 591;

Butler v. Gale, 27 Vt. 739; O'Connor v. Enos, 56 Wash. 448, 105 Pac. 1039. In Indiana such evidence has, however, been admitted. Allen v. Lee, 1 Ind. 58, 48 Am. Dec. 352; Pitman v. Conner, 27 Ind. 337. So in Illinois. Sidders v. Riley, 22 Ill. 109; and Idaho, Urich v. McPherson, 27 Idaho 319, 149 Pac. 295.

40. Rawle, Covenants, § 88, p. 112; Haire v. Baker, 5 N. Y. 357; Van Wagner v. Van Nostrand, 19 Iowa, 427.

41. Taylor v. Gilman, 25 Vt. 411; Sanders v. Wagner, 32 N. J. Eq. 506.

tion,⁴² but this involves a contradiction of the recital of the consideration, for the purpose of varying a contractual liability, and the view above suggested, that evidence of the assumption is admissible as aiding in the interpretation of the covenant would appear to be preferable.^{42a} Some courts have refused to admit evidence of the oral assumption for the purpose of affecting one's liability upon the covenant.^{42b}

§ 453. Covenants for quiet enjoyment and of warranty. The covenant that the covenantee shall quietly enjoy the premises conveyed without disturbance, and the covenant to warrant and defend the premises, termed, respectively, the covenants for "quiet enjoyment" and "of warranty," are substantially similar in effect, except when some variation is introduced by the particular language used.⁴³

The modern covenant of warranty, by which one covenants that he will warrant and defend the premises unto the grantee against all lawful claims by third persons, is entirely different from the old common law warranty, and is merely a personal covenant, a breach of which entitles one to the recovery of damages. It is not recognized in England, and appears to have arisen in this country from the fact that the early conveyances contained both personal covenants and a clause in the form of the common law warranty, and that this latter, as it was no longer utilized as a real covenant, became incorporated in the clause containing the personal covenants, and so became itself a covenant of that character.⁴⁴

42. *Ante*, § 438, note 93.

42a. *Gill v. Ferrin*, 71 N. H. 421, 52 Atl. 558; *Johnston v. Markle Paper Co.*, 153 Pa. 195, 25 Atl. 560, 885; *Johnson v. Elmen*, 94 Tex. 168, 52 L. R. A. 162, 86 Am. St. Rep. 845, 59 S. W. 253.

42b. *Ante*, § 438, note 92.

43. *Rawle, Covenants*, § 114; *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; *Mitchell v. Warner*, 5 Conn. 497; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Kramer v. Carter*, 136 Mass. 504.

44. *Rawle, Covenants*, §§ 110-114.

As in the case of a covenant against incumbrances,⁴⁵ the covenantee's knowledge of the defect in the title of the covenantor at the time of the making of the covenant of warranty is ordinarily no defense to an action thereon.⁴⁶ Occasionally, however, his knowledge of the defect has, in the particular case, and in view of the character of the defect, been regarded as calling for a construction of the covenant as not covering the defect.⁴⁷

— **Construction of covenant.** A covenant for quiet enjoyment or of warranty, like other covenants, is to be construed with reference to the interest in the land which the instrument purports to convey. So if it purports to convey an estate less than a fee simple,⁴⁸ or an undivided interest only,⁴⁹ the presence of the covenant does not impose a personal liability by reason of a lack of title in excess of such interest, or operate to enlarge the interest conveyed. On a somewhat similar theory, if the conveyance is in terms of the property as being subject to a mortgage, an "equity of redemption," as it is frequently termed, the covenant is construed accordingly, and the mortgage is not regarded as within the scope of the covenant.⁵⁰

45. *Ante*, § 452, note 38.

46. *Mackintosh v. Stewart*, 181 Ala. 328, 61 So. 956; *Flynn v. White Breast Coal etc. Co.*, 72 Iowa, 738, 32 N. W. 471; *Cornelius v. Kinnard*, 157 Ky. 50, 162 S. W. 524; *Downs v. Nally*, 161 Ky. 432, 170 S. W. 1193; *Contra. Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300.

47. See *McAndrews & Forbes Co. v. Camden Nat. Bk.*, 87 N. J. L. 231, 94 Atl. 627; *Hymes v. Estey*, 166 N. Y. 505, 15 Am. St. Rep. 421, 22 N. E. 1087 (highway).

48. *Adams v. Ross*, 30 N. J. L. 505, 82 Am. Dec. 237. See

R. P.—32.

Snell v. Young, 3 Ired. L. (25 N. Car.) 379; *Rawle, Covenants*, § 298.

49. *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Coster v. Monroe Mfg. Co.*, 2 N. J. Eq. 467; *Lamb v. Wakefield*, 1 Sawy. (U. S.) 251.

50. *Miller v. De Graffenried*, 43 Colo. 306, 15 Ann. Cas. 981, 95 Pac. 941; *Drury v. Holden*, 121 Ill. 130; *Freeman v. Baxter*, 55 Me. 508; *Hopper v. Smyser*, 90 Md. 363, 45 Atl. 206; *Brown v. South Boston Sav. Bk.*, 148 Mass. 300, 19 N. E. 382; *Shafer v. Wiseman*, 47 Mich. 63, 10 N. W. 104.

In a number of cases, when the conveyance was in terms merely of the grantor's right title or interest, the covenant has been construed as referring merely to such right, title or interest, so as to render the covenant almost if not entirely nugatory for the purpose of protecting the grantee.⁵¹ The mere fact, however, that a conveyance, which in terms conveys the land, recites an intention to dispose of all the grantor's right title and interest, would not ordinarily be given such an effect.⁵²

The decisions are not entirely in accord as to whether outstanding leases,⁵³ railroad rights of way,⁵⁴

51. Reynolds v. Shaver, 59 Ark. 299, 43 Am. St. Rep. 36, 27 S. W. 78; McNear v. McComber, 18 Iowa, 12; Ballard v. Child, 46 Me. 152; White & Corbitt v. Stewart, 131 Ga. 460, 62 S. E. 590; Combs v. Combs, 130 Ky. 827, 114 S. W. 334; Sweet v. Brown, 12 Metc. (Mass.) 175, 45 Am. Dec. 243; Coble v. Barringer, 171 N. Car. 445, 88 S. E. 518; Hull v. Hull, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800. But see Bayley v. McCoy, 8 Oreg. 259; Peck v. Hensley, 20 Tex. 67.

52. Locke v. White, 89 Ind. 492; Hubbard v. Apthorp, 3 Cush. (Mass.) 419; Steiner v. Baughman, 12 Pa. 106; Mills v. Catlin, 22 Vt. 98.

53. That an outstanding lease involves a breach, see Bass v. Starnes, 108 Ark. 357, 158 S. W. 136; Van Wagner v. Van Nostrand, 19 Iowa, 422; Burchfield v. Brinkman, 92 Kan. 377, 140 Pac. 894; Beutel v. American Machine Co., 144 Ky. 57, 137 S. W. 799; Fortescue v. Columbia Real Estate Co., 75 N. J. L. 272, 67

Atl. 1024; Rickert v. Snyder, 9 Wend. (N. Y.) 415; Hampton Park Terrace v. Sottile, 102 S. C. 372, 86 S. E. 1066 (although known to the covenantee).

That an outstanding lease does not involve a breach, see Kellum v. Berkshire Life Ins. Co., 101 Ind. 455; Hammond v. Jones, 41 Ind. App. 32, 83 N. E. 257; Knerb v. Beardsley, 139 Mo. App. 565, 123 S. W. 545 (grantee consenting to take lessee as his tenant); Baldwin v. Smith (Tex. Civ. App.), 119 S. W. 111 (if known to covenantee). See Simons v. Diamond Match Co., 159 Mich. 241, 123 N. W. 1132.

54. That a railway right of way involves a breach, see Flynn v. White Breast Coal etc. Co., 72 Iowa, 738, 32 N. W. 471; Schwartz v. Black, 131 Tenn. 360, 174 S. W. 1146 (nominal damages).

That a railway right of way does not involve a breach, see Van Ness v. Royal Phosphate Co., 60 Fla. 284, 30 L. R. A. N. S. 833, Ann. Cas. 1912C, 647, 53 So. 381; Brown v. Young, 69 Iowa, 625, 29 N. W. 941; Goodman v.

and highways,⁵⁵ are to be regarded as within a covenant of warranty, a lack of accord which also exists, as we have seen, in connection with a covenant against incumbrances.⁵⁶

A taking of the land, or of an easement therein, under the right of eminent domain, does not involve a breach of the covenant of warranty or for quiet enjoyment.⁵⁷

A covenant for quiet enjoyment, when accompanying a lease for years, is, as before stated, broken only if the interference with the enjoyment is by the lessor or by a third person under title paramount.⁵⁸ So when such a covenant, or a covenant of warranty, occurs in a conveyance in fee simple, there can be no recovery unless the disturbance of the grantee's enjoyment is by the grantor⁵⁹ or by a third person under lawful claim of title.⁶⁰ It is not broken by a tortious disturbance by a stranger, this being something beyond the

Heilig, 157 N. C. 6, 36 L. R. A. (N. S.) 1004, 72 S. E. 866; Colclough v. Briggs, 99 S. C. 181, 83 S. E. 35; Milwaukee etc. R. Co. v. Strange, 63 Wis. 178, 23 N. W. 432.

55. That a highway involves a breach, see *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545 (though known to covenantee); *Louisville Public Warehouse Co. v. James*, 21 Ky. L. Rep. 1726, 56 S. W. 19 (*semble*); *Haynes v. Young*, 36 Me. 557.

That a highway does not involve a breach, see *Craus v. Durdall*, 154 Iowa, 468, 134 N. W. 1086; *Hymes v. Estey*, 116 N. Y. 505, 15 Am. St. Rep. 421, 22 N. E. 108 (if actual or constructive notice to covenantee); *Butte v. Riffe*, 78 Ky. 352 (*ditto*); *Ake v. Mason*, 101 Pa. 17 (*ditto*). A like view has been taken of a

public levee. *Ireton v. Thomas*, 84 Kan. 70, 113 Pac. 306, and a public wharf, *Burke v. Trabue's Ex'r*, 137 Ky. 580, 126 S. W. 125.

56. *Ante*, § 452, notes 20-23, 25.

57. *Rawle, Covenants*, § 129; *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Brimmer v. City of Boston*, 102 Mass. 19; *Cooper v. Bloodgood*, 32 N. J. Eq. 209; *Stevenson v. Loehr*, 57 Ill. 509, 11 Am. Rep. 36; *Folts v. Huntley*, 7 Wend. (N. Y.) 210.

58. *Ante*, § 49 (b).

59. See *post*, this section, notes 63-67.

60. *Davis v. Smith*, 36 Ill. 35, 85 Am. Dec. 385; *Bostwick v. Williams*, 36 Ill. 35, 85 Am. Dec. 385; *Burrus v. Wilkinson*, 31 Miss. 537; *Kent v. Welch*, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; *Johnson v. Nyce's Ex'rs*, 17 Ohio 66, 49 Am. Dec. 444; *Mc-*

control of the grantor, and for which the grantee has his remedy against the wrongdoer.⁶¹

The covenant for quiet enjoyment may be general in terms, to the effect that the grantee shall quietly enjoy the premises, or it may be expressly restricted to their enjoyment free from interference by reason of the acts of the grantor and of those persons who claim through or under him, it being then referred to as a "qualified" or "limited" covenant.⁶² So the covenant of warranty may extend to the acts and claims of all persons whomsoever (general warranty), or it may extend merely to the acts and claims of the grantor and those claiming under him (special warranty). The following remarks are based upon the assumption that, in the particular case, the covenant is general in form.

—**Breach by act of covenantor.** The question of the character of the act which, when committed by the covenantor himself, will constitute a breach of the covenant for quiet enjoyment, is presumably to be determined with reference to the same considerations as control in the case of a similar covenant in a lease, which latter has frequently been the subject of decision.⁶³ While it has been said that the lessor's act must, for this purpose, amount to an eviction,⁶⁴ and

Grew v. Harmon, 164 Pa. St. 115, 30 Atl. 265, 268; Knapp v. Town of Marlboro, 34 Vt. 235.

61. Hayes v. Bickerstaff, Vaughan, 118; Noonan v. Lee, 2 Black (U. S.) 499; Chestnut v. Tyson, 105 Ala. 149, 53 Am. St. Rep. 101, 16 So. 723; Hoppes v. Cheek, 21 Ark. 585; Playter v. Cunningham, 21 Cal. 229; Barry v. Guild, 126 Ill. 439, 2 L. R. A. 334, 18 N. E. 759; Gardner v. Keteltas, 3 Hill (N. Y.) 330; Poley v. Lacert, 35 Oreg. 166, 58 Pac. 37. But a covenant against

the acts of a certain person applies to his tortious, as well as his rightful, acts. Rawle, Covenants, § 128; Foster v. Mapes, Cro. Eliz. 212.

62. As to the construction of such words of qualification, see 1 Tiffany, Landlord & Tenant, p. 523; Rawle, Covenants, ch. 6.

63. See 1 Tiffany, Landlord & Tenant, § 79d.

64. Rawle, Covenants, § 128; Sedgwick v. Hollenback, 7 Johns. (N. Y.) 376; Akerly v. Vilas, 23 Wis. 207, 99 Am. Dec. 165.

that his wrongful entry on the premises without claiming title, or without doing such acts as amount to an assertion of title, is insufficient, because constituting merely a trespass not amounting to an eviction,⁶⁵ the trend of the later authorities is apparently to the effect that any intentional interference by the covenantor with the covenantee's enjoyment and use of the premises constitutes a breach of the covenant, regardless of whether it results in an eviction.⁶⁶

It has occasionally been asserted or assumed that a grantor may be liable, on his covenant of warranty in a conveyance by him in fee simple, by reason of the fact that he makes a subsequent conveyance to another, who takes without notice and records his conveyance before the prior conveyance is recorded, with the result that nothing passes by such prior conveyance.⁶⁷ This view is to be regarded as based, it would seem, on the theory that the entry by the grantee in the second conveyance is to be considered as in behalf of or by direction of the common grantor, who is thus in the position of one who, after conveying with warranty, himself evicts his covenantee.

— **Breach by reason of paramount claim.** In order that there be a breach of the covenant of warranty or of that for quiet enjoyment by reason of a paramount

65. *Crosse v. Young*, 2 Show. 425; *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. 123. See 1 *Tiffany, Landlord & Ten.*, p. 528.

66. 1 *Tiffany, Landlord & Ten.* p. 529.

67. *Madden v. Caldwell Land Co.*, 16 Idaho, 59, 21 L. R. A. N. S. 332, 100 Pac. 358; *Curtis v. Deering*, 12 Me. 499; *Williamson v. Williamson*, 71 Me. 442; *Eaton v. Hopkins*, 71 Fla. 615, 71 So. 922; *Jones v. Warner*, 81 Ill. 343; *Lukens v. Nicholson*, 4 Phila.

(Pa.) 22 *Contra*, *Wade v. Comstock*, 11 Ohio St. 71 See, also, as opposed to the view of these cases, *dictum* of Sharswood, J., in *Scott v. Scott*, 70 Pa. 244, and *Rawle, Covenants*, § 128.

The covenantor has even been held liable on account of an entry upon the covenantee made by the grantee in a prior conveyance executed by the covenantor, though by reason of the prior record of the later conveyance the entry was wrongful. *Thomas v. West & Wheeler*, 64

title in another, an eviction of the covenantee by such other is ordinarily necessary.⁶⁸ Consequently the mere existence of a lien on the land, such as a mortgage, involves no breach of the covenant,⁶⁹ though a breach may occur as a result of the enforcement of the lien, followed by an eviction by the person to whom the ownership of the land passes as a result of such enforcement.⁷⁰ And the existence of an inchoate dower right does not involve a breach,⁷¹ though a breach may result from the enforcement of a right of dower

Wash. 344, 116 Pac. 1076, disapproving *Lamb v. Willis*, 125 App. Div. 183, 109 N. Y. Supp. 75.

68. *Rawle, Covenants*, § 131; *Gulf Coal & Coke Co. v. Musgrove*, 195 Ala. 219, 70 So. 179; *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *Brooks v. Winkles*, 139 Ga. 732, 78 S. E. 129; *Grant v. McArthur's Ex'r*, 153 Ky. 356, 155 S. W. 732; *Boulden v. Wood*, 96 Md. 332, 53 Atl. 911; *Coopwood v. McCandless*, 99 Miss. 364, 54 So. 1007; *Aiple-Hemmelman Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480; *Troxell v. Johnson*, 52 Neb. 46, 71 N. W. 968; *Smith v. Wahl*, 88 N. J. 623, 97 Atl. 261; *Scriven v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224, 3 N. E. 675; *Werner v. Wheeler*, 142 N. Y. App. Div. 358, 127 N. Y. Supp. 158; *Richmond Cedar Works v. J. L. Roper Lumber Co.*, 161 N. C. 603, 77 S. E. 770; *Rancho Bonito Land & Live Stock Co. v. North*, 92 Tex. 72, 45 S. W. 994; *Lennig v. Harrisonburg Land & Improvement Co.*, 107 Va. 458, 59 S. E. 400; *McKinley Land Co. v. Maynor*, 76 W. Va. 156, 85 S. E. 79; *Durbin v. Shenners*, 133 Wis. 134, 113 N. W. 421.

69. *King v. Killbride*, 58 Conn. 109; *Clark v. Lineberger*, 44 Ind. 223; *Kimberlin v. Templeton*, 55 Ind. App. 155, 102 N. E. 160; *Foster v. Woodward*, 141 Mass. 160, 6 N. E. 853; *Koenig v. Branson*, 73 Mo. 634; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Leddy v. Enos*, 6 Wash. 247, 33 Pac. 508, 34 Pac. 665; *Durbin v. Shenners*, 133 Wis. 134, 131 N. W. 421.

70. *Collier v. Cowger*, 52 Ark. 322, 6 L. R. A. 107, 12 S. W. 702; *King v. Kilbride*, 58 Conn. 109; *Clark v. Lineberger*, 44 Ind. 223; *Congregation of Sisters of Perpetual Adoration v. Jane*, 110 Miss. 612, 70 So. 818; *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479; *Stewart v. Drake*, 9 N. J. L. 139; *Jenks v. Quinn*, 137 N. Y. 223, 33 N. E. 376; *Smith v. Dixon*, 27 Ohio St. 471; *Williams v. O'Donnell*, 225 Pa. 321, 74 Atl. 205; *Harr v. Shaffer*, 52 W. Va. 207, 43 S. E. 89; *Jackson v. McAuley*, 13 Wash. 298, 43 Pac. 41.

71. *Tierney v. Whiting*, 2 Colo. 620; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Aiple-Hemmelman Real Estate Co. v.*

consummate.⁷² There are, however, some exceptions to the requirement of an eviction. Of these the most important is the case of a covenantee who is unable, upon receiving the conveyance, to obtain possession of the land, owing to the fact that another person, having a superior title thereto, is in possession, it being considered unnecessary, in such a case, that the covenantee should be compelled to take forcible possession in order that he himself may be ejected, or to bring a suit for the land, which would necessarily result adversely to him,⁷³ and a like doctrine has been applied when the paramount owner, though not in possession at the time of the conveyance, took possession before the covenantee entered and in that way excluded the latter.⁷⁴

In the case of absolutely unoccupied land, the mere assertion of a paramount title, without the taking of actual possession by the holder thereof, might be regarded as so indicative of an intention to exclude the covenantee as to involve a breach of the covenant.⁷⁵ Another case of a breach of the covenant

Spelbrink, 211 Mo. 671, 111 S. W. 480.

72. Bostwick v. Williams, 36 Ill. 65, 85 Am. Dec. 385; Davis v. Logan, 5 B. Mon. (Ky.) 341; Maguire v. Riggin, 44 Mo. 512; McAlpin v. Woodruff, 1 Disn. 339, 12 Ohio Dec. 658; Lewis v. Lewis, 5 Rich. L. (S. C.) 12; Welsh v. Kibler, 5 S. C. 405.

73. Cloake v. Hooper, Freem. 122; Peters v. Bowman, 98 U. S. 56, 25 L. Ed. 91; Banks v. Whitehead, 7 Ala. 83; Moore v. Vail, 17 Ill. 185; Cummins v. Kennedy, 3 Litt. (Ky.) 118, 14 Am. Dec. 45; Wlty v. Hightower, 12 Smedes & M. (Miss.) 478; Murphy v. Price, 48 Mo. 247; Heyn v. Ohman, 42 Neb. 693, 60

N. W. 952; Shattuck v. Lamb, 65 N. Y. 499, 22 Am. Rep. 656; Hunt v. Hay, 214 N. Y. 578, 108 N. E. 851; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759; McHargue v. Calchina, 78 Ore. 326, 153 Pac. 99; New York & Cleveland Gas Co. v. Graham, 226 Pa. 348, 75 Atl. 657; Lennig v. Harrisonburg Land & Improvement Co., 107 Va. 458, 59 S. E. 400; McConaughy v. Bennett's Ex'rs, 50 W. Va. 172, 40 S. E. 540.

74. St. John v. Palmer, 5 Hill (N. Y.) 599; Winslow v. McCall, 32 Barb. (N. Y.) 541; Hodges v. Latham, 98 N. C. 239, 2 Am. St. Rep. 333, 3 S. E. 495.

75. See Rawle, Covenants, § 140; Jennings v. Kiernan, 35 Ore.

without an eviction may occur in the case of an easement outstanding in a third person.⁷⁶ The exercise of such an easement,⁷⁷ and occasionally, perhaps, the mere assertion of the right to exercise it,⁷⁸ has been regarded as involving a breach of the covenant. In a few cases, where the conveyance of land was regarded, by reason of the use of the expression "appurtenances," or otherwise, as intended to include an easement in the adjoining land, a failure of title to such easement has been held to involve a breach of the covenant.⁷⁹

In one state it has been said that an eviction is unnecessary if the covenantor is insolvent or a non

349, 55 Pac. 443, 56 Pac. 72. In *Seldon v. Dudley E. Jones Co.*, 74 Ark. 348, 85 S. W. 778, it is even asserted that in the case of wild and unimproved land, the mere existence of a paramount title involves a breach.

76. Occasionally it has been decided, apparently, that the existence of an easement does not involve a breach of the covenant. *Diseker v. Eau Claire Land & Imp. Co.*, 86 S. C. 281, 68 S. E. 529; *Cummings v. Hamrick*, 74 W. Va. 406, 82 S. E. 44.

77. *Flynn v. White Breast Coal & Min. Co.*, 72 Iowa, 738, 32 N. W. 471; *Lamb v. Danforth*, 59 Me. 324, 8 Am. Rep. 426; *Harrington v. Bean*, 89 Me. 470, 36 Atl. 986; *Smith v. Richards*, 155 Mass. 79, 28 N. E. 1132; *Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224, 3 N. E. 675; *Rea v. Minkler*, 5 Lans. (N. Y.) 196; *Wilson v. Cochran*, 46 Pa. 229. The case of *Mitchell v. Warner*, 5 Conn. 497, in which it was

decided that the exercise of a right to divert water from a stream on the land did not involve a breach of the covenant, has been criticized. See *Wilson v. Cochran*, 46 Pa. 233; *Rawle, Covenants*, § 152 note.

78. *Helton v. Asher*, 135 Ky. 751, 123 S. W. 285; *Kramer v. Carter*, 136 Mass. 504.

The successful assertion of the easement by suit has been regarded as involving a breach of the covenant. *Alling v. Burlock*, 46 Conn. 504; *Ensign v. Colt*, 75 Conn. 111, 52 Atl. 829. 946; *Butt v. Riffe*, 78 Ky. 352; *Hymes v. Estey*, 116 N. Y. 501. 15 Am. St. Rep. 421, 22 N. E. 1087.

79. *Downs v. Nally*, 161 Ky. 432, 170 S. W. 1193; *Richstein v. Welch*, 197 Mass. 224, 83 N. E. 417; *Scheible v. Slagle*, 89 Ind. 323; *Bowling v. Burton*, 101 N. C. 176, 2 L. R. A. 285, 7 S. E. 701; *Peters v. Grubb*, 21 Pa. 455; *Adams v. Conover*, 87 N. Y. 422.

resident⁸⁰ or is about to remove his property from the state.⁸¹ An eviction is obviously not necessary in any state in which the covenant of warranty is regarded as including that against incumbrances.⁸²

To constitute an actual eviction under paramount title the dispossession need not be under legal process,⁸³ nor need there be any judicial decision in favor of the holder of the paramount title,⁸⁴ it being sufficient that the claim is actually asserted,⁸⁵ that it is

80. Walker v. Robinson, 163 Ky. 618, 174 S. W. 503.

81. Knight's Adm'r v. Schroad-
er, 148 Ky. 610, 147 S. W. 378.

82. Moore v. Lanham, 3 Hill
(S. C.) 304; Jeter v. Glenn, 9 Rich.
L. (S. C.) 374; Van Wagner v. Van
Nostrand, 19 Iowa, 422; Bullard
v. Hopkins, 128 Iowa, 703, 105
N. W. 197 (*semble*); Taylor v.
Allen, 60 Pa. Super Ct. 503.

83. Rawle, Covenants, § 132;
Foster v. Pierson, 4 Term R. 617;
McGary v. Hastings, 39 Cal. 360,
2 Am. Rep. 456; Green v. Ir-
ving, 54 Miss. 450, 28 Am. Rep.
360; Greenvault v. Davis, 4 Hill
(N. Y.) 645; Hodges v. Latham,
98 N. C. 239, 2 Am. St. Rep.
333, 3 S. E. 495.

84. Dugger v. Oglesby, 99 Ill.
405; Mason v. Cooksey, 51 Ind.
519; Hamilton v. Cutts, 4 Mass.
350, 3 Am. Dec. 222.

85. There can be no eviction
under paramount title unless
such title is actually asserted,
and consequently, at least in the
ordinary case, no breach of the
covenant occurs if the covenantee
yields possession to the holder of
a paramount title, who has not
asserted his title. Hester v.
Hunnicutt, 104 Ala. 282, 16 So.
162; Moore v. Vail, 17 Ill. 185;

Axtel v. Chase, 83 Ind. 546;
Green v. Irving, 54 Miss. 450, 28
Am. Rep. 360; Ogden v. Ball,
40 Minn. 94, 41 N. W. 453; Mor-
gan v. Hannibal R. Co., 63 Mo.
129; Githens v. Barnhill,—(Mo.
App.)—184 S. W. 145; McGrew v.
Harmon, 164 Pa. St. 115, 30 Atl.
265, 268; Leddy v. Enos, 6 Wash.
247, 33 Pac. 508, 34 Pac. 665.

To the rule requiring an as-
sertion of the adverse claim an
exception has been recognized
when the paramount title was in
the United States. Dillahunt v.
Little Rock & Ft. S. Ry. Co., 59
Ark. 629, 27 S. W. 1002, 28 S.
W. 557; Crawford County Bank
v. Baker, 95 Ark. 438, 130 S. W.
556; McGary v. Hastings, 39 Cal.
367, 2 Am. Rep. 456; Harrington
v. Clark, 56 Kan. 644, 44 Pac.
624; Pevey v. Jones, 71 Miss. 627,
42 Am. St. Rep. 486, 16 So.
252.

The cancellation of an entry
or patent by the land office has
been regarded as a sufficient as-
sertion of the government title.
Butler v. Watts, 13 La. Ann. 390;
Efta v. Swanson, 115 Minn. 373,
132 N. W. 335, Giddings v. Hol-
ter, 19 Mont. 263, 48 Pac. 8;
Jennings v. Kiernan, 35 Ore. 349,
55 Pac. 443, 56 Pac. 72 (suit

valid,⁸⁶ and that the covenantee yields thereto.⁸⁷

A constructive eviction, as distinguished from an actual one, involving a breach of the covenant, occurs when, upon the assertion of a paramount title, the covenantee, instead of yielding possession to the hostile claimant, buys in such title, or takes a lease from the holder thereof.⁸⁸ The covenantee is, however, under no obligation to the covenantor thus to arrive at a settlement with the paramount owner.⁸⁹ Somewhat similar to the case of a purchase of the paramount

to annul patent). And dealing with the land as state land has been regarded as sufficient assertion of a paramount title in the state. *Green v. Irving*, 54 Miss. 450; *Brown v. Allen*, 57 Hun (N. Y.) 219, 10 N. Y. Supp. 714.

86. See *Rawle*, Covenants § 136, and cases cited *ante*, this section, note 60.

87. *Gunter v. Williams*, 40 Ala. 561; *Clements v. Collins*, 59 Ga. 124; *Axtel v. Chase*, 83 Ind. 546; *Hamilton v. Cutts*, 4 Mass. 350, 3 Am. Dec. 222; *Kramer v. Carter*, 136 Mass. 504; *Allis v. Nininger*, 25 Minn. 525; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 337; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284; *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479; *Cornish v. Capron*, 136 N. Y. 232, 32 N. E. 773; *Jenks v. Quinn*, 137 N. Y. 223, 33 N. E. 376; *Brown v. Corson*, 16 Ore. 388, 19 Pac. 66, 21 Pac. 47; *Wilson v. Cochran*, 46 Pa. St. 229; *Hebert v. Handy*, 29 R. I. 543, 72 Atl. 1102.

88. *Dillahunt v. Little Rock & Ft. S. Ry. Co.*, 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Hayden v. Patterson*,

39 Colo. 15, 88 Pac. 437; *Joyner v. Smith*, 132 Ga. 779, 65 S. E. 68; *McConnell v. Downs*, 48 Ill. 271; *Beasley v. Phillips*, 20 Ind. App. 182; *Smith v. Keeley*, 146 Iowa, 660, 125 N. W. 669; *Sprague v. Baker*, 17 Mass. 590; *Brooks v. Mohl*, 104 Minn. 404, 116 N. W. 931; *Loomis v. Bedel*, 11 N. H. 74; *Hodges v. Latham*, 98 N. C. 239, 2 Am. St. Rep. 333, 3 S. E. 495; *Pee Dee Naval Stores Co. v. Hamer*, 92 S. C. 423, 75 S. E. 695; *Morrow v. Baird*, 114 Tenn. 552, 86 S. W. 1079; *Clark v. Mumford*, 62 Tex. 531; *Morgan v. Haley*, 107 Va. 331, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846, 13 Ann. Cas. 204, 58 S. E. 564; See *Tucker v. Cooney*, 34 Hun. (N. Y.) 227, 100 N. Y. 719; *Stewart v. Drake*, 9 N. J. L. 139. In one or two states a different view has been taken. *Huff v. Cumberland Valley Land Co.* 17 Ky. L. Rep. 213, 30 S. W. 660; *Dyer v. Britton*, 53 Miss. 270. Compare *Swinney v. Cockrell*, 86 Miss. 318, 38 So. 353.

89. *Brawley v. Copelin*, 106 Ark. 256, 153 S. W. 101; *Miller v. Halsey*, 14 N. J. L. 48; *Olmstead v. Rawson*, 188 N. Y. 517, 81 N. E. 456; *Parker v. Crinton*, 143

title by the covenantee is that of the extinguishment by him of a paramount lien,⁹⁰ or the purchase by him of the property upon a sale under such lien.⁹¹

Occasionally a mere adjudication that another's title is superior to that of the covenantee has been regarded as involving a breach of the covenant of warranty, without reference to whether the covenantee still retains the possession.⁹² Such a view appears to involve, to some extent, a departure from the requirement of eviction in order to effect a breach of the covenant,⁹³ and might well, perhaps, be confined to cases in which the land, at the time of the adjudication, is vacant and unoccupied.⁹⁴ Occasionally there has been considered to be a breach of the covenant by reason of an outstanding legal title when the cove-

Ga. 421, 85 S. E. 338; Rawle, Covenants §, 181.

90. Bemis v. Smith, 10 Metc. (Mass.) 194; Estabrook v. Smith, 6 Gray (Mass.) 572, 66 Am. Dec. 443; Jackson v. Hanna, 8 Jones Law, (53 N. C.) 188; Welsh v. Kibler, 5 S. C. 405; Kenney v. Norton, 10 Heisk. (Tenn.) 384; McCrillis v. Thomas 110 Mo. App. 699, 85 S. W. 673.

91. Talbott v. Donaldson, 71 Kan. 483, 80 Pac. 981; Whitney v. Dinsmore, 6 Cush. (Mass.) 124; Hill v. Bacon, 110 Mass. 387; Cowdrey v. Coit, 44 N. Y. 382, 4 Am. Rep. 690; Brown v. Dinsmore. 12 Pa. 372.

It has been held that the covenantee may pay the taxes on the property when due, and assert a breach of the covenant. Swinney v. Cockrell, 86 Miss. 318, 38 So. 353. But this is open to question so long as there has been no claim made against the property on account of the taxes. Leddy v. Enos, 6 Wash. 247, 33 Pac.

508, 34 Pac. 665.

92. Cox v. Bradford, 101 Ark. 302, 142 S. W. 172; Hayden v. Patterson, 39 Colo. 15, 88 Pac. 437; Wilber v. Buchanan, 85 Ind. 42; Wright v. Nipple, 92 Ind. 310; Sarrls v. Beckman, 55 Ind. App. 638, 104 N. E. 598; Waggener v. Howsley's Adm'r, 64 Ky. 113, 175 S. W. 4; Hubbard v. Stanaford, 30 Ky. L. Rep. 1044, 100 S. W. 232; Boyd v. Bartlett, 36 Vt. 9; Black v. Barto, 65 Wash. 502, Ann. Cas. 1913B, 846, 118 Pac. 623.

93. That a mere adjudication is not sufficient, see Wagner v. Finnegan, 54 Minn. 251, 55 N. W. 1129; Hoy v. Taliaferro, 8 Sm. & M. (Miss.) 727; Real v. Hollister, 20 Neb. 112, 29 N. W. 189; Kerr v. Shaw, 13 Johns. (N. Y.) 236; Ravenel v. Ingram, 131 N. C. 549, 42 S. E. 967; Paul v. Wiltman, 3 Watts & S. (Pa.) 407.

94. See Wagner v. Finnegan, 54 Minn. 25. 55 N. W. 1129; St. John v. Palmer, 5 Hill (N. Y.)

nantee has obtained a decree in equity cancelling such title in his favor.⁹⁵

—**Proof of paramount title.** One alleging a breach of the covenant by reason of an eviction or assertion of claim by a third person has the burden of showing that such person had a paramount title.⁹⁶ But "it has come to be well settled in most if not all of the United States that, in general, upon suit being brought upon a paramount claim against one who is entitled to the benefit of any of the covenants for title, and more particularly it would seem of the covenant of warranty, he can, by giving proper notice of the action to the party bound by the covenants and requiring him to defend it, relieve himself from the burden of being obliged afterward to prove, in the action on the covenants, the validity of the title of the adverse claimant,"⁹⁷ and occasionally a judgment thus recognizing

599, and *ante*, this section, note 75.

95. *Smith v. Keeley*, 146 Iowa, 660, 125 N. W. 669; *Mackenzie v. Clement*,—(Mo. App.)—129 S. W. 730; *Lane v. Fury*, 31 Ohio St. 574.

96. *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; *Tuggle v. Hamilton*, 100 Ga. 292, 27 S. E. 987; *Moore v. Vail*, 17 Ill. 190; *Crance v. Collenbaugh*, 47 Ind. 256; *George v. Putney*, 4 Cush. (Mass.) 355, 50 Am. Dec. 788; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284; *Snyder v. Jennings*, 15 Neb. 372, 19 N. W. 501; *Stone v. Hooker*, 9 Cow. (N. Y.) 157; *Cobb v. Klosterman*, 58 Ore. 211, 114 Pac. 96; *Callis v. Cogbill*, 9 Lea (Tenn.) 137; *Westrope v. Chambers*, 51 Tex. 178; *McKillop v. Post*, 82 Vt. 403, 74 Atl. 78.

The burden of showing the

validity of the asserted paramount title is upon the covenantee who yields thereto. *Eversole v. Early*, 80 Iowa, 601, 44 N. W. 897; *Rawle Covenants* §, 136; *Tiffany, Landlord & Tenant* p. 1299.

97. *Rawle, Covenants* § 117. See *Carpenter v. Carpenter*, 88 Ark. 169, 113 S. W. 1032; *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *Taylor v. Allen*, 131 Ga. 416, 62 S. E. 291; *Harding v. Sucher*, 261 Ill. 284, 103 N. E. 1019; *Olmstead v. Rawson*, 188 N. Y. 517, 81 N. E. 456; *Stonebraker v. Ault*,—Okla.—158 Pac. 570; *Samson v. Zimmerman*, 73 Kan. 654, 85 Pac. 757; *Elliott v. Saufley*, 89 Ky. 52, 11 S. W. 200; *Farnsworth v. Kimball*, 112 Me. 238, 91 Atl. 954; *Boyle v. Edwards*, 114 Mass. 375; *Cummings v. Harrison*, 57 Miss. 275; *Sachse v. Loeb*, 45 Tex. Civ. App. 536,

the supremacy of another's title has been regarded as conclusive upon the covenantor when rendered in a suit brought not by such other against the covenantee, but by the covenantee against such other, the covenantor being notified to appear and prosecute the suit.⁹⁸ The notice need not, it seems, be in writing.⁹⁹ It has sometimes been regarded as necessary that the notice include or be accompanied by a request that the covenantor defend the action,¹ but such a requirement has not always been recognized.² Obviously the notice must be given with sufficient promptitude to enable the covenantor to prepare his defense.³ If no notice of the action is given to the covenantor, a judgment therein against him is not even *prima facie* evidence of the paramount character of the title of the party in favor of whom it was rendered,⁴ but apart from any question

101 S. W. 450; *Farwell v. Bean*, 82 Vt. 172, 72 Atl. 731. So in the case of notice to the covenantor's heir, afterwards sued on the covenant. *Farnsworth v. Kimball*, 112 Me. 238, 91 Atl. 954.

98. *Gragg v. Richardson*, 25 Ga. 570, 71 Am. Dec. 190; *Sarrls v. Beckman*, 55 Ind. App. 638, 104 N. E. 598; *Hubbard v. Stanaford*, 30 Ky. L. Rep. 1044, 100 S. W. 232; *Dalton v. Bowker*, 8 Nev. 191; *White v. Williams*, 13 Tex. 258; *Pitkin v. Leavitt*, 13 Vt. 379.

99. *Sarrls v. Beckman*, 55 Ind. App. 638, 104 N. E. 598; *Richstein v. Welch*, 197 Mass. 224, 83 N. E. 417; *Cummings v. Harrison*, 57 Miss. 275; *Walton v. Campbell*, 51 Neb. 788, 71 N. W. 737; *Miner v. Clark*, 15 Wend. (N. Y.) 426. *Contra*, *Mason v. Kellogg*, 38 Mich. 132, approved in *Rawle Covenants*, § 119.

1. *Pence v. Rhonemus*, 58 Ind. App. 268, 108 N. E. 129; *Wheelock*

v. Overshiner, 110 Mo. 100, 19 S. W. 640; *Paul v. Witman*, 3 Watts & S. (Pa.) 409; *Clark v. Mumford*, 62 Tex. 532; *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426. That the covenantor must be "tendered the opportunity to take upon himself the defense" is asserted in *Richstein v. Welch*, 197 Mass. 224, 83 N. E. 417.

2. *Cummings v. Harrison*, 57 Miss. 275; *Jones v. Balsley*, 154 N. Car. 61, 69 S. E. 827; *Morgan v. Haley*, 107 Va. 331, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846, 13 Ann. Cas. 204, 58 S. E. 564.

3. *Fassler v. Streit*, 100 Neb. 722, 161 N. W. 172; *Morette v. Bostwick*, 127 N. Y. App. Div. 701, 111 N. Y. Supp. 1021; *Middleton v. Thompson*, 1 Speers L. (S. Car.) 67; *Somers v. Schmidt*, 24 Wis. 421, 1 Am. Rep. 191.

4. *Rawle Covenants* §, 123 and cases cited. *Osburn v. Pritchard*, 104 Ga. 145, 30 S. E. 656;

of notice the covenantor is bound by the judgment if he is a party thereto.⁵

§ 454. **Covenant for further assurance.** The covenant by the grantor to make such other assurances as may be necessary to perfect the title is less extensively used in the United States than any of the other covenants for title, though its importance to the purchaser, it has been said, "can hardly be overrated."⁶ Under this covenant, the covenantor may be required to do such further acts as may be necessary on his part to perfect the title which the conveyance purports to pass, but the covenantee cannot demand that he do acts which are unnecessary, or which it is impossible for him to do. The remedy under this covenant is more often by a suit for specific performance than by an action of damages, as in the case of the other covenants.⁷

§ 455. **The measure of damages—Covenant for seisin.** In an action for breach of the covenant for seisin, the measure of damages is ordinarily the amount of the consideration paid by the grantee, usually with interest, such consideration being presumably the value

Council Imp. Co. v. Pacific & Idaho Northern Land & Improvement Co., 29 Idaho 113, 57 Pac. 258; Sisk v. Woodruff, 15 Ill. 15; Dalton v. Bowker, 8 Nev. 190; Baumgartner v. Chipman, 30 Utah, 466, 86 Pac. 411; Anderson v. Bigelow, 16 Wash. 198, 47 Pac. 426; Wallace v. Pereles, 109 Wis. 316, 53 L. R. A. 644, 83 Am. St. Rep. 898, 85 N. W. 371. See Kapiolani Estate v. Atcherley, 238 U. S. 119, 59 L. Ed. 1229.

5. Seyfried v. Knoblauch, 44 Colo. 86, 96 Pac. 993; Samson v. Zimmerman, 73 Kan. 654, 85 Pac.

757; Elliott v. Saufley, 89 Ky. 52, 11 S. W. 200; Eaker v. Harvey, 192 Mo. App. 697, 179 S. W. 985; Smith v. Dixon, 27 Ohio St. 477; Jennings v. Kiernan, 35 Ore. 349, 55 Pac. 443, 56 Pac. 72.

6. Rawle, Covenants for Title, § 98. See Cochran v. Pascault, 54 Md. 1.

7. Rawle, Covenants, §§ 99-109. The fact that this covenant may be enforced by specific performance, while the other covenants for title cannot, is the reason, as stated by Mr. Rawle, of its great value to the purchaser.

of the land at the time of the sale, with a view to which the covenant was made.⁸ Adopting this measure of damages in case the breach is as to part of the premises only, the recovery is a part of the consideration, proportioned to the value of such part.⁹ And if the estate which passes is less than that purported to be conveyed, the amount recoverable is the consideration paid less the value of the estate which actually passes.¹⁰

Occasionally the view has been asserted that the covenantee can recover only nominal damages on account of a breach of the covenant for seisin, if he has in no way been disturbed in his possession of the land.¹¹ In the great majority of cases, however, the fact that the grantee is or is not still in possession is not re-

8. *Mather v. Stokely*, 218 Fed. 764, 134 C. C. A. 442; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Mitchell v. Hazen*, 4 Conn. 516, 10 Am. Dec. 169; *King v. Gilson's Adm'x*, 32 Ill. 348, 83 Am. Dec. 269; *Shorthill v. Ferguson*, 44 Iowa, 249; *Cummins v. Kennedy*, 3 Litt. (Ky.) 118, 14 Am. Dec. 45; *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Nichols v. Walter*, 8 Mass. 243; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1; *Crowell v. Jones*, 67 N. C. 386, 83 S. E. 551; *Backus' Admr's v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585; *Conklin v. Hancock*, 67 Ohio St. 455, 66 N. E. 518; *Bender v. Fromberger*, 4 Dall. (Pa.) 442; *Park v. Cheek*, 4 Cold. (Tenn.) 20; *Norfolk & W. Ry. Co. v. Mundy*, 110 Va. 422, 66 S. E. 61.

9. *Bibb v. Freeman*, 59 Ala. 612; *Seyfried v. Knoblauch*, 44 Colo. 86, 96 Pac. 993; *Hubbard v. Norton*, 10 Conn. 422; *Lloyd v. Sandusky*, 203 Ill. 621, 68 N. E.

154; *Wright v. Nipple*, 92 Ind. 310; *Scantlin v. Allison*, 12 Kan. 85; *Cushman v. Blanchard*, 2 Me. 266, 11 Am. Dec. 76; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Dubay v. Kelly*, 137 Mich. 345, 100 N. W. 677; *Adkins v. Tomlinson*, 121 Mo. 487, 26 S. W. 573; *Staats v. Ten. Eyck's Ex'rs*, 3 Caines (N. Y.) 111, 2 Am. Dec. 254; *Campbell v. Shaw*, 170 N. Car. 186, 86 S. E. 1035; *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115.

10. *Gray v. Biscoe, Noy*, 142; *Hartford etc. Ore. Co. v. Miller*, 41 Conn. 112; *Kimball v. Bryant*, 25 Minn. 496; *Tanner v. Livingston*, 12 Wend. (N. Y.) 83; *Curtis v. Brannon*, 98 Tenn. 153, 69 L. R. A. 760, 38 S. W. 1073; *Bowne v. Walcott*, 1 N. Dak. 415.

11. *Hacker v. Blake*, 17 Ind. 97; *Hencke v. Johnson*, 62 Iowa, 555; *Sable v. Brockmeier*, 45 Minn. 248, 47 N. W. 794; *Conklin v. Hannibal etc.*, R. Co. 65 Mo. 533; *Bowne v. Wolcott*, 1 N. Dak. 415, 48 N. W. 336; *Kinzie*

ferred to in connection with the question of the amount of damages recoverable, and in a few cases the view referred to is clearly repudiated.¹² But since, if the covenantee is allowed to recover what he paid for the land, he should not be allowed to retain the land, the courts, in giving him substantial damages in such case, have occasionally taken measures to protect the covenantor in this regard, either by requiring the tender of a reconveyance as a prerequisite to the recovery of a judgment,¹³ or by regarding the judgment for damages as in itself revesting the title in the covenantor¹⁴ or, it might be that the court will require a reconveyance as a prerequisite to the issue of execution on the judgment.¹⁵

Although the covenant is broken by reason of lack of title in the grantor at the time of the conveyance, only nominal damages can be recovered if, before suit on the covenant, the lapse of the limitation period has perfected the title of the grantee,¹⁶ or if the grantee's title is perfected by the grantor's acquisition of the paramount title, which enures to the benefit of the grantee on the theory of estoppel.¹⁷

In case the grantee buys in a paramount title, he can recover the amount paid therefor, provided this

v. Riely's Ex'r, 100 Va. 709, 42 S. E. 872; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653.

12. *Bolinger v. Brake*, 57 Kan. 663, 47 Pac. 537; *Parkinson v. Woulds*, 125 Mich. 325, 84 N. W. 292; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 119; *Blake v. Burnham*, 29 Vt. 437.

13. *Shorthill v. Ferguson*, 44 Iowa, 249, 47 Iowa, 284; *Frazer v. Supervisors of Peoria*, 74 Ill. Ill. 282; *Flint v. Steadman*, 36 Vt. 210.

14. *Stinson v. Sumner*, 9 Mass. 150; *Parker v. Brown*, 15 N. H.

188; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 123; *Campbell v. Martin*, 89 Vt. 214, 95 Atl. 494 (on satisfaction of judgment); *Noonan v. Ilsey*, 21 Wis. 148.

15. See *Rawle, Covenants*, § 185; *Catlin v. Hurlburt*, 3 Vt. 403; *Ives v. Niles*, 5 Watts (Pa.) 323; *Campbell v. Martin*, 89 Vt. 214, 95 Atl. 494.

16. *Wilson v. Forbes*, 2 Dev. (N. Car.) 30; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 123; *Garfield v. Williams*, 2 Vt. 328.

17. Ante, § 449, notes 73-76.

was a fair and reasonable price, and no more.¹⁸

The covenant for right to convey being the equivalent of the covenant of seisin, it follows that the measure of damages for breach is the same, that is, ordinarily the amount of the consideration paid.¹⁹

— **Covenant for quiet enjoyment and warranty.** The measure of damages for breach of a covenant for quiet enjoyment or of warranty is, by the weight of authority, the same as that for breach of the covenant for seisin or of right to convey, that is, in the ordinary case, the value of the land at the time of the conveyance, as measured by the consideration paid, without reference to any increase in value arising from the development of the neighborhood or the improvement of the land itself.²⁰ In some of the New England states,

18. *Anderson v. Knox*, 20 Ala. 156; *Pate v. Marshall*, 23 Ark. 591; *Weber v. Anderson*, 73 Ill. 439; *Bolinger v. Brake*, 57 Kan. 663, 47 Pac. 537; *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 500; *Kimball v. Bryant*, 25 Minn. 496; *Hall v. Bray*, 51 Mo. 288; *Werner v. Wheeler*, 142 App. Div. 358, 127 N. Y. Supp. 158; *Price v. Deal*, 90 N. Car. 290; *Eames v. Armstrong*, 146 N. Car. 1, 125 Am. St. Rep. 436, 59 S. E. 165; *Cobb v. Klosterman*, 58 Ore. 211, 114 Pac. 96.

19. *Mitchell v. Hazen*, 4 Conn. 516, 10 Am. Dec. 169; *Willson v. Willson*, 25 N. H. 233, 57 Am. Dec. 320; *Hodges v. Thayer*, 110 Mass. 286; *Kinzie v. Riely's Ex'r*, 100 Va. 709, 42 S. E. 872 (nominal damages); *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. 6.

20. *Allinder v. Bessemer Coal, Iron & Land Co.*, 164 Ala. 275, 51 So. 234; *Weber v. Anderson*, 73 Ill. 439; *Burton v. Reeds*, 20 Ind.

87; *Swafford v. Whipple*, 3 G. Greene (Iowa) 261, 54 Am. Dec. 498; *Efta v. Swanson*, 115 Minn. 373, 132 N. W. 335; *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171; *Bennett v. Jenkins*, 13 Johns. (N. Y.) 50; *Hunt v. Hay*, 214 N. Y. 578, 108 N. E. 851; *Clark v. Parr*, 14 Ohio. 118, 45 Am. Dec. 529; *Brown v. Dickerson*, 12 Pa. St. 372; *Elliott v. Thompson*, 4 Humph. Tenn.) 99, 40 Am. Dec. 630; *Lewis v. Ross*, 95 Tex. 358, 67 S. W. 405; *Farwell v. Bean*, 82 Vt. 172, 72 Atl. 731; *Conrad v. Effinger*, 87 Va. 59, 24 Am. St. Rep. 646, 12 S. E. 2; *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455.

The amount of the consideration paid by the covenantee, rather than that received by the covenantor, determines the damages. *Hunt v. Hay*, 214 N. Y. 578, 108 N. E. 851.

however, the covenants for quiet enjoyment and of warranty are regarded as intended to indemnify the covenantee for any loss suffered by him, and as consequently entitling him to damages to the extent of the value of the land at the time of the eviction.²¹ Such a rule may involve a very great burden upon one who sells land his title to which is defective, though he believes it to be good, he being thereby made liable for the cost of all improvements, however great, made by his grantee, as well as for any increase in value arising from growth of population and the like causes.²² Upon a breach of the covenant as regards a part of the land only, the grantee is entitled to recover a proportioned part of what he could have recovered on a total breach.²³

In case the grantee is not actually dispossessed, but buys in the outstanding title, he is ordinarily entitled, in an action on the covenant of warranty or for quiet enjoyment, to recover only the amount paid by him therefor.²⁴ In so far as there may be a breach by

21. *Horsford v. Wright*, Kirby (Conn.) 3, 1 Am. Dec. 8; *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Ceconi v. Rodden*, 147 Mass. 64, 16 N. E. 749; *Park v. Bates*, 12 Vt. 381, 36 Am. Dec. 347; *Williamson v. Williamson*, 71 Me. 442.

22. See Rawle, Covenants, §§ 165-171.

23. *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321; *Phillips v. Reichert*, 17 Ind. 120, 79 Am. Dec. 463; *McNally v. White*, 154 Ind. 63, 54 N. E. 794, 56 N. E. 214; *James v. Louisville Public Warehouse Co.*, 23 Ky. Law Rep. 1216, 64 S. W. 966; *Boyle v. Edwards*, 114 Mass. 373; *Allen v. Miller*, 99 Miss. 75, 54 So. 731; *Mengel v. Williamson*, 50 Pa. Super. Ct. 100; *Hynes v. Packard*,

92 Tex. 44, 45 S. W. 562; *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455; *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89.

24. *Brawley v. Copelin*, 106 Ark. 256, 153 S. W. 101; *Claycomb v. Munger*, 51 Ill. 373; *Beasley v. Phillips*, 20 Ind. App. 182, 50 N. E. 488; *Sullivan v. Hill*, 33 Ky. L. Rep. 962, 112 S. W. 564; *Leffingwell v. Elliott*, 8 Pick. (Mass.) 455; *Brooks v. Mohl*, 104 Minn. 404, 116 N. W. 931; *Halloway v. Miller*, 84 Miss. 776, 36 So. 531; *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479; *Lemby v. Ellis*, 146 N. Car. 221, 59 S. E. 683; *Arrigoni v. Johnson*, 6 Oreg. 167; *Cox v. Henry*, 32 Pa. St. 18; *Mengel v. Williamson*, 50 Pa. Super. Ct. 100;

reason of an easement outstanding in a third person,²⁵ he can, it seems, recover only the amount of the consequent decrease in the value of the land.²⁶ In so far as damages for breach of a covenant for title may be measured by the consideration paid, the recital in that regard in the conveyance is not conclusive as to the amount.²⁷

— **Covenant against incumbrances.** The covenant against incumbrances is considered as one for indemnity only, and the covenantee can recover no more than what he may have been compelled to pay in order to extinguish the outstanding incumbrance,²⁸ or, in case he can not so extinguish it, the amount of injury which he may be considered to have suffered from its existence, ordinarily measured by the resulting diminution in the value of the land.²⁹ But though no loss has been

Brown v. Thompson, 81 S. C. 380, 62 S. E. 440; *McClelland v. Moore*, 48 Tex. 355; *Cameron v. Burke*, 61 Wash. 203, 112 Pac. 252. But see *Nolan v. Feltman*, 12 Bush. (Ky.) 119.

25. *Ante*, § 453, notes 76-78.

26. *Harrington v. Bean*, 89 Me. 470, 36 Atl. 986; *Schwartz v. Black*, 131 Tenn. 360, Ann. Cas. 1916C 1195, 174 S. W. 1146.

27. *Bass v. Starnes*, 108 Ark. 357, 158 S. W. 136; *Rook v. Rook*, 111 Ill. App. 398; *Cook v. Curtis*, 68 Mich. 611, 36 N. W. 692; *Holmes v. Seaman*, 72 Neb. 300, 100 N. W. 417, 101 N. W. 1030; *Mayer v. Wooten*, 46 Tex. Civ. App. 327, 102 N. W. 423.

28. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Amos v. Cosby*, 74 Ga. 793; *McDowell v. Milroy*, 69 Ill. 498; *Boice v. Coffeen*, 158 Iowa, 705, 138 N.

W. 857; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *Johnson v. Collins*, 116 Mass. 392; *Kellogg v. Malin*, 62 Mo. 429; *Hartshorn v. Cleveland*, 52 N. J. Law 473, 19 Atl. 974; *Corbett v. Wren*, 25 Oreg. 305, 35 Pac. 658; *Myers v. Brodbeck*, 110 Pa. St. 198, 5 Atl. 662; *Pritchard v. Rebori*, 135 Tenn. 328, 186 S. W. 121; *George A. Lowe Co. v. Simmons Warehouse Co.*, 39 Utah, 395, Ann. Cas. 1913E, 246, 117 Pac. 874; *Eaton v. Lyman*, 30 Wis. 429.

29. *Rawle, Covenants*, §§ 190, 191; *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509; *Mitchell v. Stanley*, 44 Conn. 312; *Morgan v. Smith*, 11 Ill. 194; *Kostendader v. Pierce*, 37 Iowa, 645; *Harrington v. Bean*, 89 Me. 470, 36 Atl. 986; *Wetherbee v. Bennett*, 2 Allen (Mass.) 428; *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 3 L. R. A. (N. S.) 98, 112 Am. St. Rep.

sustained at the time of bringing suit, he may recover nominal damages, since the covenant is regarded as broken as soon as made, when there is any outstanding incumbrance.³⁰

In those states in which the recovery on a covenant for quiet enjoyment or of warranty is limited to the amount of the consideration paid, the recovery for breach of the covenant against incumbrances is likewise so limited, no matter what expenditure or loss the covenantee may have incurred on account of the incumbrance.³¹

296, 76 N. E. 449; Mackey v. Harmon, 34 Minn. 168, 24 N. W. 702; Kellogg v. Malin, 62 Mo. 429; Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Williams v. Hewitt, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496; Smith v. White, 71 W. Va. 639, 48 L. R. A. (N. S.) 623, 78 S. E. 378; Gadow v. Hunholtz, 160 Wis. 293, 151 N. W. 810. See McGuckin v. Milbank, 152 N. Y. 297, 46 N. E. 490.

When the breach arises from the existence of an outstanding term of years, the value of the use of the land for such term has been regarded as the measure of damages. Barker v. Denning, 91 Kan. 485, 138 Pac. 573; Malsbury v. Jacobus, 88 Neb. 751, 130 N. W. 424; Porter v. Bradley, 7 R. I. 542.

30. Tuskegee Land & Security Co. v. Birmingham Realty Co., 161 Ala. 542, 23 L. R. A. (N. S.) 992, 49 So. 378; Ensign v. Colt, 75 Conn. 111, 52 Atl. 829, 946; Willetts v. Burgess, 34 Ill. 494; Thompson v. Richmond, 102 Me. 335, 66 Atl. 649; Wilcox v. Musche, 39 Mich. 101; Walker's

Adm'r v. Deaver, 79 Mo. 664; Smith v. Jefts, 44 N. H. 482; Hasselbuch v. Mohmking, 76 N. J. L. 691, 73 Atl. 961; McGucken v. Milbank, 152 N. Y. 297, 46 N. E. 490; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759; Funk v. Voneida, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617; International Development Co. v. Clemans, 59 Wash. 398, 109 Pac. 1034; In re Hanlin's Estate, 133 Wis. 140, 113 N. W. 411; Rawle, Covenants, §§ 188, 189.

That the grantee could have recovered nominal damages on a covenant against incumbrances by reason of an outstanding mortgage does not prevent a recovery on the covenant of warranty upon his eviction after foreclosure of the mortgage. Smith v. Wahl, 88 N. J. L. 623, 97 Atl. 261.

31. Rawle, Covenants, § 193; Collier v. Cowger, 52 Ark. 322, 6 L. R. A. 107, 12 S. W. 702; Guthrie v. Russell, 46 Iowa, 269, 26 Am. Rep. 135; Dimmick v. Lockwood, 10 Wend. (N. Y.) 142; Foote v. Burnet, 10 Ohio, 317, 36 Am. Dec. 90; George A. Lowe Co. v. Simmons Warehouse Co.,

— **Interest.** Interest from the time of plaintiff's eviction is presumably always recoverable by him,³² since from that time he is deprived of the use of his money and also of the use of the land. For a like reason a covenantee who, by reason of an outstanding title, fails to acquire the possession of the land under the conveyance to him, is entitled to interest on the purchase price paid by him from the time of its payment.³³

Whether, when the covenantee did acquire the possession under his conveyance, he is entitled to interest on the purchase price for the period previous to his eviction by the paramount owner, has ordinarily been regarded as dependent on the question of his liability to the latter for mesne profits.³⁴ Except for this liability, he might well be regarded as compensated, by his enjoyment of the land, for his deprivation of the use of the money, and so not entitled to interest. But the courts usually assume that if he has not already been made liable for such profits, he will be made so liable, and consequently do not regard his enjoyment of the land as in itself sufficient to deprive him of interest. In so far, however, as his non liability for mesne profits can be regarded as established, by adjudication or otherwise, he is not entitled to interest,³⁵ and, so if, by

39 Utah, 395, 117 Pac. 874, Ann. Cas. 1913E, 246; *Eaton v. Lyman*, 30 Wis. 41.

32. *Collier v. Cowger*, 52 Ark. 322, 6 L. R. A. 107, 12 S. W. 702; *Spring v Chase*, 22 Me 505, 39 Am. Dec. 595; *Hutchins v. Roundtree*, 77 Mo. 500; *Henning v. Withers*, 3 Brev. (S. C.) 458, 6 Am. Dec. 589; *Conrad v. Effinger*, 87 Va. 59, 24 Am. St. Rep. 649.

33. *Graham v. Dyer*, 16 Ky. L. Rep. 541, 29 S. W. 346; *Hutchins v. Roundtree*, 77 Mo. 500; *Hunt v. Nolen*, 46 S. C. 551, 24 S. E. 543; *Johns v. Hardin*, 81

Tex. 37, 16 S. W. 623.

34. In Virginia the recovery of interest is restricted to that which accrues after eviction. *Threlkeld v. Fitzhugh*, 2 Leigh, 451; *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113.

35. *Harding v. Larkin*, 41 Ill. 413; *White v. Tucker*, 52 Miss. 145; *Withers v. Bank of Commerce & Trust Co.*, 104 Miss. 681, 61 So. 690; *McGuffey v. Humes*, 85 Tenn. 26, 1 S. W. 506; *Mann v. Mathews*, 82 Tex. 98, 17 S. W. 927; *Flint v. Steadman*, 36 Vt. 210. *Contra*, *Rhea*

reason of the statute of limitations, or for some other reason, he is liable for mesne profits for only a limited number of years back, his right to recover interest is limited to those years.³⁶ Occasionally the immunity of the covenantee from liability for mesne profits has been regarded as precluding his recovery of interest only in so far as the land was capable of beneficial use,³⁷ but the correctness of such a view is open to question.³⁸

— **Expenses of litigation.** Since the covenantee, if he relinquishes possession on the demand of one asserting a paramount title, has the burden of showing that the claimant's title is paramount,³⁹ it appears just and equitable that he should have the privilege of defending against the adverse claim without incurring loss by so doing. This has been generally recognized by the courts to the extent of giving him, as an element of damages in an action on the covenant, the costs in an action against him by the paramount claimant, which action he, in good faith but unsuccessfully, undertook to defend.⁴⁰ In some states the covenantee is

v. Swain, 122 Ind. 272, 22 N. E. 1000, 23 N. E. 776.

36. *Fernander v. Dunn*, 19 Ga. 497, 65 Am. Dec. 607; *Harding v. Larkin*, 41 Ill. 413; *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595; *Stebbins v. Wolf*, 33 Kan. 765, 7 Pac. 542; *Thompson v. Jones*, 11 B. Mon. (Ky.) 365; *Hutchins v. Roundtree*, 77 Mo. 500; *Morris v. Rowan*, 17 N. J. L. 304; *Foster v. Thompson*, 41 N. H. 373; *Staats v. Ten Eyck*, 3 Caines, 111, 2 Am. Dec. 256; *Caulkins v. Harris*, 9 Johns, 324; *Bennett v. Jenkins*, 13 Johns. (N. Y.) 50; *Clark v. Parr*, 14 Ohio, 118, 45 Am. Dec. 529; *Cox v. Henry*, 32 Pa. 18; *Mengel Box Co. v. Ferguson*, 124 Tenn. 433, 137 S. W. 101.

37. *Wood v. Kingston Coal Co.*, 48 Ill. 356, 95 Am. Dec. 554; *Yazoo & M. V. R. Co. v. Banister*, 89 Miss. 808, 42 So. 345.

38. See *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595.

39. *Ante*, § 453, note 96.

40. *Kingsbury v. Milner*, 69 Ala. 502; *Beach v. Nordman*, 90 Ark. 59, 117 S. W. 785; *McCormick v. Marcy*, 165 Cal. 449, 132 Pac. 449; *Harding v. Larkin*, 41 Ill. 413; *Stebbins v. Wolf*, 33 Kan. 765, 7 Pac. 542; *Robertson v. Lemon*, 2 Bush (Ky.) 302; *Dubay v. Kelly*, 137 Mich. 345, 100 N. W. 677; *Brooks v. Mohl*, 104 Minn. 404, 116 N. W. 931; *Brooks v. Black*, 68 Miss. 161, 11 L. R. A. 176, 24 Am. St. Rep. 259, 8 So. 332; *Hazelett v. Wood-*

also allowed the reasonable amount of fees paid his attorney in such action,⁴¹ while in others his right to attorney's fees is denied.⁴² Not infrequently the covenantee has been said to be entitled to recover the expense or cost of such previous litigation, an expression presumably broad enough to include attorney's fees as well as taxed costs.⁴³

ruff, 150 Mo. 534, 51 S. W. 1048; Taylor v. Holter, 1 Mont. 688; Jones v. Balsley, 154 N. C. 61, 69 S. E. 827; Pitcher v. Livingston, 4 Johns. (N. Y.) 4 Am. Dec. 229; McAlpin v. Woodruff, 11 Ohio St. 120; Welsh v. Kibber, 5 S. C. 405; Mengel Box Co. v. Ferguson, 124 Tenn. 433, 137 S. W. 101; Morgan v. Haley, 107 Va. 331, 13 L. R. A. N. S. 732, 12 Am. St. Rep. 846, 13 Ann. Cas. 204, 58 S. E. 564. *Contra*, Taylor v. Allen, 131 Ga. 416, 62 S. E. 291; Terry's Ex'r v. Drabenstadt, 48 Pa. 400; Clark v. Mumford, 62 Tex. 531. See Shook v. Lanfer, (Tex. Civ. App.) 100 S. W. 1042.

The covenantee is obviously not entitled to the costs of defending an action in which he is successful, since this would impose liability under the covenant for the act of a third person not having paramount title. Hoffman v. Dickson, 65 Wash. 556, 39 L. R. A. (N. S.) 67, Ann. Cas. 1913B, 869, 118 Pac. 737; Smith v. Parsons, 33 W. Va. 644, 11 S. E. 68.

41. Beach v. Nordman. 90 Ark. 59, 117 S. W. 785; McCormick v. Marcy, 165 Cal. 449, 132 Pac. 449; Harding v. Larkin, 41 Ill. 413; Meservey v. Snell, 94 Iowa, 222, 58 Am. St. Rep. 391, 62 N. W. 767; Burchfield v. Brinkman,

92 Kan. 377, 140 Pac. 894; Robertson v. Lemon, 2 Bush (Ky.) 302; Ryerson v. Chapman, 66 Me. 557; Brooks v. Mohl, 104 Minn. 404, 116 N. W. 931; Hazelett v. Woodruff, 150 Mo. 534, 51 S. W. 1048; Taylor v. Holter, 1 Mont. 688; Walton v. Campbell, 51 Neb. 788, 71 N. W. 737; Rickert v. Snyder, 9 Wend. (N. Y.) 416; Lane v. Fury, 31 Ohio St. 574; Keeler v. Wood, 30 Vt. 242.

42. Taylor v. Allen, 131 Ga. 416, 62 S. E. 291; Reggio v. Braggiotti, 7 Cush. (Mass.) 166; Brooks v. Black, 68 Miss. 161, 11 L. R. A. 176, 24 Am. St. Rep. 259, 8 So. 332; Holmes v. Sinickson, 15 N. J. L. 313; Terry v. Drabenstadt, 68 Pa. 400; Jeter v. Glenn, 9 Rich. L. (S. C.) 374; Mengel Box Co. v. Ferguson, 124 Tenn. 433, 137 S. W. 101; Turner v. Miller, 42 Tex. 418; Morgan v. Haley, 107 Va. 331, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846, 13 Ann. Cas. 204, 58 S. E. 564.

43. Beach v. Nordman, 90 Ark. 59, 117 S. W. 785; Butler v. Barnes, 61 Conn. 399, 24 Atl. 328; Meservey v. Snell, 94 Iowa, 222, 58 Am. St. Rep. 391, 62 N. W. 767; Stebbins v. Wolf, 33 Kan. 765, 7 Pac. 542; Quick v. Walker, 125 Mo. App. 257, 102 S. W. 33; Williamson v. Williamson,

The view has occasionally been asserted or suggested that the costs of the previous action,⁴⁴ or the amount of attorneys' fees therein,⁴⁵⁻⁴⁶ should be allowed only in case the covenantee notified the covenantor of the litigation in time to enable the latter to determine the advisability of contesting the adverse claim, the covenantee being in that case entitled to recover such expenditures unless the covenantor requested him not to make the contest.

The allowance to the covenantee of the cost of previous litigation between him and the paramount claimant has not been confined to the case of an action against him by such claimant, but has been extended to the case of a proceeding by him against such claimant

71 Me. 442; *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479; *Ryerson v. Chapman*, 66 Me. 557; *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671; *Brooks v. Mohl*, 104 Minn. 404, 17 L. R. A. (N. S.) 1195, 116 N. W. 931; *Taylor v. Holter*, 1 Mont. 688; *Drew v. Towle*, 30 N. H. 531 (*semble*); *Winnepiseogee P. Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171 (*semble*); *Lane v. Fury*, 31 Ohio St. 574; *Point St. Iron Works v. Turner*, 14 R. I. 122, 51 Am. Rep. 364; *Keeler v. Wood*, 30 Vt. 242; *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104.

44. *De Jarnette v. Dreyfus*, 166 Ala. 138, 51 So. 932; *Butler v. Barnes*, 61 Conn. 399, 24 Atl. 328; *Teague v. Whaley*, 20 Ind. App. 26, 50 N. E. 41; *Walsh v. Dunn*, 34 Ill. App. 146; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271, 22 S. W. 314; *Hutchins v. Roundtree*, 77 Mo. 500; *Mengel Box Co. v. Ferguson*, 124 Tenn. 433, 137 S. W.

101. But that no notice is necessary, see *Ryerson v. Chapman*, 66 Me. 557; *Morris v. Rowan*, 17 N. J. L. 304; *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104. See *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014.

45-46. *Garner v. Morris*, 187 Ala. 658, 65 So. 1000; *Teague v. Whaley*, 20 Ind. App. 26, 50 N. E. 41; *Meservey v. Snell*, 94 Iowa, 222, 58 Am. St. Rep. 391, 62 N. W. 767; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271, 22 S. W. 314; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671; *Mackenzie v. Clement*, 144 Mo. App. 114, 129 S. W. 730; *Jeffords v. Dreisbach*, 168 Mo. App. 577, 153 S. W. 274; *Balte v. Bademiller*, 37 Ore. 27, 82 Am. St. Rep. 737, 60 Pac. 601; *Ellis v. Abbott*, 69 Ore. 234, 138 Pac. 488; *Point St. Iron Works v. Turner*, 14 R. I. 122, 51 Am. Rep. 364.

involving the validity of the claim, and which resulted in favor of the latter.⁴⁷

— **Action against remote grantor.** Upon the question of the measure of damages in an action upon a covenant of warranty brought, not by the original covenantee, but by a remote grantee entitled to the benefit of the covenant as one running with the land,⁴⁸ the cases are not in accord. Some courts have adopted the view that the purchase price paid by the original covenantee is the measure of recovery,⁴⁹ while others regard the recovery as limited by what the plaintiff himself paid for the land,⁵⁰ without, however, recognizing any right to recover more than the price paid by the original covenantee, if this was less than that paid by the plaintiff.⁵¹ These latter cases thus in effect regard the covenant as one for limited indemnity.

47. *Chestnut v. Tyson*, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101; *Gragg v. Richardson*, 25 Ga. 566, 71 Am. Dec. 190 (*semble*); *Walsh v. Dunn*, 34 Ill. App. 146; *Yokum v. Thomas*, 15 Iowa, 67; *Barnett v. Montgomery*, 6 T. B. Mon. (Ky.) 331; *Kyle v. Fauntleroy*, 9 B. Mon. (Ky.) 622; *Ryerson v. Chapman*, 66 Me. 557; *Haynes v. Stevens*, 11 N. H. 28.. *Andrews v. Davison*, 17 N. H. 413, 43 Am. Dec. 606; *Lane v. Fury*, 31 Ohio St. 574; *Pitkin v. Leavitt*, 13 Vt. 379.

48. *Post*, § 456.

49. *Mischke v. Baughn*, 52 Iowa, 528, 3 N. W. 543; *Dougherty v. Duvall*, 9 B. Mon. (Ky.) 57; *Cook v. Curtis*, 68 Mich. 611, 36 N. W. 692; *Brooks v. Black*, 68 Miss. 161, 8 So. 332, 11 L. R. A. 176, 24 Am. St. Rep. 259; *Lowrance v. Robertson*, 10 S. C. 8; *Lewis v. Ross*, 95 Tex. 358, 67 S. W. 405; *Hollingsworth v. Mexia*,

14 Tex. Civ. App. 363, 37 S. W. 455; *Rogers v. Golson*, (Tex. Civ. App.) 31 S. W. 200.

50. *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. 464; *Taylor v. Wallace*, 20 Colo. 211, 46 Am. St. Rep. 285, 37 Pac. 963; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Moore v. Frankenfield*, 25 Minn. 540; *Dickson v. Desire*, 23 Mo. 166; *Williams v. Beeman*, 2 Dev. L. (13 N. C.) 483; *Mette v. Dow*, 9 Lea (Tenn.) 93; *Whitzman v. Hirsh*, 87 Tenn. 513, 11 S. W. 421; *Eaton v. Lyman*, 26 Wis. 61, 7 Am. Rep. 39.

51. *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. 464; *Taylor v. Wallace*, 20 Colo. 211, 46 Am. St. Rep. 285, 37 Pac. 963; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Moore v. Frankenfield*, 25 Minn. 540; *Dickson v. Desire*, 23 Mo. 166; *Williams v. Beeman*, 2 Dev. L. (S. C.) 483; *Whitzman v. Hirsh*, 87 Tenn. 513, 11

§ 456. **Covenants running with the land.** The benefit of a covenant for title until breach runs with the land.⁵² Upon breach, the covenant is changed into a mere personal right of action, to be enforced by the person entitled to the benefit of the covenant at the time of the breach, or, in case of his death, his personal representative, and not passing with the land to his heir, or to his grantee, unless there is an express assignment of the right of action.⁵³

Since covenants for quiet enjoyment and of warranty are not broken until an interference with the use and enjoyment occurs, such a covenant may be enforced by any person to whom, after the making of the covenant and before such interference, the land may have passed, whether a grantee of the covenantee, his heir, or his devisee,⁵⁴ while one to whom the land passes after such interference has no right of action by reason

S. W. 421; *Eaton v. Lyman*, 26 Wis. 61, 7 Am. Rep. 39.

52. Rawle, *Covenants*, § 205.

53. *Lewis v. Ridge*, Cro. Eliz. 863; *Lucy v. Levington*, 2 Lev. 26; *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91; *Pinckard v. American Freehold Land Mortgage Co.*, 143 Ala. 568, 39 So. 350; *Davis v. Lyman*, 6 Conn. 249; *Ladd v. Noyes*, 137 Mass. 151; *Davidson v. Cox*, 10 Neb. 150 4 N. W. 1035; *Adams v. Conover*, 87 N. Y. 422; *Geiszler v. De Graaf*, 166 N. Y. 339, 82 Am. St. Rep. 659, 59 N. E. 993; *Wesco v. Kern*, 36 Ore. 433, 59 Pac. 548, 60 Pac. 563; *Provident Life & Trust Co. v. Fiss*, 147 Pa. St. 232, 23 Atl. 560; *Clement v. Bank of Rutland*, 61 Vt. 298, 4 L. R. A. 425, 17 Atl. 717; *McConaughy v. Bennett's Ex'rs*, 50 W. Va. 172, 40 S. E. 540.

54. *Deason v. Findley*, 145 Ala.

407, 40 So. 220; *Gibbons v. Moore*, 98 Ark. 501, 136 S. W. 937; *Redwine v. Brown*, 10 Ga. 311; *Claycomb v. Munger*, 51 Ill. 373; *Pence v. Rhonemus*, 58 Ind. App. 268, 108 N. E. 129; *Wyman v. Ballard*, 12 Mass. 304; *Libby v. Hutchinson*, 72 N. H. 190, 55 Atl. 547; *Suydam v. Jones*, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; *Keyes & Marshall Bros. Realty Co. v. Trustees of Canton Christian College*, 205 N. Y. 593, 98 N. E. 1105; *King v. Kerr's Adm'rs*, 5 Ohio, 154, 22 Am. Dec. 777; *Arnold v. Joines*, 50 Okla. 4, 150 Pac. 130; *Lawrence v. Senter*, 4 Sneed (Tenn.) 52; *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95; *McConaughy v. Bennett's Ex'rs*, 50 W. Va. 172, 40 S. E. 540; *Patterson v. Cappon*, 125 Wis. 198, 102 N. W. 1083; Rawle, *Covenants*, § 213 *et seq.*

of his ownership of the land.⁵⁵ It appears to be the rule, however, in a number of states, that the benefit of the covenant will not pass unless the covenantor,⁵⁶ or the covenantee,⁵⁷ was in possession of the land at the time of his transfer thereof, such possession being regarded as involving an interest in the land,⁵⁸ to which the covenant can be regarded as adhering, while in the absence of such possession the attempted conveyance by the covenantee, with a paramount title outstanding, transfers no interest whatsoever with which the covenant can run.

The covenants of seisin and of right to convey,⁵⁹

55. *Gulf Coal & Coke Co. v. Musgrove*, 195 Ala. 219, 70 So. 179; *De Long v. Spring Lake Beach Imp. Co.*, 74 N. J. L. 250, 66 Atl. 591; *Thompson v. Richmond*, 102 Me. 335, 66 Atl. 649; *Smith v. Richards*, 155 Mass. 79, 28 N. E. 1132; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593.

56. *Wilson v. Widenham*, 51 Me. 566; *Slater v. Rawson*, 1 Metc. (Mass.) 450, 6 Id. 439; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. 142; *Iowa Loan & Trust Co. v. Fullen*, 114 Mo. App. 633, 91 S. W. 58; *Mygatt v. Coe*, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521; *Bull v. Beiseker*, 16 N. Dak. 290, 14 L. R. A. (N. S.) 514, 113 N. W. 870; *H. T. & C. Co. v. Whitehouse*, 47 Utah, 323, 154 Pac. 950; *Dickinson v. Hoomes*, 8 Gratt. (Va.) 353, 399; *McDonald v. Rothgeb*, 112 Va. 749, 72 S. E. 692; *Wallace v. Perelles*, 109 Wis. 316, 53 L. R. A. 644, 83 Am. St. Rep. 898, 85 N. W. 371. See *Solberg v. Robinson*, 34 S. Dak. 55, 147 N. W. 87.

57. *Wead v. Larkin*, 54 Ill.

489, 5 Am. Rep. 149; *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302.

58. The idea, though not so expressed by the courts, appears to be closely analogous to that of the tortious fee acquired by a disseisor. See *ante*, § 15.

59. *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136; *Lawrence v. Montgomery*, 37 Cal. 188; *Mitchell v. Warner*, 5 Conn. 498; *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650; *Thompson v. Richmond*, 102 Me. 335, 66 Atl. 649; *Sears v. Broady*, 66 Neb. 207, 92 N. W. 214; *Chapman v. Holmes' Ex'rs*, 10 N. J. L. 20; *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; *Mygatt v. Coe*, 124 N. Y. 212, 11 L. R. A. 646, 26 N. E. 611; *Eames v. Armstrong*, 142 N. Car. 506, 55 S. E. 405; *Brady v. Bank of Commerce of Coweta*, 41 Okla. 473, Ann. Cas. 1915B, 1019, 138 Pac. 1020; *Solberg v. Robinson*, 34 S. Dak. 55, 147 N. W. 87; *Clement v. Bank of Rutland*, 61 Vt. 298, 4 L. R. A. 425, 17 Atl. 717.

and also the covenant against incumbrances,⁶⁰ have, in the majority of the states, been regarded as not running with the land, the theory being that they involve stipulations that a certain state of things exists at the time of the conveyance, and that the nonexistence thereof involves an immediate breach. In some states, however, a different view has been adopted as to these covenants,⁶¹ it being considered that, even though a technical breach be regarded as occurring at the time of the conveyance, this does not prevent the covenant from running until a breach occurs which involves substantial damage, and this view, which accords in result with that adopted in England,⁶² has been favored by the text book writers, as conducing to the efficiency of the covenants and presumably harmonizing with the purpose of their introduction, that of affording indemnity to persons claiming under the covenantee as well as to the covenantee himself.⁶³ In some states a similar

60. *Turner v. Lawson*, 144 Ala. 432, 39 So. 755; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335; *Mitchell v. Warner*, 5 Conn. 498; *Thompson v. Richmond*, 102 Me. 335, 66 Atl. 649; *Clark v. Swift*, 3 Metc. (Mass.) 390; *Simonds v. Diamond Match Co.*, 159 Mich. 241, 123 N. W. 1132; *Blondeau v. Sheridan*, 81 Mo. 545; *Bryant v. Mosher*, 96 Neb. 555, 148 N. W. 329; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Carter v. Denman's Ex'rs.*, 23 N. J. L. 260; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909.

61. Covenants of seisin and right to convey. *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Dehority v. Wright*, 101 Ind. 382; *Schofield v. Iowa Homestead Co.*, 32 Iowa, 318, 7 Am. Rep. 197;

Sturgis v. Slocum, 140 Iowa, 25, 116 N. W. 128; *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442; *Mecklem v. Blake*, 22 Wis. 495; Covenants against incumbrances. *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Hunt v. Marsh*, 80 Mo. 396; *Foote v. Burnet*, 10 Ohio, 317; *Cole v. Kimball*, 52 Vt. 639; *In re Hamlin's Estate*, 133 Wis. 140, 113 N. W. 411. See *Post v. Compau*, 42 Mich. 90.

62. *Kingdon v. Nottle*, 1 Maule & S. 355; *King v. Jones*, 5 Taunt. 418, *Kingdon v. Nottle*, 4 Maule & S. 53.

63. See *Rawle, Covenants*, §§ 208, 212; 1 *Smith's Leading Cases*, Amer. notes, p. 221; 4 *Kent, Comm.* 472; editorial note 15 *Harv. Law Rev.* 150. Compare note 6 *Mich. Law Rev.* 254.

result has been attained on the theory that the right of action for the breach which immediately occurs is transferred by the covenantor's subsequent conveyance, unless a contrary intention appears, so as to enable the transferee to bring suit on the covenant, either in his own name,⁶⁴ or in that of the covenantor.⁶⁵ Occasionally a statute specifically provides for the running of such covenants.⁶⁶

A covenant for further assurance is not regarded as broken until damage has been caused by refusal to furnish the assurance, and there is consequently a right of action on such covenant in favor of one to whom the land passes before such refusal.⁶⁷

The right of a remote grantee to sue upon a covenant of title as running with the land is not affected by the fact that he also has a right of action on a covenant made directly with himself by his immediate grantor.⁶⁸

In order to avoid the possibility of two or more judgments against the covenantor on account of the same breach in favor of successive owners of the land, the rule has been laid down and generally adopted that neither the covenantor nor a subsequent owner, after parting with the land, can recover on the covenant until he has himself been compelled to pay damages on

64. *Tucker v. McArthur*, 103 Ga. 409, 30 S. E. 283; *Security Bank of Minnesota v. Holmes*, 65 Minn. 531, 60 Am. St. Rep. 495, 68 N. W. 113; *Kimball v. Bryant*, 25 Minn. 496; *Coleman v. Luckinger*, 224 Mo. 1, 123 S. W. 441; *Geiszler v. De Graaf*, 166 N. Y. 339, 82 Am. St. Rep. 659, 59 N. E. 993; *Hall v. Paine*, 14 Ohio St. 417. See *Arnold v. Joines*, 50 Okla. 4, 150 Pac. 130.

65. *Rawle, Covenants*, § 226. See *Peters v. Bowman*, 98 U. S. 59, 25 L. Ed. 91; *Newman v. Sevier*, 134 Ill. App. 544; *Cole v. Kimball*, 52 Vt. 643. As to a

suit on a covenant against incumbrances in the name of the assignor, and the difficulties of pleading therein, see *Rawle, Covenants*, § 227.

66. *Rawle, Covenants*, § 211.

67. *Rawle, Covenants*, § 230; *Bennett v. Waller*, 23 Ill. 97; *Collier v. Gamble*, 10 Mo. 467; *Colby v. Osgood*, 29 Barb. (N. Y.) 339.

68. *Withy v. Mumford*, 5 Cow. (N. W.) 137, 607; *Markland v. Crump*, 18 N. C. 101, 27 Am. Dec. 101, 27 Am. Dec. 230; *Rawle, Covenants*, § 215.

his own covenant, in favor of one claiming under him, this being regarded as tantamount to an eviction.⁶⁹

The covenantee or other owner of the land cannot, unless in special cases, after having conveyed the land, release the covenant, so as to affect the right of his grantee to sue thereon,⁷⁰ and it has been suggested that such a release by the covenantee, even though made by him while owner of the land, does not affect the right of action in favor of a subsequent transferee of the land who takes without notice, actual or constructive, of the release.⁷¹

V. EXECUTION OF THE CONVEYANCE.

§ 457. **Signing.** At common law, a written transfer of land was always sealed, but not signed. In England, the better opinion is that the requirement in the Statute of Frauds that the writing be signed does not apply to a sealed instrument.⁷² In this country,

69. *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233; *Redwine v. Brown*, 10 Ga. 311; *Thompson v. Richmond*, 102 Me. 335, 66 Atl. 649; *Wheeler v. Sohler*, 3 Cush. (Mass.) 222; *Simonds v. Diamond Match Co.*, 159 Mich. 241, 123 N. W. 1132; *Allis v. Foley*, 126 Minn. 14, 147 N. W. 670; *Chase v. Weston*, 12 N. H. 413; *Withy v. Mumford*, 5 Cow. (N. Y.) 137; *Markland v. Crump*, 18 N. C. 94, 27 Am. Dec. 230; *Clement v. Bank of Rutland*, 61 Vt. 298, 4 L. R. A. 425, 17 Atl. 717.

70. *Abby v. Goodrich*, 3 Day (Conn.) 433; *Claycomb v. Munger*, 51 Ill. 373; *Crooker v. Jewell*, 29 Me. 527; *Chase v. Weston*, 12 N. H. 413.

71. See *Claycomb v. Munger*, 51 Ill. 373; *Susquehanna & Wyo-*

ming Valley Railroad & Coal Co. v. Quick, 61 Pa. St. 339; *Field v. Snell*, 4 Cush. (Mass.) 504. *Contra*, see *Littlefield v. Getchell*, 32 Me. 392.

72. *Cherry v. Heming*, 4 Exch. 631; *Cooch v. Goodman*, 2 Q. B. 580, 597; *Aveline v. Whisson*, 4 Man. & G. 801; 3 *Preston*, Abstracts, 61; *Challis*, Real Prop. (3rd ed.) 404. The statute in terms (29 Car. II. c. 3, § 1) provides that all leases, estates, interests of freehold, terms of years, etc., "made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only."

however, a state statute requiring a signed writing for the transfer of an interest in land has been construed as requiring the writing to be signed, although it be sealed.⁷³ In the absence of a statutory requirement that the instrument be "subscribed" by the grantor, the signature may, it has been held, be in any part thereof.⁷⁴

The signing may be by mark, although the person so signing is able to write,⁷⁵ or may be by the hand of another person in the grantor's presence.⁷⁶ Even a signature by another, made out of the grantor's presence,⁷⁷ is sufficient if adopted by the grantor, as when he subsequently acknowledges or delivers the instrument as his act and deed.

When the conveyance purports to be by more than one grantor, but all the grantors do not sign, the signatures of those that do, followed by delivery by them,

73. *Goodman v. Randall*, 44 Conn. 321; *Shillock v. Gilbert*, 23 Minn. 386; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Adams v. Medsker*, 25 W. Va. 127.

74. *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *Smith v. Howell*, 11 N. J. Eq. 349; *Devereux v. McMahon*, 108 N. C. 134, 12 L. R. A. 205, 12 S. E. 902; *Saunders v. Hackney*, 10 Lea (Tenn.) 194; *Newton v. Emerson*, 66 Tex. 142.

75. *Meazels v. Martin*, 93 Ky. 50, 18 S. W. 1028; *Devereux v. McMahon*, 108 N. C. 134, 12 L. R. A. 205; *Truman v. Lore's Lessee*, 14 Ohio St. 144; *Mackay v. Easton*, 19 Wall. (U. S.) 619, 22 L. Ed. 211.

76. *Lewis v. Watson*, 98 Ala. 497, 22 L. R. A. 297, 39 Am. St. Rep. 82, 13 So. 570; *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec.

84; *Middlesboro Waterworks v. Neal*, 105 Ky. 586, 49 S. W. 428; *Bird v. Decker*, 64 Me. 550; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *McMurtry v. Brown*, 6 Neb. 368; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Lee v. Parker*, 171 N. C. 144, 88 S. E. 217; *Hays v. Hays*, 6 Pa. St. 368.

77. *McClendon v. Equitable Mortgage Co.*, 122 Ala. 384, 122 So. 30; *O'Neal v. Judsonia State Bank*, 111 Ark. 589, 164 S. W. 295; *Chivington v. Colorado Springs Co.*, 9 Colo. 597; *Ford v. Ford*, 27 App. D. C. 401; *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506; *Hailey First Nat. Bank v. Glenn*, 10 Idaho, 224, 109 Am. St. Rep. 204; *Kerr v. Russell*, *Nye v. Lowry*, 82 Ind. 316; 69 Ill. 666, 18 Am. Rep. 634; *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92;

will be sufficient to divest their interest,⁷⁸ unless their delivery was conditional upon signature by the others.⁷⁹

§ 458. Sealing—Necessity. At common law, the only recognized mode of authenticating a written instrument was by sealing, and consequently any conveyance in use at the present day which takes effect by the common law, such as a grant of a right in another's land, or a release, must be under seal, in the absence of a statutory provision to the contrary.⁸⁰

In a number of the states, by express provision of statute, seals are no longer necessary, and the presence of a seal on a conveyance does not affect the acquisition of rights thereunder.⁸¹ In other states there is an express requirement that a transfer of an interest in land shall be under seal.⁸²

Since, after the passage of the Statute of Uses, a conveyance by bargain and sale might be oral, the mere payment of a consideration being sufficient to raise a use, which the statute would execute,⁸³ and since moreover, the Statute of Enrollments, passed in recognition of this fact, and requiring a bargain and sale to be by writing under seal and enrolled, has been

Conlan v. Grace, 36 Minn. 276;
Pierce v. Hakes, 23 Pa. St. 231;
Newton v. Emerson, 66 Tex. 142;

78. Colton v. Leavey, 22 Cal. 496;
Jackson v. Sanford, 19 Ga. 14;
Scott v. Whipple, 5 Me. 336;
Harrelson v. Sarvis, 39 S. C. 14,
17 S. E. 368.

79. Johnson v. Brook, 31 Miss. 17;
Arthur v. Anderson, 9 Rich. (S. C.) 234;
Haskins v. Lombard, 16 Me. 140, 33 Am. Dec. 645.
See *Post*, § 462.

80. Somerset v. Fogwell, 5 Barn. & C. 875;
Wood v. Lead-bitter, 13 Mees. & W. 838;
Hewlins v. Shippam, 5 Barn. & C. 229;
Arnold v. Stevens, 24 Pick. (Mass.) 109, 35 Am. Dec. 305;

Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484;
Huff v. McCauley, 53 Pa. St. 206, 91 Am. Dec. 203;
Cagle v. Parker, 97 N. C. 271, 2 S. E. 76.

81. 1 Stimson's Am. St. Law, § 1564 (B). See Wisdom v. Reeves, 110 Ala. 418, 18 So. 13;
Pierson v. Armstrong, 1 Iowa, 283, 63 Am. Dec. 440;
Jerome v. Ortman, 66 Mich. 668;
Gibbs v. McGuire, 70 Miss. 646, 12 So. 829.

82. 1 Stimson's Am. St. Law, § 1564 (A).

83. Challis, Real Prop. 419, 420; Williams, Real Prop. (18th Ed.) 196; 1 Hayes, Conveyancing (5th Ed.) 76. See *ante*, § 428.

generally regarded as not in force in this country, it would seem that a seal is unnecessary, in the absence of a state statute to the contrary, in the case of a conveyance taking effect under the Statute of Uses or under a state statute. In a number of the states, however, it has been decided or assumed that, even in the absence of a local statutory requirement, a seal is necessary, this view being sometimes based upon the assumption that a conveyance of land is necessarily a "deed," which, since a deed means a sealed instrument, assumes the very point in question.⁸⁴

Even when a seal is necessary to convey the legal title, an unsealed conveyance will be effective in equity, it being there regarded as a contract for a conveyance, specifically enforceable.⁸⁵

— **Sufficiency.** At common law, an instrument was sealed, usually, at least, by impressing some device upon wax, which was made to adhere to the paper;⁸⁶ but at the present day an impression made by stamping upon the paper on which the instrument is written,⁸⁷ or

84. *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Barrett v. Hinckley*, 270 Ill. 298, 110 N. E. 359; *Osby v. Reynolds*, 260 Ill. 576, 103 N. E. 556; *Switzer v. Knapps*, 10 Iowa. 72, 74 Am. Dec. 375; *McLaughlin v. Randall*, 66 Me. 226; *Colvin v. Warford*, 20 Md. 357; *Robinson v. Noel*, 49 Miss. 253; *Jackson v. Hart*, 12 Johns. (N. Y.) 77. In *Underwood v. Campbell*, 14 N. H. 393, it seems to be considered that the Statute of Enrollments is in force in New Hampshire.

85. *Switzer v. Knapps*, 10 Iowa, 72, 74 Am. Dec. 375; *Jewell v. Harding*, 72 Me. 124; *McCarley v. Tippah County Sup'rs*, 58 Miss. 483; *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *First*

Nat. Bank of North Bend v. Gage, 71 Ore. 373, 142 Pac. 539; *Brinkley v. Bethel*, 9 Heisk. (Tenn.) 786; *Frost v. Wolf*, 77 Tex. 455, 19 Am. St. Rep. 761; *Garten v. Layton*, 76 W. Va. 63, 84 S. E. 1058.

86. 3 Co. Inst. 169.

87. *Sugden, Powers* (8th Ed.) 232; *Pillow v. Roberts*, 13 How. (U. S.) 472; *Pillow v. Roberts*, 12 Ark. 822; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *Allen v. Sullivan R. Co.*, 32 N. H. 446; *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 52. *Contra*, *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 227; *Warren v. Lynch*, 5 Johns. (N. Y.) 239. See 1 Am. Law Rev. at p. 638.

even a paper wafer or piece of paper gummed on the face of the instrument,⁸⁸ is usually regarded as sufficient. By statute in many states, a mere scroll or any other device marked on the paper on which the conveyance is written is sufficient,⁸⁹ and in other states a similar view has been taken, in the absence of any express statute.⁹⁰ So, the writing of the word "Seal" in connection with the signature has been regarded as a sufficient sealing.⁹¹

A recital in the instrument that it is sealed is not necessary in order to make the sealing effective, if there is actually a seal.⁹² In a few decisions, however, a different view has been taken when the alleged seal consisted of merely a scroll or other device which did not of itself show that it was affixed as a seal.⁹³ A statement in the instrument that it is sealed will not be sufficient as a substitute for a seal.⁹⁴

88. *Tasker v. Bartlett*, 5 Cush. (Mass.) 359; *Turner v. Field*, 44 Mo. 382; *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 52.

89. 1 *Stimson's Am. St. Law*, § 1565.

90. *Trasher v. Everhart*, 3 Gill. & J. (Md.) 246; *Hudson v. Poindexter*, 42 Miss. 304; *Hacker's Appeal*, 121 Pa. St. 192; *Jones v. Logwood*, 1 Wash. (Va.) 42. *Contra*, *McLaughlin v. Randall*, 66 Me. 226; *Bates v. Boston & N. Y. C. R. Co.*, 10 Allen (Mass.) 251; *Douglas v. Oldham*, 6 N. H. 150; *Warren v. Lynch*, 5 Johns. (N. Y.) 239.

91. *Cochran v. Stewart*, 57 Minn. 499, 59 N. M. 543; *Whiteley v. Davis' Lessee*, 1 Swan (Tenn.) 333. The word "Seal" within a scroll has been decided to be sufficient in some cases. *Hastings v. Vaughn*, 5 Cal. 315; *Miller v. Binder*, 28 Pa. St. 489;

English v. Helms, 4 Tex. 228. *Contra*, *Beardsley v. Knight*, 4 Vt. 471.

92. *Wing v. Chase*, 35 Me. 260; *Devereux v. McMahon*, 108 N. C. 134, 12 L. R. A. 205, 12 S. E. 902; *Proprietors of Mill Dam Foundry Co. v. Hovey*, 21 Pick. (Mass.) 417, 428; *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502; *Comyns, Dig. "Fait"* (A 2).

93. *Bohannon v. Hough*, 1 Miss. 461; *Cromwell v. Tate's Ex'r*, 7 Leigh (Va.) 301, 30 Am. Dec. 506; *Corlies v. Vannote*, 16 N. J. L. 324; *Carter v. Penn*, 4 Ala. 140. And see *Buckingham v. Orr*, 6 Colo. 587. Compare *Ashwell v. Ayres*, 4 Grat. (Va.) 283.

94. *Armstrong v. Pearce*, 5 Harr. (Del.) 551; *Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *McPherson v. Reese*, 58 Miss. 749; *Patterson v. Galliher*, 122 N. C. 511, 29 S. E. 773; *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502;

The seal need not, and in fact usually is not, affixed at the same time as or after the signing of the instrument, it being sufficient that the party adopts, expressly or impliedly, the seal already placed on the paper.⁹⁵ So, each of the parties executing the instrument need not have a separate seal, one seal being sufficient if adopted by all the parties signing.⁹⁶

§ 459. **Witnesses.** In some states witnesses, usually two in number, are necessary in order to make a conveyance valid as between the parties thereto. In other states, no witnesses are required, while in some, though witnesses are not necessary to render the conveyance valid as between the parties, they are necessary for the purpose of proving the deed for record, in the absence of an acknowledgment by the grantor.⁹⁷

The witness need not be present at the actual signing of the instrument by the grantor, provided the latter acknowledges to him that it is his act, and expressly or impliedly requests him to attest the instrument.⁹⁸ The witnesses must sign the instrument, their signatures being usually placed under a clause, "Signed, sealed, and delivered in the presence of" or some other expression which serves to show the purpose of their signature being used.⁹⁹

Mitchell v. Parham, Harp. (S. C.) 3; Davis v. Judd, 6 Wis. 85; Burnette v. Young, 107 Va. 184.

95. Sheppard's Touchstone, 54, 57; Reg. v. Inhabitants of St. Paul, 7 Q. B. 232; Ball v. Dunsterville, 4 Term R. 313; Ashwell v. Ayres, 4 Grat. (Va.) 283.

96. Carter v. Chandron, 21 Ala. 88; Davis v. Burton, 4 Ill. 41, 36 Am. Dec. 511; Bradford v. Randall, 5 Pick. (Mass.) 496; Lunsford v. La Motte Lead Co., 54 Mo. 426; Northumberland v. Cobleigh, 59 N. H. 250; Pickens v. Rymer, 90 N. C. 283, 47 Am. Rep.

521; Bowman v. Robb, 6 Pa. St. 302; Lambden v. Sharp, 9 Humph. (Tenn.) 224; Yale v. Flanders, 4 Wis. 96.

97. 1 Stimson's Am. St. Law, § 1566.

98. Jackson v. Phillips, 9 Cow. (N. Y.) 94, 113; Tate v. Lawrence, 11 Heisk. (Tenn.) 503; Clements v. Pearce, 63 Ala. 284; Mulloy v. Ingalls, 4 Neb. 115. See Little v. White, 29 S. C. 170; Poole v. Jackson, 66 Tex. 380, 1 S. W. 75; 1 Stimson's Am. St. Law, § 1567.

99. The signature of the wit-

The statutes have usually been construed as requiring that the witness be competent, at the time of his attestation of the conveyance, to testify in regard to its execution in case of litigation between the parties, with the result that his attestation is of no effect for the purpose of validating the conveyance, if he is not so competent.¹⁻²

§ 460. Acknowledgment. In some states the statute requires a conveyance to be acknowledged by the grantor before an official in order to make it effective even as between the parties,³ and in a number of states an acknowledgment is necessary to the validity of a conveyance by a married woman. More usually, however, the requirement of acknowledgment is imposed only as a preliminary to the record of a conveyance, for the purpose of charging a subsequent purchaser with notice thereof,⁴ with the result that the record of a

ness, it has been decided, may be by mark. *Brown v. McCormick*, 28 Mich. 215; *Devereux v. McMahon*, 102 N. C. 284, 9 S. E. 635.

1-2. So it has been held that one having a pecuniary interest in the conveyance is disqualified. *Winsted Sav. Bank & Building Ass'n v. Spencer*, 26 Conn. 195; *Child v. Baker*, 24 Neb. 138. And a grantor cannot witness the execution of the instrument by his co-grantor. *Townsend v. Downer*, 27 Vt. 119.

A wife or husband of a grantor has also been regarded as disqualified. *Third Nat. Bank of Chattanooga v. O'Brien*, 94 Tenn. 38, 28 S. W. 293; *Johnston v. Slater*, 11 Grat. (Va.) 321; *Corbett v. Norcross*, 35 N. H. 99. But in some cases it has been held that the witness need not be competent to testify at the

time of its execution, provided he can testify when called to prove the execution in court. *Frink v. Pond*, 46 N. H. 125; *Doe d. Johnson v. Turner*, 7 Ohio, 216, pt. 2.

3. See *Lewis v. Herrera*, 10 Ariz. 74, 85 Pac. 245; *Parrott v. Kumpf*, 102 Ill. 423; *Hout v. Hout*, 20 Ohio St. 119.

4. 1 *Stimson's Am. Stat. Law*, § 1570.

5. See *e g.*; *Green v. Abraham*, 43 Ark. 420; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549; *Edwards v. Thorn*, 25 Fla. 222, 5 So. 707; *New England Mortgage Security Co. v. Ober*, 84 Ga. 294, 10 S. E. 625; *Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780; *Graves v. Graves*, 6 Gray (Mass.) 391; *Thompson v. Scheid*, 39 Minn. 102, 12 Am. St. Rep. 619, 38 N. W. 801; *Ligon v. Barton*,

conveyance not properly acknowledged will have no such effect.⁵ The acknowledgment has, moreover, in a number of states, the effect of rendering the conveyance admissible in evidence without further proof of its execution.⁶

— **Qualifications of officer.** The statute ordinarily requires the acknowledgment to be made, if within the state, before a judge, clerk of court, justice of the peace, or notary public. The provisions of the statutes as to acknowledgment in another state sometimes provide that it may be taken by named classes of officials of the latter state, sometimes by commissioners of deeds appointed for such state, and sometimes by any officials of the other state authorized by the statutes of such state to take acknowledgments. The statutes also contain, almost invariably, specific provisions as to the officials who may take acknowledgments in foreign countries for use in the state in which the statute is passed.

It is generally agreed that an officer who is beneficially interested in the transaction cannot take an acknowledgment.⁷ Consequently the grantee cannot take the grantor's acknowledgment,⁸ nor can either the

88 Miss. 135, 40 So. 555; *Finley v. Babb*, 173 Mo. 257, 73 S. W. 180; *Brown v. Manter*, 22 N. H. 468; *Bradley v. Walker*, 138 N. Y. 291, 33 N. E. 1079; *Geneseo First Nat. Bank v. National Live Stock Bank*, 13 Okla. 719, 76 Pac. 130; *Watts v. Whetstone*, 79 S. C. 357, 60 S. E. 703.

6. 1 *Stimson's Am. St. Law*, § 1572; 4 *Wigmore, Evidence*, § 1676.

7. But in Tennessee, apparently, interest does not disqualify one to take an acknowledgment. *Cooper v. Hamilton Perpetual Bldg. etc. Ass'n*, 97 Tenn. 285, 33 L. R. A. 338, 56 Am. St. Rep. 795, 37 S. W. 12.

There is authority for the view that interest does not disqualify if there is no other officer who can take the acknowledgment. *Stevenson v. Brasher*, 90 Ky. 23, 13 S. W. 242; *Lewis v. Curry*, 74 Mo. 49. *Contra, semble*, *Hammers v. Dole*, 61 Ill. 307.

8. *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549; *Brereton v. Bennett*, 15 Colo. 254; *Hogans v. Carruth*, 18 Fla. 587; *Florida Savings Bank & Real Estate Exchange v. Rivers*, 36 Fla. 575, 18 So. 850; *Hammers v. Dole*, 61 Ill. 307; *West v. Krebaum*, 88 Ill. 263; *Wilson v. Traer*, 20 Iowa, 231; *Greenlee v. Smith*, 4 Kan. App. 733, 46 Pac. 543;

trustee in,⁹ or a beneficiary under,¹⁰ a deed of trust take the acknowledgment of the grantor therein. Whether one grantor can take the acknowledgment of his coganter appears to be uncertain.¹¹ By the weight of authority an officer is disqualified to take an acknowledgment in which a corporation is beneficially interested if he is a stockholder therein,¹² but not if

Beaman v. Whitney, 20 Me. 413; Laprad v. Sherwood, 79 Mich. 520, 44 N. W. 943; Wasson v. Connor, 54 Miss. 351; Hailey v. Alberry, 73 Mo. 427; Amick v. Woodworth, 58 Ohio St. 86, 50 N. E. 437; Hunton v. Wood, 100 Va. 54, 43 S. E. 186.

But in Murray v. Tulare Irrigation Co., 120 Cal. 311, 49 Pac. 463, 52 Pac. 586, it was held that an acknowledgment taken by one of several grantees, each of whom took "a separate and defined interest" was good as to all the grantees except that one. And in Darst v. Gale, 83 Ill. 136, a substantially similar view was taken as to an acknowledgment before one of several trustees to whom a mortgage was made.

9. Muense v. Harper, 70 Ark. 309, 67 S. W. 869; Darst v. Dale, 83 Ill. 136; Holden v. Brimāge, 72 Miss. 228, 18 So. 383; German American Bank v. Carondelet Real Estate Co., 150 Mo. 570, 51 S. W. 691; Lance v. Tainter, 137 N. C. 249, 49 S. E. 211; Rothschild v. Daugher, 85 Tex. 332, 16 L. R. A. 719, 34 Am. St. Rep. 811, 20 S. W. 142; Bowden v. Parrish, 86 Va. 67, 19 Am. St. Rep. 873, 9 S. E. 616; Hunton v. Wood, 101 Va. 54, 43 S. E. 186. *Contra*, Weidman

v. Templeton, (Tenn. Ch. App.) 61 S. W. 102.

10. Wasson v. Connor, 54 Miss. 351; Long v. Crews, 113 N. Car. 256, 18 S. E. 499; Baxter v. Howell, 7 Tex. Civ. App. 198, 26 S. W. 453.

11. That he can do so, see Greve v. Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904. *Contra*, People v. Railroad Comm'rs, 105 N. Y. App. Div. 273, 93 N. Y. Supp. 584 (certificate of incorporation).

12. Hayes v. Southern Home Bldg, etc., Ass'n, 124 Ala. 663, 82 Am. St. Rep. 216, 26 So. 527; Ogden Bld'g, etc., Ass'n v. Mensch, 196 Ill. 554, 63 N. E. 1049; Steger v. Travelling Men's Bldg etc., Ass'n, 208 Ill. 236, 100 Am. St. Rep. 225, 70 N. E. 236; Kothe v. Krag Reynolds, 20 Ind. App. 293, 50 N. E. 594; Smith v. Clark, 100 Iowa, 605, 69 N. W. 1011; Wilson v. Griess, 64 Neb. 792, 90 N. W. 866; Bexar Bldg. etc., Ass'n v. Heady, 21 Tex. Civ. App. 154, 50 S. W. 1079, 57 S. W. 583; Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624.

That a stockholder is not disqualified to take the acknowledgment of a mortgage to the corporation, see Read v. Toledo Loan Co., 68 Ohio St. 280, 62

he is a corporate officer and not a stockholder.¹³ One is not disqualified merely because he is the attorney,¹⁴ or the agent or employee, of an interested party.¹⁵ Nor is one disqualified to take an acknowledgment by the fact that he is related to an interested party,¹⁶ and even the husband of the grantee, it has been decided, may take the grantor's acknowledgment.¹⁷

— **Duties of officer.** The officer, in taking the acknowledgment, must comply with all the requirements of the statute. The statute invariably requires him to satisfy himself as to the identity of the person making the acknowledgment, and occasionally provides the manner in which he shall so satisfy himself, as by sworn witnesses. In the absence of any prescribed method of satisfying himself of the grantor's identity, the sufficiency of the acknowledgment cannot be questioned because the officer acts merely on an introduction by a

L. R. A. 338, 56 Am. St. Rep. 663, 67 N. E. 29. And this though the stockholder was also an officer of the corporation *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572; *Cooper v. Hamilton Perpetual Building & Loan Ass'n*, 97 Tenn. 285, 33 L. R. A. 338, 56 Am. St. Rep. 795, 37 S. W. 12.

13. *Woodland Bank v. Oberhaus*, 125 Cal. 320, 57 Pac. 1070; *Florida Sav. Bank v. Rivers*, 36 Fla. 577, 18 So. 850; *Horbach v. Tyrrell*, 48 Neb. 514, 37 L. R. A. 434, 67 N. W. 485; *Ogden Bldg & Loan Ass'n v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049; *Bardsley v. German American Bank*, 113 Iowa, 216, 84 N. W. 1041; *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572, 73 Pac. 680.

14. *Brown v. Parker*, 97 Fed. 446, 38 C. C. A. 261; *Bierer v.*

Fretz, 32 Kan. 329, 4 Pac. 284; *Helena First Nat. Bank v. Roberts*, 9 Mont. 323, 23 Pac. 718; *Havemeyer v. Dahn*, 48 Neb. 536, 33 L. R. A. 332, 58 Am. St. Rep. 706, 67 N. W. 489.

15. *Castetter v. Stewart*, 70 Neb. 815, 98 N. W. 34; *Wachovia Nat. Bank v. Ireland*, 122 N. C. 571, 29 S. E. 835; *Penn v. Garvin*, 56 Ark. 511, 20 S. W. 410.

16. *Helena First Nat. Bank v. Roberts*, 9 Mont. 323, 23 Pac. 718; *Lynch v. Livingston*, 6 N. Y. 422; *McAllister v. Purcell*, 124 N. C. 262, 32 S. E. 715.

17. *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Nixon v. Post*, 13 Wash. 181, 43 Pac. 23; *Kimball v. Johnson*, 14 Wis. 674 (mortgage). But the contrary has also been decided, in cases in which the grantor whose acknowledgment was taken was a married woman. *Jones v.*

third person,¹⁸ however this may affect the question of his liability for a false certificate in this regard.¹⁹ If the person making the acknowledgment speaks only a foreign language, the officer should employ an interpreter.²⁰

— **Certificate.** The statute almost invariably requires the officer who takes the acknowledgment to write upon, or attach to, the instrument, a certificate of acknowledgment, that is, a statement, under his hand, and ordinarily under his seal, showing that the acknowledgment was made. The certificate must, it is generally recognized, show a compliance with the statutory requirements, and if the statute contains specific provisions as to what the certificate must show, an omission to comply therewith renders it invalid. It must, in most jurisdictions, show the official character of the officer, that the acknowledgment was in fact made before him by the party who executed the instrument, and that such person was personally known to him, or that he was satisfied or informed as to the identity of such person. But the certificate is to be construed with reference to the instrument to which it is appended, and consequently omissions or errors therein, not pertaining to the fact of acknowledgment itself, may usually be corrected by reference to the language of the conveyance.²¹ And, generally speaking, a substantial

Porter, 59 Miss. 628; Silcock v. Baker, 25 Tex. Civ. App. 508, 61 S. W. 939.

18. Nippel v. Hammond, 4 Col. 211; Wood v. Bach, 54 Barb. (N. Y.) 134. See Lindley v. Lindley, 92 Tex. 446, 49 S. W. 573.

19. See Barnard v. Schuler, 100 Minn. 289, 110 N. W. 966; Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131.

20. Norton v. Meader, 4 Sawy. 603; De Arnaz v. Escandon, 59

Cal. 486; Waltee v. Weaver, 57 Tex. 569.

But in Michigan an acknowledgment through an interpreter has been held to be insufficient. Dewey v. Campau, 4 Mich. 565; Harrison v. Oakman, 56 Mich. 390, 23 N. W. 164.

21. Carpenter v. Dexter, 8 Wall. (U. S.) 513; Frederick v. Wilcox, 119 Ala. 355, 72 Am. St. Rep. 925, 24 So. 582; Summer v. Mitchell, 29 Fla. 179, 14 L. R. A. 815, 30 Am. St. Rep. 106, 10 So.

compliance with the statutory requirement is sufficient, an adherence to the actual language of the statute being regarded as unnecessary.²² Oral evidence, however, is not admissible in order to prove an essential fact which was by mistake omitted from the certificate.²³

In some states, by statute, the certificate is merely *prima facie* evidence of the facts which it recites, and its falsity may be shown by extraneous evidence.²⁴ In the absence of such a statutory provision, a certificate of acknowledgment is usually regarded as conclusive in regard to the matters as to which the officer is re-

562; *Milner v. Nelson*, 86 Iowa. 452, 53 N. W. 405; *Kelly v. Rosenstock*, 45 Md. 389; *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58, 33 N. W. 214; *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618; *Claffin v. Smith*, 15 Abb. N. Cas. (N. Y.) 241; *Fuhrman v. London*, 13 Serg. & R. (Pa.) 386, 15 Am. Dec. 608.

22. *Kelly v. Calhoun*, 95 U. S. 710, 24 L. Ed. 544; *Frederick v. Wilcox*, 119 Ala. 355, 72 Am. St. Rep. 925; *Jacoway v. Gault*, 20 Ark. 190; *Goode v. Smith*, 8 Cal. 581; *Wilson v. Russell*, 4 Dak. 376, 31 N. W. 645; *De-launey v. Burnett*, 9 Ill. 454; *Martin v. Davidson*, 3 Bush (Ky.) 572; *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111; *Gross v. Watts*, 206 Mo. 373, 121 Am. St. Rep. 662, 104 S. W. 30; *Torrey v. Thayer*, 37 N. J. L. 339; *Abrams v. Rhoner*, 44 Hun 511; *Etheridge v. Ferebee*, 31 N. C. 312; *Garton v. Hudson-Kimberly Pub. Co.*, 8 Okla. 631; *Jamison v. Jamison*, 3 Whart. (Pa.) 457, 31 Am. Dec. 536; *Timber v. Desparois*, 18 S. D. 587, 101 N. W. 879; *Hughes v. Powers*, 99

Tenn. 480, 15 Lea, 683; *Wilson v. Simpson*, 80 Tex. 279, 16 S. W. 40; *Welles v. Cole*, 6 Gratt. (Va.) 645; *Bensimer v. Fell*, 35 W. Va. 15, 29 Am. St. Rep. 774, 12 S. E. 1078.

23. *Elliott v. Piersol's Lessee*, 1 Pet. (U. S.) 328; *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79; *Ennor v. Thompson*, 46 Ill. 214; *Barnett v. Shackelford*, 6 J. J. Marsh (Ky.) 532, 22 Am. Dec. 100; *Willis v. Gattman*, 53 Miss. 721; *Salt v. Anderson*, 71 Neb. 826, 99 N. W. 678; *Wynne v. Small*, 102 N. C. 133, 8 S. E. 912; *Harty v. Ladd*, 3 Ore. 353; *Looney v. Adamson*, 48 Tex. 619; *Harrisonburg First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740.

24. See *Moore v. Hopkins*, 83 Cal. 270, 17 Am. St. Rep. 248; *Tuten v. Gazan*, 18 Fla. 751; *Carver v. Carver*, 97 Ind. 497; *Peoples Gas Co. v. Fletcher*, 81 Kan. 76, 41 L. R. A. N. S. 1161, 105 Pac. 34; *Romer v. Conter*, 53 Minn. 171, 54 N. W. 1052; *Pierce v. Georger*, 103 Mo. 540, 15 S. W. 848; *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711.

quired to certify,²⁵ but the fact that there was no acknowledgment whatever may be shown in contradiction of the certificate.²⁶ As between the parties, moreover, evidence is always admissible to show that the acknowledgment was obtained by fraud or imposition, in which the grantee participated, or of which he knew,²⁷ but this cannot be shown as against a person ignorant of the fraud,²⁸

25. *Grider v. American Freehold Land Mortg. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58; *Petty v. Grisard*, 45 Ark. 117; *Ford v. Ford*, 27 App. D. C. 401, 6 L. R. A. (N. S.) 442; *Graham v. Anderson*, 42 Ill. 515, 92 Am. Dec. 89; *Johnston v. Wallace*, 53 Miss. 333, 24 Am. Rep. 699; *Pereau v. Frederick*, 17 Neb. 117, 22 N. 235; *Mutual Life Ins. Co. v. Corey*, 135 N. Y. 326, 31 N. E. 1095; *Moore v. Fuller*, 6 Ore. 275, 25 Am. Rep. 524; *Heilman v. Kroh*, 155 Pa. St. 1, 25 Atl. 751; *Ronner v. Welcker*, 99 Tenn. 623, 42 S. W. 439; *Wheelock v. Cavitt*, 91 Tex. 679, 66 Am. St. Rep. 920.

So it has been held that the certificate cannot be impeached by a showing that the acknowledgment was taken by telephone. *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156.

26. *Grider v. American Freehold Land Mortg. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58; *Meyer v. Gossett*, 38 Ark. 377; *Le Mesnager v. Hamilton*, 101 Cal. 533, 40 Am. St. Rep. 81; *Smith v. Ward*, 2 Root (Conn.) 374, 1 Am. Dec. 80; *Lewis v. McGrath*, 191 Ill. 401, N. E. 61 N. E. 135; *Morris v. Sargent*, 18 Iowa, 90; *O'Neil v. Webster*, 150 Mass. 572, 23 N. E. 235; *Spivey v. Rose*, 120 N. C. 163, 26 S. E. 701;

Williams v. Carskadden, 36 Ohio St. 664; *Michener v. Cavender*, 38 Pa. St. 334, 80 Am. Dec. 486; *Wheelock v. Cavitt*, 91 Tex. 679, 66 Am. St. Rep. 920.

27. *Grider v. American Freehold Land Mortg. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58; *Chivington v. Colorado Springs Co.*, 9 Colo. 597; *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537; *Aultman-Taylor Co. v. Frasure*, 95 Ky. 429, 26 S. W. 5; *Central Bank of Frederick v. Copeland*, 18 Md. 305, 81 Am. Dec. 597. *O'Neil v. Webster*, 150 Mass. 572, 23 N. E. 275; *Allen v. Lenoir*, 53 Miss. 321; *Williamson v. Carskadden*, 36 Ohio St. 664; *Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552; *Pierce v. Fort*, 60 Tex. 464.

28. *De Arnaz v. Escandon*, 59 Cal. 486; *Ladew v. Paine*, 82 Ill. 221; *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699; *Moore v. Fuller*, 6 Ore. 272, 25 Am. Rep. 524; *Londen v. Blythe*, 27 Pa. St. 22, 67 Am. Dec. 142; *Pennsylvania Trust Co. v. Kline*, 192 Pa. St. 1, 43 Atl. 401; *Campbell v. Harris Lithia Springs Co.*, 74 S. C. 282, 114 Am. St. Rep. 1001; *Cason v. Cason*, 116 Tenn. 173, 93 S. W. 89; *Pierce v. Fort*, 60 Tex. 464;

at least if a purchaser for value.²⁹

It has been quite frequently decided that, as against a purchaser for value and without notice, if the certificate is regular on its face, it cannot be shown that there was no valid acknowledgment by reason of lack of authority in the officer, as when he was beneficially interested, or that he undertook to act outside of his jurisdiction. The tendency of the later authorities is to regard the instrument as duly acknowledged, for the purpose of making its record effective as constructive notice, in favor of an innocent purchaser, in spite of the existence of such a defect, not apparent on the record or the face of the certificate.³⁰ In a considerable number of decisions, however, any such qualification upon the right to question the validity of the acknowledgment is ignored.³¹

— **By married woman.** In some states, a conveyance in which a married woman joins, whether for the purpose of conveying her own property, or in order to release her rights in her husband's property, must, in order to be effective as against her, be acknowledged

29. *Lewars v. Weaver*, 121 Pa. St. 268, 15 Atl. 514; *Edwards v. Boyd*, 9 Lea (Tenn.) 204.

30. *Ogden Bldg., etc., Ass'n v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049; *Bank of Benson v. Hove*, 45 Minn. 40, 47 N. W. 449; *Stevens v. Hampton*, 46 Mo. 404; *Morrow v. Cole*, 58 N. J. Eq. 203, 42 Atl. 673; *Heilbrun v. Hammond*, 13 Hun 474; *Blanton v. Bostic*, 126 N. C. 418, 35 S. E. 1035; *Ardmore National Bank v. Briggs*, 20 Okla. 427, 23 L. R. A. (N. S.) 1074, 94 Pac. 533; *Peterson v. Lowry*, 48 Tex. 408; *Corey v. Moore*, 86 Va. 721, 11 S. E. 114; *Boswell v. First Nat. Bank of Laramie*, 16 Wyo. 161,

92 Pac. 624, 93 Pac. 661; *National Bank of Fredericksburg*, 1 Hughes (U. S.) 37 per Waite, C. J.

31. See *Edinburgh American Land Mortg. Co. v. Peoples*, 102 Ala. 241, 14 So. 656; *Leonhard v. Flood*, 68 Ark. 162, 56 S. W. 781; *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293, 50 N. E. 594; *Wilson v. Traer*, 20 Iowa, 231; *Farmers, etc., Bank v. Stockdale*, 121 Iowa, 748, 96 N. W. 732; *Smith v. Clark*, 100 Iowa, 605, 69 N. W. 1011; *Groesbeck v. Seeley*, 13 Mich. 329; *Davis v. Beazley*, 75 Va. 491; *Hunton v. Wood*, 101 Va. 54, 43 S. E. 186.

by her before the officer after a private examination by him to ascertain that she executes it voluntarily and without compulsion from her husband, and the certificate of the officer must state that he so examined her, and that she acknowledged the instrument to be her free and voluntary act. In some of the other states, while a private examination is not necessary, the certificate must contain such a statement as to the free and voluntary nature of her act.³² The officer is also occasionally required by the statute to ascertain, before taking the acknowledgment, that she understands the nature of the instrument.³³ The number of states in which an acknowledgment is thus necessary to the validity of a conveyance by a married woman is, however, steadily diminishing, the tendency of recent legislation being to enable her to dispose of her property as if a *feme sole*.

— **Proof in place of acknowledgment.** In many states the statute authorizes, as an alternative to acknowledgment, and as preliminary to record, proof of the authenticity of the instrument, ordinarily by the evidence of the attesting witnesses. In some states such proof is authorized only when the grantor refuses to make acknowledgment, or dies before making it. In some it is authorized when the acknowledgment or certificate thereof is defective.³⁴

§ 461. Delivery. A written instrument, regarded as a constitutive or dispositive act, becomes legally operative by reason either (1) of the mutual action of two or more persons, parties in interest thereto, or (2) of the action of one person, from whom the writing

32. 1 Stimson's Am. St. Law, § 6501.

33. See Norton v. Davis, 83 Tex. 32, 18 S. W. 455; Drew v. Arnold, 85 Mo. 128; Tavenner v. Barrett, 21 W. Va. 656; Spencer

v. Reese, 165 Pa. St. 158, 30 Atl. 722; Mettler v. Miller, 129 Ill. 630, 22 N. E. 529.

34. 1 Stimson's Am. St. Law, §§ 1590-1606.

may be regarded as issuing. The mutual action of two or more persons is required in the case of what are known as simple contracts, while all other instruments, by the theory of the English common law,³⁵ become legally operative by the action of one party only. Of such other instruments, some are said to take effect by delivery, this term serving to designate the final act by which one who has previously signed the instrument, or both signed and sealed it, signifies his intention that the instrument shall have a legal operation, and so realizes his intention in fact. Conveyances of land, including leases, contracts under seal, mortgages of land and of chattels, deeds of gift, insurance policies, and promissory notes, take effect by delivery. Of the instruments which, while becoming operative by the action of one person alone, are not said to take effect by delivery, the most important class, perhaps the only class, consists of testamentary instruments, wills. But though, in the case of a will, there is no requirement of delivery under that name, nevertheless an instrument ordinarily becomes operative as a will only by virtue of a final expression of intention by the maker to that effect, such expression usually taking the form, by force of statute, of a declaration in the presence of witnesses of an intention that the instrument shall be legally operative, or of a request addressed to witnesses to attest the signature thereto, provided they accede to the request.³⁶ Such final expression of intention in the case of a will is the equivalent of the final expression of intention by means of delivery in the case of an instrument *inter vivos*.

The expression "delivery," as applied to a written instrument, had its inception, it appears,³⁷ in connection with written conveyances of lands, the manual transfer

35. *Post*, § 463, note 7.

Series) §§ 298, 302, 313; 2 Pollock

36. *Post*, § 469.

& Maitland, *Hist. Eng. Law*, 85,

37. Brissaud, *French Private*

86.

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or "delivery" of which was, in early times, upon parts of the continent of Europe, regarded as in effect a symbolical transfer of the land itself, analogous to livery of seisin. And not only was the notion of physical delivery of the instrument applied in connection with the transfer of land, but it was applied also in connection with written evidences of contract, the physical transfer of the document being necessary to make it legally operative, and being effective to that end.³⁸ The view that a transfer of land could be effected by means of the manual transfer of a writing was originally adopted in England to but a limited extent, but in so far as the courts recognized the effectiveness of a written instrument for the purpose of transfer or of contract, they adopted the continental conception of a physical change of possession thereof as a prerequisite to its legal operation, and accordingly the necessity of delivery became established in connection with various classes of written instruments as they came to be recognized by the courts, particularly deeds of grant, contracts under seal, the only class of contract recognized in the earlier history of our law, and promissory notes.³⁹

While, as before stated, the necessity of delivery in connection with the instruments last named, and others of an analogous character, is still fully recognized, the crude conception of a manual transfer of the instrument as the only means of making it legally effective, which gave birth to the expression "delivery" as used in this connection, has been superseded by the more enlightened view that whether an instrument has been delivered is a question of intention merely, there being a sufficient delivery if an intention appears that it shall be legally operative,⁴⁰ however this intention

38. Brissaud, *op. cit.* § 370; 2 Pollock & Maitland, 190.

39. As to promissory notes, see article by Professor W. S. Holdsworth, "The Early History of Negotiable Instruments," 31

Law Quart. Rev. at p. 17.

40. Fitzpatrick v. Brigman, 130 Ala. 450, 30 So. 500; Russell v. May, 77 Ark. 89, 90 S. W. 617; Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544; Flynn v. Flynn, 17

may be indicated.⁴¹ Accordingly, it is generally agreed that delivery does not necessarily involve any manual transfer of the instrument,⁴² and provided an intention is indicated that the deed shall take effect, the fact that the grantor retains possession of the instrument is im-

Idaho, 147, 104 Pac. 1030; Bowers v. Cottrell, 15 Idaho, 221, 96 Pac. 936; Riegel v. Riegel, 243 Ill. 626, 90 N. E. 1108; Burkholder v. Casad, 47 Ind. 418; Sheldon v. Crane, 146 Iowa, 461, 125 N. W. 238; Doty v. Barker, 78 Kan. 636, 97 Pac. 964; Burk v. Sproat, 96 Mich. 404, 55 N. W. 985; Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525; Coulson v. Coulson, 180 Mo. 709, 79 S. W. 473; Martin v. Flaharty, 13 Mont. 96, 32 Pac. 187, 19 L. R. A. 242, 40 Am. St. Rep. 415; Flannery v. Flannery, 99 Neb. 557, 156 N. W. 1065; Vreeland v. Vreeland, 48 N. J. Eq. 56, 21 Atl. 627; Fisher v. Hall, 42 N. Y. 416; Lee v. Parker 171 N. C. 144, 88 S. E. 217; Mitchell's Lessee v. Ryan, 3 Ohio St. 377; Johnson v. Craig, 37 Okla. 378, 130 Pac. 581; Sappingfield v. King,—Ore.—8 L. R. A. N. S. 106; Hannah v. Swarnet, 8 Watts (Pa.) 11; McCartney v. McCartney, 93 Tex. 359, 55 S. W. 310; Matson v. Johnson, 48 Wash. 256, 125 Am. St. Rep. 924, 93 Pac. 324; Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 S. E. 873. In Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509, it is in effect said that though the grantor intends, in handing the instrument to the grantor, to make it operative as a conveyance, there is no delivery if it is procured by fraud. This is, it is submitted, erroneous. The intention exists,

and hence there is a delivery, though the intention is based on a misconception wrongfully induced. There are almost numberless decisions recognizing that the legal title passes in such case.

41. Delivery, being a question of intention, is one of fact, for the jury. Murray v. Stair, 2 Barn. & C. 82; Fitzpatrick v. Brigman, 133 Ala. 242, 31 So. 940; Donahue v. Sweeny, 171 Cal. 388, 153 Pac. 708; Emmons v. Harding, 162 Ind. 154, 1 Ann. Cas. 864, 70 N. E. 142; Brann v. Monroe, 11 Ky. L. Rep. 324; Bishop v. Burke, 207 Mass. 133, 93 N. E. 254; O'Rourke v. O'Rourke, 130 Minn. 292, 153 N. W. 607; Hurlburt v. Wheeler, 40 N. H. 73; Jones v. Swayze, 42 N. J. L. 279; Crain v. Wright, 36 Hun. 74, 114 N. Y. 307; Archambeau v. Edmunson, 87 Ore. 476, 171 Pac. 186; Fisher v. Kean, 1 Watts (Pa.) 278; Kana-well v. Miller,—Pa.—104 Atl. 861; McCartney v. McCartney, 93 Tex. 359, 55 S. W. 310; Dwinell v. Bliss, 58 Vt. 353, 5 Atl. 317; Holly St. Land Co. v. Beyer, 48 Wash. 422, 93 Pac. 1065; Garrett v. Goff, 61 W. Va. 221, 56 S. E. 351; Kittoe v. Willey, 121 Wis. 548, 99 N. W. 337.

42. Gulf Red Cedar Co. v. Crenshaw, 169 Ala. 606, 53 So. 812; Faulkner v. Feazel, 113 Ark. 289, 168 S. W. 568; Smith v.

material.⁴³ So, while it is frequently said, both by the older and later authorities, that delivery may be made to a third person for the benefit of the grantee,⁴⁴ mean-

May, 3 Penn. (Del.) 233, 50 Atl. 59; Benneson v. Aiken, 102 Ill. 284, 40 Am. Rep. 592; Hoyt v. Northup, 256 Ill. 604, 100 N. E. 164; Prince v. Prince, 258 Ill. 304, 101 N. E. 608; Fitzgerald v. Goff, 99 Ind. 28; Newton v. Bealer, 41 Iowa, 334; Pentico v. Hays, 75 Kan. 76, 88 Pac. 738, 9 L. R. A. (N. S.) 224; Kirby v. Hulette, 174 Ky. 257, 192 S. W. 63; Byers v. McClanahan, 6 Gill. & J. (Md.) 250; Creeden v. Mahoney, 193 Mass. 402, 79 N. E. 776; Thatcher v. St. Andrews Church, 37 Mich. 264; Chastek v. Souba, 93 Minn. 418, 101 N. W. 618; Young v. Elgin—(Miss.)—27 So. 595; Lee v. Parker, 171 N. C. 144, 88 S. E. 217; Dukes v. Spangler, 35 Ohio St. 119; Kanawell v. Miller,—Pa.—104 Atl. 861; Farrar v. Bridges, 5 Hump. (Tenn.) 411; Watson v. Johnson, 48 Wash. 256, 125 Am. St. Rep. 924, 93 Pac. 324.

43. Doe d. Garnons v. Knight, 5 Barn. & C. 671; Xenos v. Wickham, L. R. 2 H. L. 296; Austin v. Fendall, 2 MacArthur (D. C.) 362; Otis v. Spencer, 102 Ill. 622, 40 Am. Rep. 617; Colee v. Colee, 122 Ind. 109, 17 Am. St. Rep. 345; Bunnell v. Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607; Moore v. Hazelton, 9 Allen (Mass.) 102; Stevens v. Hatch, 6 Minn. 64; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Ruckman v. Ruckman, 32 N. J. Eq. 259; Scrugham v. Wood, 15 Wend. (N. Y.) 545, 30 Am. Dec.

75; Mitchell's Lessee v. Ryan, 3 Ohio St. 377; Ledgerwood v. Gault, 2 Lea (Tenn.) 643; Thatcher v. Capeca, 75 Wash. 249, 134 Pac. 923.

So the fact that the grantor still has access to the instrument does not conclusively negative delivery. Strickland v. Griswold, 149 Ala. 325, 43 So. 105; Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Munro v. Bowles, 187 Ill. 346, 54 L. R. A. 864; Terry v. Glover, 235 Mo. 544, 139 S. W. 337; Payne v. Hallgarth, 33 Ore. 430, 54 Pac. 162; Wilson v. Wilson, 32 Utah 169, 89 Pac. 643.

44. Sheppard's Touchstone, 57, 4 Kent. Comm. 455; Doe d. Garnons v. Knight, 5 Barn. & C. 671; Xenos v. Wickham, L. R. 2 H. L. 312; Gulf Red Cedar Co. v. Crenshaw, 169 Ala. 606, 53 So. 812; Watson v. Hill, 123 Ark. 601, 186 S. W. 68; Crozer v. White—(Cal.)—100 Pac. 130; Clark v. Clark, 183 Ill. 448, 75 Am. St. Rep. 115; Gomel v. McDaniels, 269 Ill. 362, 109 N. E. 996; Matheson v. Matheson, 139 Iowa, 511, 18 L. R. A. (N. S.) 1167, 117 N. W. 755; Harmon v. Bower, 78 Kan. 135, 17 L. R. A. (N. S.) 502, 16 Ann. Cas. 121, 96 Pac. 51; Beatty v. Beatty, 151 Ky. 547, 152 S. W. 540; Clark v. Creswell, 112 Md. 339, 21 Ann. Cas. 338, 76 Atl. 579; Foster v. Mansfield, 3 Metc. (Mass.) 412; Cooper v. Cooper, 162 Mich. 304.

ing thereby that the conveyance may take effect by reason of physical transfer of the instrument to a third person, this would seem to result, not from any particular virtue in the transfer, but from the fact that the transfer may show an intention to make the instrument legally operative. A declaration to such third person of an intention that the deed shall take effect would seem to be quite as effective as a manual transfer to him, if satisfactorily proven,⁴⁵ and would indeed, as affording indubitable evidence of the grantor's intention, have a conclusiveness that may be lacking in the case of a mere manual transfer. Such a transfer to a third person, if not made with the intention that the instrument shall be legally operative, does not con-

127 N. W. 266; *Barnard v. Thurston*, 86 Minn. 343, 90 N. W. 574; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326; *Jones v. Swayze*, 42 N. J. L. 279; *Church v. Gilman*, 15 Wend. (N. Y.) 656; *Robbins v. Roscoe*, 120 N. C. 79, 38 L. R. A. 238, 58 Am. St. Rep. 774; *Meeks v. Stillwell*, 54 Ohio St. 541; *Belcher v. La Grande Nat. Bk.* 87 Ore. 665, 171 Pac. 410; *Blight v. Schenck*, 10 Pa. St. 285; *Eckman v. Eckman*, 55 Pa. St. 269; *Kanner v. Startz*,—Tex Civ. App.—, 203 S. W. 603.

Statements, occasionally found, to the effect that the instrument must be handed to the third person with the intention that he pass it on, so to speak, to the grantee named (See *e. g.* *Osborne v. Eslinger*, 155 Ind. 351, 80 Am. St. Rep. 240, 58 N. E. 439) or that he must so pass it on (*Furenes v. Eide*, 109 Iowa, 511, 77 Am. St. Rep. 545, 80 N. W. 539; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418) are, it is

submitted, absolutely incorrect. The intention of the grantor as to whether the instrument shall take effect as a conveyance is the subject for ascertainment, not his intention, if he happens to have any, as to the ultimate custody of the writing.

In one state it appears to have been decided that a manual transfer to a third person cannot involve delivery unless such person is a duly authorized agent of the grantee. *Jameson v. Goodwin*,—Okla.— 170 Pac. 241. Such a view is, it is submitted, entirely out of harmony with the authorities generally.

45. 3 Preston, Abstracts, 63; *Doe d. Garnons v. Knight*, 5 Barn. & C. 671; *Xenos v. Wickham*, L. R. 2 H. L. 312; *Linton v. Brown's Adm'rs* (C. C.) 20 Fed. 455; *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436; *Moore v. Hazelton*, 9 Allen (Mass.) 102; *Regan v. Howe*, 121 Mass. 424; *Kane v. Mackin*, 9 Smedes & M. (Miss.) 387; *Vought v. Vought*,

stitute a delivery;⁴⁶ nor does such a transfer to the grantee himself, if the transfer is not with such intention, but is for another purpose as, for instance, to enable him to examine the instrument.⁴⁷

In spite, however, of these numerous decisions recognizing the minor importance of the matter of actual transfer of the instrument in connection with the question of delivery, the courts not infrequently speak as if such transfer were an essential in delivery. The occasional mention, moreover, of delivery "to" the grantee, suggests the idea of a physical transfer to

50 N. J. Eq. 177, 27 Atl. 489; *Scrugham v. Wood*, 15 Wend. (N. Y.) 545; *Diehl v. Emig*, 65 Pa. St. 320; *Contra*, *Moore v. Collins*, 15 N. C. 384.

46. *Co. Litt.* 36a; *Sheppard's Touchstone* 57; *Culver v. Carroll*, 175 Ala. 469, Ann. Cas. 1914D, 103, 57 So. 767; *Baker v. Baker*, —(Cal.)—, 100 Pac. 892; *Merrills v. Swift*, 18 Conn. 257; *Porter v. Woodhouse*, 59 Conn. 568, 13 L. R. A. 64, 21 Am. St. Rep. 131, 22 Atl. 299; *Lange v. Cullinan*, 205 Ill. 365, 68 N. E. 934; *Connor v. Buhl*, 115 Mich. 531, 73 N. W. 821; *Cannon v. Cannon*, 26 N. J. Eq. 316; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377; *Sears v. Scranton Trust Co.*, 228 Pa. 226, 20 Ann. Cas. 1145, 77 Atl. 423; *Leftwich v. Early*, 115 Va. 323, 79 S. E. 384; *Showalter v. Spangler*, 93 Wash. 326, 160 Pac. 1042.

A statement of an intention that the conveyance shall be immediately operative has been regarded as effective as a de-

livery, although the instrument had been previously placed in another's custody to hold it in behalf of the grantor. *Moore v. Trott*, 162 Cal. 268, 122 Pac. 462; *Elliott v. Hoffhine*, 97 Kan. 26, 154 Pac. 225.

47. *Bray v. Bray*, 132 Ark. 438, 201 S. W. 281; *Kenney v. Parks*, 137 Cal. 527, 70 Pac. 556; *Cox v. Schnerr*, 172 Cal. 371, 156 Pac. 509; *Oswald v. Caldwell*, 225 Ill. 224, 80 N. E. 131; *Kavanaugh v. Kavanaugh*, 260 Ill. 179, 103 N. E. 65; *Witt v. Witt*, 174 Iowa. 173, 156 N. W. 321; *Ball v. Sandlin*, 176 Ky. 537, 175 S. W. 1089; *Tewkesbury v. Tewkesbury*, 222 Mass. 595, 111 N. E. 394; *Comer v. Baldwin*, 16 Minn. 172; *Braman v. Bingham*, 26 N. Y. 483; *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028; *Clark v. Clark*, 56 Ore. 218, 107 Pac. 23; *In re Nicholl's Petition*, 190 Pa. 308, 42 Atl. 692; *Gordon v. White*, 33 S. D. 234, 145 N. W. 439; *Dwinell v. Bliss*, 58 Vt. 353, 5 Atl. 317; *Zoerb v. Paetz*, 137 Wis. 59, 117 N. W. 793.

him. The delivery of a conveyance or other instrument involves in its essence no delivery "to" any one, since it means merely the expression, by word or act, of an intention that the instrument shall be legally operative, and the fact that in many cases such intention is indicated by the making of a physical transfer does not show that such transfer is necessary. The partial survival of the primitive formalism, as it has been well termed,⁴⁸ which attached some peculiar efficacy to the physical transfer of the instrument, as involving a symbolical transfer of the property described therein, is presumably to be attributed to the fact that in other connections the words "deliver" and "delivery," as applied to inanimate things, ordinarily have reference to a physical transfer.

It being conceded that even a voluntary transfer of the instrument by the grantor to the grantee does not involve a delivery if not with the intention that the instrument shall be legally operative, it necessarily follows that the instrument cannot be regarded as having been delivered merely because the grantee has acquired possession thereof without the grantor's consent.⁴⁹ And it has been decided that the fact of non delivery in such case may be asserted even as against a subsequent *bona fide* purchaser, who purchased in reliance on the grantee's possession of the instrument.⁵⁰

48. 4 Wigmore, Evidence, § 2405.

49. *Bender v. Barton*, 166 Ala. 337, 52 So. 26; *Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936; *Lundy v. Mason*, 174 Ill. 505, 51 N. E. 614; *Schaefer v. Purviance*, 160 Ind. 63, 66 N. E. 154; *Hintz v. Hintz*, 175 Iowa, 392, 156 N. W. 878; *White v. Holder*—(Ky.)—118 S. W. 995; *Westlake v. Dunn*, 184 Mass. 260, 100 Am. St. Rep. 557; *Gardiner v. Gardiner*, 134 Mich. 90, 95 N. W. 973; *Allen*

v. Ayer, 26 Ore. 589, 39 Pac. 1; *King v. Diffey*—Tex. Civ. App.—192 S. W. 262.

50. *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; *Henry v. Carson*, 96 Ind. 412; *Ogden v. Ogden*, 4 Ohio St. 458; *Burns v. Kennedy*, 49 Ore. 588, 90 Pac. 1102; *Van Amringe v. Morton*, 4 Whart. (Pa.) 382; *Steffian v. Milmo Nat. Bank*, 69 Tex. 513, 6 S. W. 823; *Tyler Building & Loan Ass'n v. Baird & Scales*—Tex. Civ. App.—, 165 S. W. 542.

There are, however, *dicta* to the effect that the grantor may, by reason of his lack of care in the custody of the instrument, be estopped, in favor of a *bona fide* purchaser, to deny its delivery.⁵¹

Apart from any question of *bona fide* purchase, there are a number of decisions to the effect that an instrument of conveyance, the possession of which has been improperly acquired by the grantee named therein, may be subsequently made operative by the grantor's recognition of the title as being in such grantee.⁵² In connection with these decisions the courts ordinarily speak of such recognition as involving a "ratification" of the deed or of the delivery, but what actually occurs is, it is conceived, a delivery by the grantor, that is, an expression of an intention by him, not previously expressed, that the instrument, which has already passed into the grantee's hands, shall take effect as a transfer of title. An instrument which is inoperative as a conveyance for lack of legal delivery cannot be made operative by ratification, there being indeed, in such case, nothing to ratify. And likewise a physical transfer of the instrument, which lacks all legal significance because not made by one authorized to make delivery, cannot thereafter, by ratification, be transformed into a legal delivery, that is, an expression of intention that the instrument shall be legally operative.

51. Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; Alexander v. Welcker, 141 Cal. 302, 74 Pac. 845; Allen v. Ayer, 26 Ore. 589, 39 Pac. 1; Merck v. Merck, 83 S. Car. 329, 137 Am. St. Rep. 815, 65 S. E. 347; Steffian v. Milmo Nat'l Bank, 69 Tex. 513, 6 S. W. 823; Garner v. Risinger, 35 Tex. Civ. App. 378, 81 S. W. 343; Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546; Laughlin v. Calumet & Chicago Canal & Dock

Co., 13 C. C. A. 1, 65 Fed. 441. See *post*, § 462, note 42.

52. Whitney v. Dewey, 10 Idaho, 633, 69 L. R. A. 572, 80 Pac. 1117; Phelps v. Pratt, 225 Ill. 85, 9 L. R. A. (N. S.) 945, 80 N. E. 69; Harkness v. Cleaves, 113 Iowa, 140, 84 N. W. 1033; McNulty v. McNulty, 47 Kan. 208, 27 Pac. 819; Pannell v. Askew,—Tex. Civ. App.—, 143 S. W. 364.

— **Delivery by agent.** The delivery of an instrument is a part of the execution thereof,⁵³ and in so far as a written or sealed authority may be necessary to enable one to sign or seal an instrument as an agent acting in behalf of the grantor, such an authority is, it is conceived, necessary to enable one to deliver the instrument as such agent.⁵⁴ It would be strange if the final expression of intention, which makes the instrument legally operative, could be given by one acting under an oral authority, while the merely preliminary acts of signing and sealing can be performed by an agent only when acting under authority in writing. There are, however, to be found occasional judicial statements that a deed may be delivered by one acting under oral authority,⁵⁵ and that this may be done is not infrequently assumed by the courts.⁵⁶ That an oral authority is sufficient for this purpose appears to be involved in the decisions, rendered in a number of states,⁵⁷ that a conveyance which, at the time it leaves

53. See *Goodlet v. Goodman Coal & Coke Co.*, 192 Fed. 775, 113 C. C. A. 61; *Clark v. Child*, 66 Cal. 87, 4 Pac. 1058; *Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936; *Colee v. Colee*, 122 Ind. 109, 17 Am. St. Rep. 345; *McAndrew v. Sewell*, 100 Kan. 47, 163 Pac. 653; *Tucker v. Helgien*, 102 Minn. 382, 113 N. W. 912; and other cases cited in "Words & Phrases" under "Execute."

54. That an agent cannot deliver a deed without authority under seal is explicitly decided in *Hibblewhite v. M'Morline*, 6 Mees. & W. 200; *Powell v. London & Provincial Bank* (1893), 2 Ch. 555.

So it is said in *Sheppard's Touchstone* at p. 57, that "where one person delivers an instrument as the act of another per-

son, who is present, no deed conferring an authority is requisite. But a person cannot, unless authorized by deed, execute an instrument as the act of a person who is absent."

55. *White v. Duggan*, 140 Mass. 18, 54 Am. Rep. 437; *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. See *Huffcut, Agency* (2nd Ed.) p. 38.

56. *Sturtevant v. Sturtevant*, 116 Ill. 340, 6 N. E. 428; *Furenes v. Eide*, 109 Iowa, 511, 77 Am. St. Rep. 545, 80 N. W. 539; *Conway v. Rock*, 139 Iowa, 162, 117 N. W. 273; *Santaquin Min. Co. v. High Roller Min. Co.*, 25 Utah 282, 71 Pac. 77; *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 3 L. R. A. 583.

57. *Ante*, § 434, note 68.

the hands of the grantor, lacks the name of a grantee, becomes valid if the name is subsequently inserted by an agent acting under oral authority from the grantor, these decisions apparently involving the assumption that the delivery of the deed is made by such agent, since delivery could not be made so long as the instrument, lacking the name of the grantee, was a legal nullity, and there is no act by the grantor, after the insertion of such name, which can be referred to as indicative of an intention to deliver.

The view indicated in the decisions referred to, that an agent acting under oral authority may make delivery, is presumably based on the misconception, previously referred to, that delivery of a deed means merely the manual transfer of the instrument. That an agent in possession of the instrument in behalf of the grantor is in a position to hand it to the grantee, whether his agency is based on a written or an oral authority, is sufficiently obvious, and because he is in a position to do this it is assumed that he has the power and authority to make delivery of the instrument on behalf of the grantor. But delivery of the instrument involves more than a manual transfer thereof, and the fact that the agent is in a position to make such a transfer is no reason for assuming that he has legal authority to express, by word or act, an intention on the part of the grantor that the instrument shall become legally operative. It no doubt frequently occurs that the grantor hands the completed instrument to an agent, with oral instructions to hand it to the grantee upon some subsequent event, ordinarily the payment of the purchase money. In such case, however, the delivery, it is conceived, is properly to be regarded as a conditional delivery made by the grantor himself, a delivery made by him, that is, at the time of handing the instrument to his agent, conditioned however upon the subsequent payment of the purchase money or occurrence of the other event named, on which the agent was to hand the instrument to the grantee. Upon

the satisfaction of the condition the delivery by the grantor becomes effective, as in the case of any other conditional delivery,⁵⁸ and the mere act of the agent in handing the instrument to the grantee is not technically speaking, a delivery thereof, it having already been delivered.

Since the delivery must be made by the grantor, or by the grantor's agent, in order to be effective, there can be no delivery after the grantor's death. A deceased grantor can obviously not make delivery, and the agent's authority necessarily comes to an end upon the death of the principal.⁵⁹

— **Retention of control.** It is not infrequently said that there is no delivery if the grantor still retains control or dominion over the deed.⁶⁰ Such a statement is somewhat ambiguous. The mere fact that the grantor retains possession of the instrument is, as above

58. *Post*, § 462.

59. Mortgage Trust Co. of Pennsylvania v. Moore, 150 Ind. 465, 50 N. E. 72; Schaeffer v. Anchor Mut. Fire Ins. Co., 113 Iowa, 652, 85 N. W. 985; Colyer v. Hyden, 94 Ky. 180, 21 S. W. 868; Taft v. Taft, 59 Mich. 185, 60 Am. Rep. 291; Givens v. Ott. 222 Mo. 395, 121 S. W. 23; Meikle v. Cloquet, 44 Wash. 513, 87 Pac. 841.

60. See *e. g.* Tarwater v. Going, 140 Ala. 273, 37 So. 330; Porter v. Woodhouse, 59 Conn. 568, 13 L. R. A. 64, 21 Am. St. Rep. 131, 22 Atl. 299; Rutledge v. Montgomery, 30 Ga. 899; Callerland v. Piot, 241 Ill. 120, 89 N. E. 266; Pethel v. Pethel, 45 Ind. App. 664, 90 N. E. 102; Kirby v. Hulette, 174 Ky. 257, 192 S. W. 63; Renehan v. McAvoy, 116 Md. 356, 38 L. R. A. (N. S.) 941, 81 Atl. 586; Joslin

v. Goddard, 187 Mass. 165, 72 N. E. 948; Taft v. Taft, 59 Mich. 185, 60 Am. Rep. 291; Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525; Hall v. Waddill, 78 Miss. 16, 27 So. 936, 28 So. 831; Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747; Baker v. Haskell, 47 N. H. 479, 93 Am. Dec. 455; Fisher v. Hall, 41 N. Y. 416; Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028; Arneggaard v. Arneggaard, 7 N. D. 475, 41 L. R. A. 258; Ball v. Foreman, 37 Ohio St. 139; Eckman v. Eckman, 55 Pa. St. 269; Johnson v. Johnson, 24 R. I. 571, 54 Atl. 378; Merck v. Merck, 83 S. C. 329, 137 Am. St. Rep. 815, 65 S. E. 347; Cassidy v. Holland, 27 S. D. 287, 130 N. W. 771; Gaines v. Keener, 48 W. Va. 56, 35 S. E. 856; Butts v. Richards, 152 Wis. 318, 140 N. W. 1.

indicated,⁶¹ not incompatible with delivery, and yet it can hardly be said that, having possession of the deed, he has no dominion or control thereover. The statement may mean that the fact that the grantor has a right to demand the physical possession of the instrument, or to refuse to relinquish such possession, conclusively shows that the instrument has not been delivered since, after delivery, the grantee, and not the grantor, is entitled to control the possession of the instrument, it being his muniment of title. Or it may mean that the fact that the grantor has a right to determine whether the instrument shall have a legal operation shows that it has not been delivered, since after delivery he has no such right. But since the question whether the grantor has the right of control as regards either possession of the instrument or its legal operation depends on whether there has been a delivery, the statement referred to amounts to little more than a statement that, so long as the instrument is subject to the grantor's control by reason of lack of delivery, the instrument has not been delivered. The statement is unquestionably correct, but appears to be of questionable utility, and its frequent repetition is calculated to obscure, rather than to clarify, the nature of delivery.

— **Presumptions as to delivery.** In connection with the question of the delivery of a deed, various rules of presumption have been judicially asserted, that is, particular states of fact have been regarded as showing *prima facie*, that the instrument has or has not been delivered.

It has been said that the fact that the instrument remains in the possession of the grantor raises a presumption that it has not been delivered.⁶² This appears

61. <i>Ante</i> , this section, note 43.	133 Iowa, 320, 107 N. W. 310,
62. <i>Donahue v. Sweeny</i> , 171	110 N. W. 582; <i>Dunbar v. Meadows</i> , 165 Ky. 275, 176 S. W.
<i>Cal.</i> 388, 153 Pac. 708; <i>Kavanaugh v. Kavanaugh</i> , 260 Ill. 79,	1167; <i>Dudley v. Nickerson</i> , 107
103 N. E. 65; <i>Shetler v. Stewart</i> ,	Me. 25, 78 Atl. 100; <i>Kanawell v.</i>

to be merely another way of saying that delivery is an affirmative fact, the burden of proving which is upon the person alleging it. If he cannot support this burden by evidence of a change of possession of the instrument, he must support it by other evidence.⁶³

While a presumption of non delivery is said ordinarily to arise from the grantor's possession of the instrument, no such presumption arises, it is said, if the grantor, by the terms of the instrument, reserves a life estate in the property, for the reason that there is no object in such a reservation unless the instrument is to operate before the grantor's death.⁶⁴ That such a reservation shows that the instrument was prepared with the intention that its operation should not be postponed till the grantor's death may be conceded, but it is difficult to see what bearing this has on the question of delivery, since the form of the instrument, even without the reservation, shows that it was prepared with this intention. It might as well be said that any instrument in the form of a conveyance *inter vivos* as distinguished from a will, though still in the possession of the grantor, is to be presumed to have been delivered, since it would not have been prepared in that form had it not been intended to operate before the grantor's death. Delivery is, as above indi-

Miller, —Pa.— 104 Atl. 861; Cassidy v. Holland, 27 S. D. 287, 130 N. W. 771; Butts v. Richards, 152 Wis. 318, 140 N. W. 1.

63. See Jenkins v. Southern R. Co., 109 Ga. 35, 34 S. E. 355; Burton v. Boyd, 7 Kan. 1; Powers v. Russell, 13 Pick. (Mass.) 69; Bisard v. Sparks, 123 Mich. 587, 95 N. W. 728; Ligon v. Barton, 88 Miss. 135, 40 So. 555; Tyler v. Hall, 106 Mo. 313, 27 Am. St. Rep. 338; Atwood v. Atwood, 15 Wash. 285, 46 Pac. 240; Gaines v. Keener, 48

W. Va. 56, 35 S. E. 856; Butts v. Richards, 152 Wis. 318, 44 L. R. A. (N. S.) 528, Ann. Cas. 1914C, 854, 140 N. W. 1.

64. Hill v. Kreiger, 250 Ill. 408, 95 N. E. 468; Buck v. Garber, 261 Ill. 378, 103 N. E. 1059; Collins v. Smith, 144 Iowa, 200, 122 N. W. 839; Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 326, 16 S. W. 497; Williams v. Latham, 113 Mo. 165, 20 S. W. 99; Ball v. Foreman, 37 Ohio St. 132.

cated, the final expression, subsequent to the signing and sealing, of an intention that the instrument shall be legally operative, and, whatever the form of the instrument, it cannot well constitute the basis for an inference that, subsequent to the signing and sealing, such intention was expressed.⁶⁵

It has furthermore been said that the grantor's retention of the instrument does not give rise to a presumption of non-delivery if he retains an interest in the property and it is consequently to his advantage that the instrument be preserved.⁶⁶ It is, however, difficult to see that, in the ordinary case, it is to his advantage that the instrument be preserved, if its effect is to divest him of either the whole interest or a partial interest in the property. He would in either case be better off if the instrument were no longer available for the purpose of asserting his grantee's rights thereunder.

That the instrument is in the possession of the grantee named therein is usually referred to as raising a presumption that it has been delivered,⁶⁷ based, it would seem, on the probability that the grantor gave him possession of the instrument, and the improbability that the grantor would vest him with such a muniment of title unless he intended that the title should pass.

65. See *Colyer v. Hyden*, 94 Ky. 180, 21 S. W. 868; *Whitney v. Dewey*, 10 Idaho, 633, 69 L. R. A. 572, 80 Pac. 1117.

66. *Blakemore v. Byenside*, 7 Ark. 504; *Cribbs v. Walker*, 74 Ark. 104, 85 S. W. 244; *Scrugham v. Wood*, 15 Wend. (N. Y.) 545.

67. *Games v. Stiles*, 14 Pet. (U. S.) 322, 10 L. Ed. 476; *Simmons v. Simmons*, 78 Ala. 365; *Thompson v. McKenna*, 22 Cal. App. 129, 133 Pac. 512; *Hill v. Merritt*, 146 Ga. 307, 91 S.

E. 204; *Inman v. Swearingen*, 198 Ill. 437, 64 N. E. 1112; *Hathaway v. Cook*, 258 Ill. 92, 101 N. E. 227; *Hild v. Hild*, 129 Iowa, 649, 113 Am. St. Rep. 500; *Fish v. Poorman*, 85 Kan. 237, 116 Pac. 898; *Ball v. Sandlin*, 176 Ky. 537, 195 S. W. 1089; *Valentine v. Wheeler*, 116 Mass. 478; *Barras v. Barras*, 192 Mich. 584, 159 N. W. 147; *Wilson v. Wilson*, 85 Neb. 167, 122 N. W. 856; *Pierson v. Fisher*, 48 Ore. 223, 85 Pac. 621; *Painter v. Campbell*, 207 Pa. 189, 56 Atl.

In England and Massachusetts there are decisions to the effect that the signing and sealing of the instrument in the presence of an attesting witness raises a presumption of delivery,⁶⁸ the effect of which presumption would be to justify a finding of delivery, although the instrument is still in the grantor's possession, upon evidence that it was signed and sealed by him. Such a presumption does not appear to have been recognized elsewhere, and it may perhaps be regarded as based on a recognized practice, in the jurisdictions named, of making delivery of the instrument by a declaration to that effect in the presence of witnesses at the time of signing and sealing. The propriety of such an inference of delivery from the mere fact of signing and sealing might indeed depend on the particular circumstances of the case, for instance on the presence or absence of the grantee. That the grantor signs and seals the instrument in the presence of the grantee may justify an inference of delivery, while his doing so in the grantee's absence may not.⁶⁹

That the attestation clause, under which the witnesses write their names, recites the delivery of the instrument, has occasionally been regarded as creating a presumption of delivery,⁷⁰ while a contrary view has

409; *Jackson v. Lamar*, 58 Wash. 383, 108 Pac. 946.

That the presumption is not overthrown by the fact that the possession is not affirmatively shown to have originated prior to the grantor's death, see *Blair v. Howell*, 68 Iowa, 619, 28 N. W. 199; *Melaney v. Cameron*, 98 Kan. 620, 159 Pac. 19.

68. *Hall v. Bainbridge*, 12 Q. B. 699; *Hope v. Harman*, 16 Q. B. 751 note; *Burling v. Paterson*, 9 Car. & P. 570; *Moore v. Hazelton*, 9 Allen (Mass.) 102; *Howe v. Howe*, 99 Mass. 88.

69. See *Shelton's Case*, Cro.

Eliz 7; *Levister v. Hilliard*, 57 N. C. 12. "If both parties be present, and the usual formalities of execution take place, and the contract is to all appearances consummated without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor." 4 Kent's Comm. 455, quoted and applied in *Scrugham v. Wood*, 15 Wend. (N. Y.) 545; *Wallace v. Berdell*, 97 N. Y. 13.

70. *Xenos v. Wickham*, L. R. 2 H. L. 296; *Evans v. Grey*, 9 L. R. Ir. 539; *Clark v. Akers*, 16

also been expressed.⁷¹ Such a fact might properly, it would seem, be regarded as evidence sufficient to support a finding of delivery, but whether it should be regarded as creating a presumption of delivery, in the sense of requiring a finding of delivery in the absence of countervailing evidence, appears questionable.⁷²

Upon the question whether the fact that an instrument is acknowledged raises a presumption of delivery the cases are few and unsatisfactory. That it does not has occasionally been decided,⁷³ but there are a greater number of decisions to an opposite effect.⁷⁴ The fact that the instrument is acknowledged in the presence of the grantee might operate to create an inference in this regard which an acknowledgment out of his presence would not create.⁷⁵ Some weight might also be im-

Kan. 166 (*semble*); Hall v. Sears, 210 Mass. 185, 96 N. E. 141; Diehl v. Emig, 65 Pa. St. 320; Currie v. Donald, 2 Wash. (Va.) 58.

71. Fisher v. Hall, 41 N. Y. 416; Rushin v. Shield, 11 Ga. 636; Hill v. McNichol, 80 Me. 209, 13 Atl. 883.

72. The presence of such a clause has been referred to as some evidence of delivery. Dennis v. Dennis, 119 Mich. 380, 78 N. W. 333. And see, apparently to this effect. Hill v. Merritt, 146 Ga. 307, 91 S. E. 204.

73. Braun v. Monroe, 11 Ky. L. Rep. 324; Den v. Farlee, 21 N. J. L. 279; Kille v. Ege, 79 Pa. St. 15.

In Alexander v. De Kermel, 81 Ky. 345, it was decided that acknowledgment did not create a presumption of delivery for the reason that the concurrence of the grantee is needed. This is however another question, that of the necessity of acceptance.

See *post*, § 463.

74. Boyd v. Slayback, 63 Cal. 493; New Haven Trust Co. v. Camp, 81 Conn. 539, 71 Atl. 788; Baker v. Updike, 155 Ill. 54, 39 N. E. 587; Burton v. Boyd, 7 Kan. 17; Govin v. De Miranda, 76 Hun (N. Y.) 414, 27 N. Y. Supp. 1019; Tarlton v. Griggs, 131 N. C. 216, 233, 42 S. E. 591; Humphrey v. Hartford Fire Ins. Co., 15 Blatchf. (U. S.) 35.

Occasionally the fact that the instrument was both acknowledged and recorded is referred to as raising a presumption of delivery. Sulzby v. Palmer, 194 Ala. 524, 70 So. 1; Stephens v. Stephens, 108 Ark. 53, 156 S. W. 837; Felker v. Rice, 110 Ark. 70, 161 S. W. 162.

75. See Delaplain v. Grubb, 44 W. Va. 612, 67 Am. St. Rep. 788, 30 S. E. 201; Adams v. Baker, 50 W. Va. 249, 40 S. E. 356; Scrugham v. Wood, 15 Wend. (N. Y.) 545.

puted to the language of the certificate of acknowledgment, an acknowledgment in express terms that the grantor delivered the instrument being perhaps entitled to more weight than an acknowledgment merely that he executed it.⁷⁶ The usage of the community as to the time and manner of making acknowledgments might also have a bearing in this regard.⁷⁷ It would seem on the whole desirable that the courts refrain from the assertion of a presumption of delivery from acknowledgment, but rather leave it to the jury to determine whether the circumstances of the particular case show an intention on the part of the grantor that the instrument shall be legally operative.⁷⁸ In several cases it is in effect decided that a finding of delivery cannot be based on the fact of acknowledgment alone.⁷⁹

The question may arise in this connection of the effect of a statute, such as exists in a number of states, making an instrument, if duly acknowledged, admissible without further proof of execution. In one state such a statute has been regarded as placing on the opposite party the burden of showing non-delivery;⁸⁰ but this does not appear to accord with decisions in other jurisdictions that the authentication of a document sufficient to render it admissible in evidence does not necessarily create a presumption of its execution.⁸¹

76. See *Blight v. Schenck*, 10 Pa. 285; *Den v. Farlee*, 21 N. J. L. 279; *Hawes v. Hawes*, 177 Ill. 409, 53 N. E. 78.

77. In *Brann v. Monroe*, 11 Ky. L. Rep. 324 it is said that the acknowledgment raises a presumption of delivery because the instrument ought to be delivered before acknowledgment. This can not well be said in all communities.

78. That the acknowledgment is merely evidence bearing on the question appears to be recognized in *Ferguson v. Bond*, 39

W. Va. 561, 20 S. E. 591; *Hutchison v. Rust*, 2 Gratt. (Va.) 394.

79. *Humphrey v. Hartford Fire Ins. Co.*, 15 Blatchf. (U. S.) 35; *Wiggins v. Lušk*, 12 Ill. 132; *Baker v. Updike*, 155 Ill. 54, 39 N. E. 587; *Burton v. Boyd*, 7 Kan. 17; *Govin v. De Miranda*, 76 Hun. 414, 27 N. Y. Supp. 1019; 80. *Tucker v. Helgren*, 102 Minn. 382, 113 N. W. 912.

81. *Anderson v. Cuthbert*, 103 Ga. 767, 30 S. E. 244; *Scott v. Delany*, 87 Ill. 146; *Ross v. Gould*, 5 Me. 204; *Bogle v. Sul-*

That the grantor has the instrument recorded, or leaves it with the proper official for record, has been frequently referred to as raising a presumption of delivery.⁸² This amounts in effect to a statement that such action on the part of the grantor shows, *prima facie*, an intention on his part that the instrument shall be legally operative. It is in the ordinary case difficult to see any object in leaving the instrument for record, unless it is intended that it shall operate as a conveyance, and the rule of presumption referred to appears to be founded in reason. In a few states only does this view appear to have been actually repudiated, and it is not always clear, in these states, why such an effect is denied to the grantor's conduct in this regard.⁸³ In a very considerable number of cases it is said that the action of the grantor in having the instrument recorded does not show delivery if this was without the knowledge or consent of the grantee,⁸⁴ but this intro-

livant, 1 Call. (Va.) 561; Siegfried v. Levan, 6 Serg. & R. 308. See 3 Wigmore, Evidence, § 2135.

82. Lewis v. Watson, 98 Ala. 479, 39 Am. St. Rep. 82; Lee Hardware Co. v. Johnson, 132 Ark. 462, 201 S. W. 289; Ellis v. Clark, 39 Fla. 714, 23 So. 410; Creighton v. Roe, 218 Ill. 619, 109 Am. St. Rep. 310; Blackenship v. Hall, 233 Ill. 116, 122 Am. St. Rep. 149, 84 N. E. 192; Colee v. Colee, 122 Ind. 109, 17 Am. St. Rep. 345, 23 N. E. 687; Hutton v. Smith, 88 Iowa, 238, 55 N. W. 326; Lay v. Lay, —(Ky.)— 66 S. W. 371; Holmes v. McDonald, 119 Mich. 563, 75 Am. St. Rep. 430; Griffin v. Howey, 179 Mich. 104, 146 N. W. 210; Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525; Chambers v. Chambers, 227 Mo. 262, 137 Am. St. Rep. 567, 127 S. W. 86; Mitch-

ell's Lessee v. Ryan, 3 Ohio St. 377; Robbins v. Rascoe, 120 N. C. 79, 38 L. R. A. 238, 58 Am. St. Rep. 774; Thompson v. Jones, 1 Head (Tenn.) 574; Davis v. Garrett, 91 Tenn. 147, 18 S. W. 113; Newton v. Emerson, 66 Tex. 142; Bjmerland v. Ely, 15 Wash. 101.

83. See Egan v. Horrigan, 96 Me. 46. In McManus v. Commow, 10 N. D. 340, 87 N. W. 8, the decision to this effect is based on an ill-advised statute undertaking to state what constitutes delivery. In Massachusetts this position appears to be in part the result of the view (post, § 463) that there must be knowledge of or assent to the conveyance on the part of the grantee. (See Maynard v. Maynard, 10 Mass. 456; Samson v. Thornton, 3 Metc. 275), and in part of the

duces another question, that of the necessity of acceptance of a conveyance, which properly calls for separate discussion,⁸⁵ and these cases cannot generally be regarded as involving a repudiation of the view that the action of the grantor in having the instrument recorded shows, *prima facie*, an intention that it shall take effect as a conveyance. The presumption of delivery, based on the action of the grantor in having the instrument recorded, is recognized as being subject to rebuttal by evidence that he did not intend the instrument to operate as a conveyance.⁸⁶

In several cases the fact that the purpose of the conveyance was merely to prevent the assertion or collection of a claim by a third person against the gran-

notion that delivery of a deed means the physical transfer of the instrument. *Hawkes v. Pike*, 105 Mass. 560, 7 Am. St. Rep. 554; *Barnes v. Barnes*, 161 Mass. 381, 37 N. E. 379. The legislature has now intervened by making the record of a conveyance conclusive evidence of delivery in favor of a bona fide purchaser. See Rev. Laws, c. 127, § 5.

84. *Younge v. Guilbeau*, 3 Wall. (U. S. 636, 18 L. Ed. 262; *Parmelee v. Simpson*, 5 Wall. (U. S.) 81, 718 L. Ed. 542; *Knox v. Clark*, 15 Colo. App. 356, 62 Pac. 334; *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482; *Wilenou v. Handlon*, 207 Ill. 104, 69 N. E. 892; *Vaughan v. Godman*, 94 Ind. 191; *O'Connor v. O'Connor*, 100 Iowa, 476, 69 N. W. 676; *Alexander v. De Kermel*, 81 Ky. 345; *Oxnard v. Blake*, 45 Me. 602; *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146; *Samson v. Thornton* 3 Mete. (Mass.) 275, 37 Am. Dec. 135; *Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec.

412; *Cravens v. Rossiter*, 116 Mo. 338, 38 Am. St. Rep. 606; *Derry Bank v. Webster*, 44 N. H. 264; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418; *King v. Antrim Lumber Co.*,—Okla.—172 Pac. 958; *Bogard v. Barhan*, 56 Ore. 269, 108 Pac. 214.

85. *Post*, § 463.

86. *Humiston v. Preston*, 66 Conn. 579, 34 Atl. 544; *Jones v. Bush*, 4 Harr. (Del.) 1; *Ellis v. Clark*, 39 Fla. 714, 23 So. 410; *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482; *Vaughan v. Vaughan*, 94 Ind. 19; *Hutton v. Smith*, 88 Iowa, 238, 55 N. W. 326; *Hogadone v. Grange Mut. Fire Ins. Co.*, 133 Mich. 339, 94 N. W. 1045; *Barras v. Barras*, 192 Mich. 584, 159 N. W. 147; *Babbitt v. Bennett*, 68 Minn. 260, 71 N. W. 22; *Metcalfe v. Brandon*, 60 Miss. 685; *Boardman v. Dana*, 34 Pa. St. 252; *Thompson v. Jones*, 1 Head (Tenn.) 576; *Walsh v. Vermont Mut. Fire Ins. Co.*, 54 Vt. 351.

tor and not to vest a beneficial interest in the grantee, has been regarded as precluding, or at least as tending to preclude, any inference of delivery from the grantor's action in recording the instrument.⁸⁷ Such a view appears, however, to be open to question. The instrument cannot operate in any degree for his protection unless it operates as a conveyance, and the fact that he desires protection would seem to be rather an additional reason for regarding the instrument as having become operative by delivery.⁸⁸ Even conceding that his purpose to avoid payment of claims would show that there was no delivery, it might be questioned whether he, or one claiming in his right, should be allowed to assert that the ordinary inference from his use of the recording system should not be drawn, because he made such use for purposes of deception.

That the grantor, after having the instrument recorded, himself obtains it from the recording officer, instead of leaving it with the latter to be called for by the grantee, does not appear to have any proper bearing upon the question of the grantor's intention in having it recorded.⁸⁹ Even though there were the

87. *Coulson v. Scott*, 167 Ala. 606, 52 So. 436; *Union Mut. Life Ins. Co. v. Campbell*, 95 Ill. 267, 35 Am. Rep. 166; *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68, 11 N. E. 893; *Vaughan v. Godman*, 94 Ind. 19; *Davis v. Davis*, 92 Iowa, 147, 60 N. W. 507; *Egan v. Horrigan*, 96 Me. 46, 51 Atl. 246; *Hogadone v. Grange Mut. Fire Ins. Co.*, 133 Mich. 339, 94 N. W. 1045; *Hooper v. Vanstrum*, 92 Minn. 406, 100 N. W. 229; *Koppelman v. Koppelman*, 94 Tex. 40, 57 S. W. 570; *Elmore v. Marks*, 39 Vt. 538.

88. See *Corley v. Corley*, 2 Cold. (Tenn.) 520; *Chambers v.*

Chambers, 227 Mo. 262, 137 Am. St. Rep. 567, 127 S. W. 86; *Decker v. Stansberry*, 249 Ill. 487, Ann. Cas. 1912A, 227, 94 N. E. 940.

89. See *Lewis v. Watson*, 98 Ala. 480, 22 L. R. A. 297; *Russell v. May*, 77 Ark. 89, 90 S. W. 617; *Moore v. Giles*, 49 Conn. 570; *Allen v. Hughes*, 106 Ga. 775, 32 S. E. 927; *Colee v. Colee*, 122 Ind. 109, 17 Am. St. Rep. 345, 23 N. E. 687; *Collins v. Smith*, 144 Iowa, 200, 122 N. W. 839; *Lay v. Lay*, (Ky.), 66 S. W. 371; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377; *Thompson v. Jones*, 1 Head. (Tenn.) 576. But *Weber v. Christen*, 121 Ill.

fullest intention on the part of the grantor that the instrument should become legally effective, he might well desire to have it returned to him to hold temporarily. The fact, however, that the grantor not only obtains the instrument after its record, but retains it in his possession, has been regarded as showing that it has not been delivered.⁹⁰ Conceding that the record of the instrument by the grantor is sufficient in itself to make a *prima facie* showing of delivery, it is not entirely clear why his subsequent retention of the instrument should be regarded as showing a different intention. That the grantor has the instrument recorded might properly, it is submitted, overcome any inference of non-delivery from his subsequent possession of the instrument, since, as before remarked, it is difficult to conceive of any object in having it recorded other than that it should be legally operative.

It being conceded that a manual transfer of the instrument by the grantor directly to the recording officer shows, *prima facie*, an intention that it shall operate as a conveyance, it would seem that his manual transfer of the instrument to another, to be by the latter handed to the recording officer, might likewise show such an intention, and there are decisions to this effect.⁹¹

91, 2 Am. St. Rep. 68, 11 N. E. 893, is apparently *contra*.

90. Weber v. Christen, 121 Ill. 91, 2 Am. St. Rep. 68, 11 N. E. 893; Hutton v. Smith, 88 Iowa, 238, 55 N. W. 326; Jourdan v. Patterson, 102 Mich. 602, 61 N. W. 64; Babbitt v. Bennett, 68 Minn. 260, 71 N. W. 22; Elmore v. Marks, 39 Vt. 538; Fair Haven Marble & Marbleized Slate Co. v. Owens, 69 Vt. 246, 37 Atl. 749. See King v. Antrim Lumber Co., —Okla.—, 172 Pac. 958.

91. Tennessee Coal, Iron &

Railroad Co. v. Wheeler, 125 Ala. 538, 28 So. 38; Zeigler v. Daniel, 128 Ark. 403, 194 S. W. 246; Valter v. Blavka, 195 Ill. 610, 63 N. E. 499; In re Bell's Estate, 150 Iowa, 725, 130 N. W. 798; Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 325; Robbins v. Rascoe, 120 N. Car. 79, 38 L. R. A. 238, 58 Am. St. Rep. 774; Thompson v. Jones, 1 Head (Tenn.) 576; Bates v. Winters, 138 Wis. 673, 120 N. W. 498.

It has been frequently asserted that the mere fact that the instrument is of record raises a presumption of delivery, without any reference being made to the identity of the person who had it recorded.⁹² The cases do not ordinarily indicate the basis of this presumption, but occasionally⁹³ it has been regarded as based, to some extent at least, upon the statutory provisions, existent in most of the states,⁹⁴ making an instrument, duly acknowledged (or proved), and recorded, or a copy thereof, admissible without further proof. But this latter view does not appear to accord with the authorities, before referred to,⁹⁵ that the authentication of an instrument sufficient to justify its admission in evidence does not create a presumption of its due execution. A more satisfactory reason for inferring delivery from the fact that the instrument is of record would seem to be the probability that it was placed on record either by the grantor, thus indicating an intention on his part to make it operative,⁹⁶ or by the grantee, thus indicating that it was in his possession, this itself raising a presumption of delivery.⁹⁷ Any presumption arising from the mere fact of record might be overthrown by evidence that the instrument was

92. *Estes v. German Nat. Bank*, 62 Ark. 7, 34 S. W. 85; *Parker v. Salmons*, 101 Ga. 160, 65 Am. St. Rep. 291; *Spencer v. Razor*, 251 Ill. 278, 96 N. E. 300; *Witt v. Witt*, 174 Iowa, 173, 156 N. W. 321; *Maynard v. Maynard*, 145 Ky. 197, 140 S. W. 156; *Balin v. Osoba*, 76 Kan. 234, 91 Pac. 57; *Patrick v. Howard*, 47 Mich. 40, 10 N. W. 71; *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676; *Stephenson v. Van Blokland*, 60 Ore. 247, 118 Pac. 1026; *McDaniel v. Anderson*, 19 S. C. 211; *Morgan v. Morgan*, 82 Vt. 243, 137 Am. St. Rep. 1006, 73 Atl.

24; *Whiting v. Høglund*, 127 Wis. 135, 7 Ann. Cas. 224, 106 N. W. 391; *Laughlin v. Calumet & Chicago Canal & Dock Co.*, 13 C. C. A. 1, 65 Fed. 441.

93. See *Napier v. Elliott*, 177 Ala. 113, 58 So. 435; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377; *Jackson v. Perkins*, 2 Wend. (N. Y.) 317; *Goodlett v. Goodman Coal & Coke Co.*, 192 Fed. 775, 113 C. C. A. 61.

94. These statutes are summarized in 3 Wigmore, Evidence, §§ 1651, 1676.

95. *Ante*, this section, note 81.

96. *Ante*, this section, note 82.

97. *Ante*, this section, note 67.

not placed on record by the authority of either the grantor or grantee,⁹⁸ or by other evidence to the effect that there was no delivery.⁹⁹

That the parties to the instrument acted as if the title to the property had passed to the grantee named has been regarded as showing or tending to show delivery.¹ In regard to this it may be conceded that the fact that the grantor named acts as if the title had passed to the grantee named would certainly appear to be strong evidence of his intention that the instrument should operate to pass the title.² That the grantee named so acts would appear to be strong evidence of his acceptance of the conveyance, so far as an acceptance may be regarded as necessary in the particular jurisdiction,³ but it does not seem to have any particular relevancy to the question whether the grantor has delivered the instrument, assuming that, as is believed to be the case, the question of acceptance is entirely distinct from that of delivery.

—**Voluntary settlement.** It was said by Chancellor Kent in a quite early New York case,^{3a} that a voluntary settlement is valid, even though the grantor

98. *Bouvier-Iaeger Coal Land Co. v. Sypher*, 186 Fed. 644.

99. *Equitable Mtge. Co. v. Brown*, 105 Ga. 474, 30 S. E. 687; *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997; *Hathaway v. Cook*, 258 Ill. 92, 101 N. E. 227.

1. *Gould v. Day*, 94 U. S. 405, 24 L. Ed. 232; *In re Jackson Brick & Tile Co.*, 189 Fed. 636; *Cribbs v. Walker*, 74 Ark. 104, 85 S. W. 244; *Bruner v. Hart*, 59 Fla. 171, 51 So. 593; *Rode-meier v. Brown*, 169 Ill. 347, 61 Am. St. Rep. 176, 48 N. E. 468; *Bunnell v. Bunnell*, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607; *Patrick v. Howard*, 47 Mich. 40,

10 N. W. 71.

2. See *Corley v. Corley*, 2 Coldw. (Tenn.) 520; *Donahue v. Sweeny*, 171 Cal. 388, 153 Pac. 708; *Tweedale v. Barnett*, 172 Cal. 271, 156 Pac. 483; *Tupper v. Foulkes*, 9 C. B. N. S. 797. That the grantor treats the land as his own, after having signed a conveyance thereof, has been regarded as tending to show that the conveyance was not delivered. *Little v. Eaton*, 267 Ill. 623, 108 N. E. 727.

3. *Post*, § 463.

3a. *Souverybye v. Arden*, 1 Johns. Ch. 240.

retains possession of the instrument, in the absence of other circumstances to show that it is not intended to be absolute. In view of the fact, well recognized at the present day if not at that time, that not only a voluntary settlement, but any conveyance, may be effective although the physical possession of the instrument remains in the grantor,⁴ the statement referred to with reference to voluntary settlements appears to have no particular significance. It has however been quoted from time to time,⁵ and it appears to be responsible for the view, asserted in two or three states, that in the case of a voluntary settlement, especially when made in favor of an infant, the law will make stronger presumptions in favor of delivery than in other cases.⁶ In one state it has been said that in the case of such a settlement the burden of proof is on the grantor to show that there was no delivery.⁷ Why there should be a relaxation of the requirements of proof of delivery in the case of such a settlement is not entirely clear. It has been said that "the same degree of formality is never required, on account of the great degree of confidence which the parties are presumed to have in each other, and the inability of the grantee, frequently, to take care of his own interests."⁸ As a matter of fact, however, no formality is necessary in any case for the delivery of a conveyance, and conceding the necessity

4. *Ante*, this section, note 43.

5. See *Wallace v. Berdell*, 97 N. Y. 13; *Bryan v. Wash*, 7 Ill. 557; 1 *Perry, Trusts*, § 103.

6. *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577; *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548; *Abbott v. Abbott*, 189 Ill. 488, 82 Am. St. Rep. 472; *Baker v. Hall*, 214 Ill. 364, 73 N. E. 351; *Colee v. Colee*, 122 Ind. 109, 17 Am. St. Rep. 345, 23 N. E. 687; *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. 346; *Schooler*

v. Schooler 258 Mo. 83, 167 S. W. 444.

7. *Bryan v. Wash*, 7 Ill. 557; *Winterbottom v. Pattison*, 152 Ill. 334, 38 N. E. 1050; *Abbott v. Abbott*, 189 Ill. 488, 82 Am. St. Rep. 472. But in *Hawes v. Hawes*, 177 Ill. 409, 53 N. E. 78, the necessity of a showing of delivery even in the case of a voluntary settlement is clearly recognized.

8. *Bryan v. Wash*, 7 Ill. 557.

of delivery, the reasons suggested for dispensing with the ordinary proof thereof in this particular case appear somewhat inadequate. Indeed the fact that the settlement is voluntary, a gift merely, might well be regarded as requiring the strictest proof of delivery.⁹

— **Date of delivery.** Since an instrument of conveyance operates to transfer the title to the property only upon delivery, the ascertainment of the date of delivery is frequently a matter of importance. There is a rebuttable presumption that the instrument was delivered on the day on which it is dated,¹⁰ provided, at least, it is not acknowledged, or is not acknowledged on a different date. When the date of the instrument differs from the date of acknowledgment, the delivery is by some courts presumed to have taken place on the former date,¹¹ and by some on the

9. See *Jamison v. Craven*, 4 Del. Ch. 311; *Hooper v. Vanstrum*, 92 Minn. 406, 100 N. W. 229.

10. *Williams v. Armstrong*, 130 Ala. 389, 30 So. 553; *Gordon v. City of San Diego*, 108 Cal. 264, 41 Pac. 301 (statute); *Kimball v. Chicago*, 253 Ill. 105, 97 N. E. 257; *Sweetser v. Lowell*, 33 Me. 446; *Schweigel v. L. A. Shakman Co.*, 78 Minn. 142, 80 N. W. 871, 81 N. W. 529; *Blair State Bank v. Bunn*, 61 Neb. 464, 85 N. W. 527; *Crossen v. Oliver*, 37 Ore. 514, 61 Pac. 885; *State v. Dana*, 59 Wash. 30, 109 Pac. 191; *Douthat v. Roberts*, 73 W. Va. 358, 80 S. E. 819; *Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569.

11. *Smith v. Scarbrough*, 61 Ark. 104, 32 S. W. 382; *Smiley v. Fries*, 104 Ill. 416; *Lake Erie etc. R. Co. v. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355, 28

L. R. A. 612; *Scobey v. Walker*, 114 Ind. 254, 15 N. E. 674; *Crabtree v. Crabtree*, 136 Iowa, 630, 113 N. W. 923, 15 A. & E. Ann. Cas. 149; *McConnell v. Brown*, 6 Litt. (Ky.) 459; *Ford v. Gregory*, 10 B. Mon. (Ky.) 175; *Smith v. Porter*, 10 Gray. (Mass.) 66; *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399. But see *Mighill v. Town of Rowley*, 224 Mass. 586, 113 N. E. 569; *People v. Snyder*, 41 N. Y. 397; *Harriman Land Co. v. Hilton*, 121 Tenn. 308, 120 S. W. 162; *Kirby v. Cartwright*, 48 Tex. Civ. App. 8, 106 S. W. 742; *Beall v. Chatham*, (Tex. Civ. App.), 117 S. W. 492; *Harriman v. Oberdorfer*, 33 Gratt. (Va.) 497. In *Calligan v. Calligan*, 259 Ill. 52, 102 N. E. 247, it is decided that the deed is presumed to have been delivered on the day of its date, though not acknowledged till a later

latter.¹² This difference of view as to whether the date of acknowledgment should control, in the absence of other evidence, appears to be the result, to a very considerable extent, at least, of a difference of view as to the probability of delivery before acknowledgment,^{12a} and the usage of different communities in this regard might well differ.

§ 462. Conditional delivery. The delivery of a conveyance, or of any other instrument which takes effect by delivery, may be conditioned upon the performance of some act or the occurrence of some event.

A conditional delivery is usually referred to as a delivery "in escrow," or it is said that an instrument conditionally delivered is delivered as an "escrow." These forms of expression have the sanction of centuries of usage, and yet it may be questioned whether they are not calculated to give a wrong impression as to such a delivery. The word "escrow" meant originally, it appears, a piece or roll of parchment or paper, and its use in this connection doubtless has reference to the fact that an instrument conditionally delivered is not immediately operative. But an instrument in the form of a deed, which is conditionally delivered, is delivered as a deed, an instrument capable of legal operation, and not as a mere piece of paper. Otherwise it could not become legally operative upon the satisfaction of the condition. In the case of a conditional delivery, a delivery in escrow, the maker of the instrument in effect says: "I now deliver this as my

date, if the acknowledgment was not necessary to the passing of title, and only then.

12. *Kitchener v. Jehlik*, 85 Kan. 684, 118 Pac. 1058; *Loomis v. Pingree*, 43 Me. 299 (*semble*); *Henderson v. Baltimore*, 8 Md. 352 (*semble*); *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Miller v. Peter*, 158 Mich.

336, 122 N. W. 780; *Fontaine v. Boatmen's Sav. Inst.*, 57 Mo. 552; *Barber Asphalt Pav. Co. v. Field*, 174 Mo. App. 11, 161 S. W. 364; *Bolaskey v. Furey*, 12 Phila. (Pa.) 428 (*semble*); *Kent v. Cecil*, (Tex. Civ. App.), 25 S. W. 715.

12a. *Ante*, this section, note 77.

act and deed, provided such a condition is satisfied," and not "I now deliver this as a mere piece of paper, provided such a condition is satisfied." The use of the word "escrow" in this connection is, however, so thoroughly established that any question as to its propriety is necessarily futile, and the expressions "conditional delivery" and "delivery in escrow" will here be used for the most part interchangeably.

— **Physical transfer.** The conception of a conditional delivery, a delivery in escrow, as ordinarily presented in the older English books, is of a transfer of the possession of the instrument to a third person, as custodian or depositary, with directions to him to hand it to the grantee or obligee named upon the satisfaction of the condition,¹³ and so in this country the cases have tended to emphasize the matter of the physical transfer of the instrument. If, however, the delivery of a deed is, as appears to be generally agreed, merely the expression, either by word or act, of an intention that the instrument shall have a legal operation, conditional delivery would seem properly to be merely an expression of an intention that the instrument shall have a legal operation provided a certain condition is satisfied, and adopting such a view, the physical transfer or custody of the instrument becomes of minor importance. An absolute delivery can be made without a physical transfer of the instrument,¹⁴ and it is difficult to see why a conditional delivery cannot be so made. There are in England judicial expressions to the effect that it can.¹⁵⁻¹⁶ The contrary view is a relic of the primitive formalism which attaches some peculiar efficacy to the physical transfer of the instrument, as involving a symbolical transfer of the property described therein.

13. Perkins, Conveyancing, §§ 142-144; Sheppard's Touchstone, 59; 2 Bl. Comm. 307.

14. *Ante*, § 461, notes 42, 43.

15-16. See *Gudgen v. Bessett*, 6 Ell. & Bl. 986; *Xenos v. Wickham*, L. R. 2 H. L. 296.

The manual transfer of the instrument, which is ordinarily assumed to be essential to a conditional delivery, must, according to the authorities in this country, be to a person other than the grantee, it being held that if the grantor, intending to make a conditional delivery, hands the instrument to the grantee, there is necessarily an absolute delivery.¹⁷ In England the older authorities are generally to the same effect,¹⁸ but there are occasional modern *dicta* to the contrary.¹⁹ That the mere physical transfer of the instrument should, in any jurisdiction, be allowed to override the grantor's explicit declaration of intention that the instrument shall not be immediately operative, is a striking illustration of the persistence of the primitive formalism before referred to.²⁰ An instrument may be

17. Alabama Coal & Coke Co. v. Gulf Coal & Coke Co., 165 Ala. 304, 51 So. 570; Campbell v. Jones, 52 Ark. 493, 6 L. R. A. 783; Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Larsh v. Boyle, 36 Colo. 18, 86 Pac. 1000; Walker v. Warner, 31 Dist. Colo. App. 76; Duncan v. Pope, 47 Ga. 445; Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Whitney v. Dewey, 10 Idaho, 633; 69 L. R. A. 572; McCann v. Atherton, 106 Ill. 31; Potter v. Barringer, 236 Ill. 224, 86 N. E. 233; Robinson, Norton & Co. v. Randall, 147 Ky. 45, 143 S. W. 769; Hubbard v. Greeley, 84 Me. 340, 17 L. R. A. 511, 24 Atl. 799; Ward v. Lewis, 4 Pick. (Mass.) 518; Arnold v. Patrick, 6 Paige (N. Y.) 310; Worrall v. Winn, 5 N. Y. 229, 55 Am. Dec. 330; Gaston v. City of Portland, 16 Ore. 255, 19 Pac. 127; Keenan & Wade v. City of Trenton, 130 Tenn. 71, Ann. Cas. 1916B, 519, 168 S. W. 1053; Miller v. Fletcher, 27 Gratt. (Va.) 403,

21 Am. St. Rep. 356; Richmond v. Morford, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513; Gaffney v. Stowers, 73 W. Va. 420, 80 S. E. 501. But see Wilson v. Wilson, 158 567, 49 Am. St. Rep. 176, 41 N. E. 1007; Stanley v. White, 160 Ill. 605, 43 N. E. 729.

18. They are cited in 13 Vin. Abr. Fait (O.); Norton, Deeds, 17; 10 Halsbury's Laws of England, p. 388. See Co. Litt. 36a; Sheppard's Touchstone, 59.

19. Watkins v. Nash, L. R. 20 Eq. 262; London Freehold and Leasehold Property Co. v. Suffield, L. R. 2 Ch. 608, at p. 621; Hudson v. Pevett, 5 Bing. 368; Bower v. Burdekin, 11 M. & W. 128, 146.

20. See 4 Wigmore, Evidence, §§ 2405, 2408. This writer remarks in reference to the case of Hawksland v. Gatchel Cro. Eliz. 835, which clearly decided that delivery was conditional, if so intended, although the instrument was handed to the obligee,

handed to the grantee or obligee without effecting any delivery whatsoever,²¹ and it is difficult to see why it cannot be so handed without effecting more than a conditional delivery. So far as the danger of misleading an innocent third person is concerned, the danger is as great when there is no delivery as when the delivery is conditional only. The view referred to has, by a number of courts, been repudiated in connection with bills and notes, with the effect of upholding a conditional delivery thereof in spite of a manual transfer to the payee,²² and the same considerations in favor of its repudiation would seem to apply in the case of deeds of conveyance. A tendency to break in upon such a rule is indicated by decisions that it does not apply if the instrument shows on its face an intention that others than those who have executed it shall join in its execution before it shall become operative,²³ as well as by decisions that the grantor can hand the instrument to the grantee, to be in turn handed by the latter to a third person to hold it in escrow, without thereby rendering it immediately operative.²⁴

Occasional decisions to the effect that an instrument cannot be regarded as conditionally delivered if it is handed to the grantee's agent²⁵ are based upon the

"the authority and vogue of Coke's and Sheppard's writings obscured and suppressed prematurely this progressive conception."

21. *Ante*, § 461, note 47.

22. 1 Daniel, *Negotiable Instruments* (6th ed.), § 68a; Norton, *Bills & Notes* (3rd ed.) 71.

23. *Shelby v. Tardy*, 84 Ala. 327, 4 So. 276; *Ward v. Churn*, 18 Gratt. (Va.) 80, 98 Am. Dec. 749; *Wedlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727.

24. *Cherry v. Herring*, 83 Ala. 458, 3 So. 667; *Fairbanks v. Metcalf*, 8 Mass. 230; *Gilbert v.*

North American Fire Ins. Co., 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; *Brown v. Reynolds*, 5 Sneed. (Tenn.) 639. But see *Braman v. Bingham*, 26 N. Y. 491, for a *dictum contra*.

25. *Duncan v. Pope*, 47 Ga. 445; *Stewart v. Anderson*, 59 Ind. 375; *Hubbard v. Greeley*, 84 Me. 340, 17 L. R. A. 511; *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Ordinary v. Thatcher*, 41 N. J. L. 403 32 Am. Rep. 225; *Bond v. Wilson*, 129 N. C. 325, 40 S. E. 179.

assumption that such a manual transfer to the grantee's agent is in effect a transfer to the grantee himself. Such an assumption is justified, however, only when the transfer is to the grantee's agent as such; that is, the mere fact that for other purposes one is the grantee's agent does not render him such agent for the purpose of holding possession of the instrument, and it has accordingly been decided in a number of cases that there was a valid conditional delivery although the person to whom the instrument was handed, to hold until satisfaction of the condition, was for some purposes the agent of the grantee.²⁶

Occasional statements to the effect that an instrument which has been handed to the grantor's agent cannot be regarded as having been delivered conditionally²⁷ appear to be open to question. They are, no doubt, an outgrowth of the view that there can be no conditional delivery if the grantor retains possession of the instrument, it being considered that possession by the grantor's agent is in effect possession by the grantor himself. Conceding that there can be no conditional delivery so long as the grantor retains possession of the instrument, a view which, as we have seen, appears somewhat difficult to sustain on principle, it does not seem that there is the equivalent of such a retention of possession when the grantor hands the instrument to another, merely because such other is his agent. That is to say, the fact that the person to whom he hands the instrument is the agent of the grantor for other pur-

26. *Ashford v. Prewitt* 102 Ala. 264, 48 Am. St. Rep. 37; *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193; *Price v. Home Ins. Co.*, 54 Mo. App. 119; *Cincinnati, R. Co. v. Hliff*, 13 Ohio St. 235; *Fertig v. Bucher*, 3 Pa. St. 308; *Merchants' Ins. Co. of New York v. Nowlin*, (Tex. Civ. App.), 56 S. W. 198; *Blair v. Security Bank*, 103 Va.

762, 50 S. E. 262; *Watkins v. Nash, L. R.*, 20 Eq. 262.

27. *Day v. Lacasse*, 85 Me. 242, 27 Atl. 124; *Van Valkenburg v. Allen*, 111 Minn. 333, 137 Am. St. Rep. 561, 126 N. W. 1092; *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22. *Contra*, *Smith v. Smith*, 173 Cal. 725, 161 Pac. 495; *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816.

poses does not show that he is his agent as regards the custody of the document. The practical inconvenience of the view that there is in such case no conditional delivery would seem to be considerable. Suppose, for instance, the owner of land, having sold it, signs and seals a conveyance and hands it to his legal adviser, or other agent, with directions to hand it to the purchaser upon payment of the purchase money. If this is regarded as an absolute delivery by the vendor, the legal title passes, contrary to his intention, even before the payment of the purchase money, while if it is not regarded as a delivery, the conveyance would not pass title to the purchaser even on his payment of the price and the physical transfer of the instrument to him by the agent, unless we adopt the view, which is believed to be unsound on principle,²⁸ that an agent acting under oral authority may make delivery. The proper view, it is submitted, of a transaction of the character referred to, is that a conditional delivery takes place when the instrument is handed to the agent, the condition being the payment of the purchase money, upon the satisfaction of which condition the ownership passes.

— **Retention of control.** The question whether, when the instrument has been handed by the grantor to a third person, it is to be regarded as having been conditionally delivered, is to be determined with reference to the language used by him, construed in the light of the surrounding circumstances, as showing the grantor's intention.²⁹ That is, as absolute delivery is

28. *Ante*, § 461, notes 53-58.

29. *Murray v. Stair*, 2 B. & C. 82; *Bowker v. Burdekin*, 11 M. & W. 128; *Seeley v. Curts*, (Ala.), 61 So. 807; *In re Cornelius' Estate*, 151 Cal. 550, 91 Pac. 329; *White v. Bailey*, 14 Conn. 271; *Shults v. Shults*, 159 Ill. 654, 50 Am. St. Rep. 188, 43

N. E. 800; *Jackson v. Sheldon*, 22 Me. 569; *Andrews v. Farnham*, 29 Minn. 246, 13 N. W. 161; *Clark v. Gifford*, 10 Wend. (N. Y.) 310; *Gaston v. City of Portland*, 16 Ore. 255, 19 Pac. 127; *Bronx Inv. Co. v. National Bank of Commerce of Seattle*, 47 Wash. 566, 92 Pac. 380.

a question of the grantor's intention,³⁰ so conditional delivery is a question of his intention. Such a manual transfer of the instrument to a third person is compatible with either an absolute delivery, a conditional delivery, or no delivery whatsoever; that is, the grantor may hand the instrument to a third person with the intention that it become immediately operative, that it become operative in case a certain condition is satisfied, or with no intention as to its becoming operative. A conditional delivery differs from an absolute delivery merely in the fact that it is subject to a condition, and it is in its nature as final as an absolute delivery.³¹⁻³³ For this reason it is difficult to yield our assent to occasional decisions and *dicta*³⁴ that the grantor may, when handing the instrument to third person by way of conditional delivery, retain a right of revocation, so called, by an express statement that the instrument is not to become operative even on satisfaction of the condition if he, the grantor, in the meantime indicates a desire to the contrary. It is recognized that, after making a conditional delivery without expressly retaining any such right of control, the grantor cannot prevent the instrument from becoming operative upon

30. *Ante*, § 461, note 40.

31-33. Consequently there is no conditional delivery, or any delivery whatsoever, if the grantor hands the instrument to a third person with a statement that it is not to become operative until he indicates a desire to that effect. *Masters v. Clark*, 89 Ark. 191, 116 S. W. 186; *Miller v. Sears*, 91 Cal. 282, 25 Am. St. Rep. 176; *Loubat v. Kipp*, 9 Fla. 60; *James v. Vanderheyden*, 1 Paige (N. Y.) 385. Or if he hands it to a third person merely for safe keeping. *Dudley v. Dodley*, 126 Ark. 182, 189 S. W. 838; *Shelinsky v. Foster*, 87

Conn. 90, 87 Atl. 35; or for other purposes, so long as he retains the right to regard it as nullity. *Miller v. Sears*, 91 Cal. 282, 25 Am. St. Rep. 176, 27 Pac. 589; *Holland v. McCarty*, 173 Cal. 597, 160 Pac. 1069; *Hoig v. Adrian College*, 83 Ill. 267; *Kirby v. Hulette*, 174 Ky. 27, 192 S. W. 63.

34. *Soward v. Moss*, 59 Neb. 71, 80 N. W. 268; *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285, 7 Am. Dec. 375; *Wilkins v. Somerville*, 80 Vt. 48, 11 L. R. A. (N. S.) 1183, 130 Am. St. Rep. 906, 66 Atl. 893.

the satisfaction of the condition,³⁵ and there is no reason why he should be allowed to retain a right of control by an express statement to that effect while making delivery.³⁶ A delivery which the grantor can, at his option, treat as not a delivery, is incomprehensible, and in so far as the conveyance may still be subject to the grantor's control, in the sense that he may treat it as a legal nullity, it must be considered that there has been no delivery, conditional or unconditional, and that he has merely handed the instrument to the depository to hold as his agent.

— “**Second delivery.**” One notion as to delivery in escrow which, though erroneous on principle, and generally repudiated,³⁷ receives occasional expression,³⁸ is that such a delivery does not become operative by

35. *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. 467; *Seibel v. Higham*, 216 Mo. 121, 129 Am. St. Rep. 502, 115 S. W. 987; *James v. Vanderheyden*, 1 Paige (N. Y.) 385; *Stanton v. Miller*, 58 N. Y. 192. But see *Brown v. Allbright* 110 Ark. 394, 161 S. W. 1036, for a *dictum contra*.

36. That there is no delivery whatsoever if such right of revocation is retained, see *Moore v. Moyer*, 122 Ark. 548, 184 S. W. 63; *Roe v. Lovick*, 8 Ired. Eq. (N. C.) 88; *Prutsmann v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; and cases in note 31-33 *supra*. See also cases to the same effect in connection with a delivery to take effect on the grantor's death, *post*, note 93. That there is no delivery in so far as a right of control still exists in the grantor see *ante*, § 461, note 60.

37. *White Star Line Steamboat Co. v. Moragne*, 91 Ala. 610,

8 So. 867; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315; *Couch v. Meeker*, 2 Conn. 302; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; *Francis v. Francis*, 143 Mich. 300, 106 N. W. 864; *Naylor v. Stene*, 96 Minn. 57, 104 N. W. 685; *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400; *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003; *Shirley v. Ayres*, 14 Ohio St. 307; *Ketterson v. Inscho*, 55 Tex. Civ. App. 150, 118 S. W. 626; *Prutsmann v. Baker*, 30 Wis. 644.

38. See *Fuller v. Hollis*, 57 Ala. 435; *Fitch v. Bunch*, 30 Cal. 208, 212; *Foster v. Mansfield*, 3 Metc. (Mass.) 412; *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Stephens v. Rinehart*, 72 Pa. St. 434; 4 Kent's Comm. 454; 3 Washburn, Real Prop., § 2179; 16 Cyclopaedia Law & Proc. 561 n 3.

reason of the satisfaction of the condition, unless this is followed by a manual transfer of the instrument by its custodian to the grantee named therein, a "second delivery" as it is sometimes called. It might, of course, happen that such a transfer is a part of the condition on which the delivery is made, but that it is not ordinarily the grantor's intention that the operation of the instrument shall depend on the custodian's caprice or convenience in handing or not handing the instrument to the grantee is sufficiently obvious. The fact that, as is frequently the case, the grantor requests or directs the custodian to hand the instrument to the grantee upon the occurrence of the event specified, or even that the grantor is under the mistaken impression that such a manual transfer is necessary in order to render the instrument operative, is no reason for inferring an intention that the instrument shall not be operative unless such a transfer is made. The necessity of such a physical transfer of the instrument by its custodian cannot be regarded as involved in the occasional decisions that the grantee may, upon satisfaction of the condition, recover possession of the instrument from the custodian by suit.³⁹ The grantee is entitled to its possession because it is a muniment of his title, and not because its possession by him is necessary to render it legally operative. This notion of the necessity of a second delivery is evidently based on the primitive idea, before referred to, which still so frequently emerges, that the operation of a deed is dependent on the physical transfer of the instrument to the grantee or obligee.

39. *Tombler v. Sumpster*, 97 Ark. 480, 134 S. W. 967; *Hardin v. Neal Loan & Banking Co.*, 125 Ga. 820, 54 S. E. 755; *Guild v. Althouse*, 71 Kan. 604, 81 Pac. 172; *Stanton v. Miller*, 58 N. Y. 192, 202, 65 Barb. 58; *Baum's*

Appeal, 113 Pa. St. 58, 65, 4 Atl. 461; *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958 (*semble*); *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566, 92 Pac. 380; *Schmidt v. Deegan*, 69 Wis. 300, 34 N. W. 83.

Closely connected in its nature and origin with this notion of the necessity of a second delivery is the contention, occasionally made, that if the custodian of the instrument hands it to the grantee before the satisfaction of the condition, the instrument becomes immediately operative. This contention has met with no favor, there being a considerable number of decisions that an instrument delivered in escrow does not thus become immediately operative by reason of such a transfer to the grantee of the possession of the instrument.⁴⁰ And this has been held to be so even as against a subsequent innocent purchaser for value from the grantee,⁴¹ unless the grantor, in giving the grantee possession of the land in addition to relinquishing control of the instrument, was guilty of such negligence as to be precluded from asserting that the instrument was delivered merely in escrow.⁴² The grantor may, how-

40. Calhoun County v. American Emigrant Co., 93 U. S. 124, 127, 23 L. Ed. 826; Ober v. Pendleton, 30 Ark. 61; Heney v. Pesoli, 109 Cal. 53, 41 Pac. 819; Stanley v. Valentine, 79 Ill. 544; Jackson v. Rowley, 88 Iowa, 184, 55 N. W. 339; Daggett v. Daggett, 143 Mass. 516, 10 N. E. 311; Black v. Shreve, 13 N. J. Eq. 455, 458; Hinman v. Booth, 2 Wend. (N. Y.) 267; Thornhill v. Olson, 31 N. D. 81, L. R. A. 1916A, 493, Ann Cas. 1917E, 427, 153 N. W. 442; Powers v. Rude, 14 Okla. 381; Bradford v. Durham, 54 Ore. 1, 135 Am. St. Rep. 807, 101 Pac. 897; Sharp v. Kilborn, 64 Ore. 371, 130 Pac. 735; Etheredge v. Aetna Ins. Co., 102 S. C. 313, 86 S. E. 687; Schmidt v. Musson, 20 S. D. 389, 107 N. W. 367; Morris v. Blunt, 35 Utah, 194, 99 Pac. 686.

41. Dixon v. Bristol Sav. Bank, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193; Forcum v. Brown, 251 Ill. 301, 96 N. E. 259; Jackson v. Lynn, 94 Iowa, 151, 58 Am. St. Rep. 386, 62 N. W. 704; Seibel v. Higham, 216 Mo. 121, 129 Am. St. Rep. 502, 115 S. W. 987 (*semble*); Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Wood v. French, 39 Okla. 685, 136 Pac. 734; Boswell v. Pannell, —Tex. Civ. App.—, 146 S. W. 233; Smith v. South Royalton Bank, 32 Vt. 341; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314, 6 Wis. 453; Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993; Cobban v. Conklin, 125 C. C. A. 451, 208 Fed. 231; United States v. Payette Lumber & Mfg. Co., 198 Fed. 88. See *ante*, § 461, note 50.

42. Bailey v. Crim, 9 Biss. (U. S.) 95; Mays v. Shields, 117

ever, it is said, waive the condition, as by recognizing the instrument as operative although the condition has not been satisfied,⁴³ and even his mere failure, for an unreasonable time, to take measures to cancel or otherwise nullify the instrument after it has passed into the grantee's control may preclude him from thereafter asserting, as against an innocent purchaser, that his delivery thereof was conditional.⁴⁴

A distinction in this regard is asserted in some of the books between an instrument delivered as an escrow, not to take effect as the grantor's deed until the satisfaction of a condition, and an instrument handed to a third person, as the grantor's deed, to be "delivered" to the grantee upon the satisfaction of a condition; it being said that, in the latter case, as distinguished from the former, the instrument is the grantor's "deed presently," and if the grantee obtains possession thereof even before the satisfaction of the condition it becomes

Ga. 814, 45 S. E. 68; Quick v. Milligan, 108 Ind. 419, 58 Am. Rep. 49; Hubbard v. Greeley, 84 Me. 340, 17 L. R. A. 511, 24 Atl. 799; Schurtz v. Colvin, 55 Ohio St. 274, 45 N. E. 527; Wood v. French, 39 Okla. 685, 136 Pac. 734; Blight v. Schenck, 10 Pa. St. 285, 51 Am. Dec. 478; Spotts v. Whitaker, —Tex. Civ. App.—, 157 S. W. 422; King v. Diffey, —Tex. Civ. App.—, 192 S. W. 262.

And that the grantor may be estopped by reason of his failure to act promptly against the grantee after the wrongful acquisition of the instrument by the latter, see Allen v. Powell, (Ind. App.), 115 N. E. 96; Baillarge v. Clarke, 145 Cal. 589, 104 Am. St. Rep. 75, 79 Pac. 268; Leonard v. Shale, 266 Mo. 123, 181 S. W. 16. See *post*, § 462, note 44.

43. Jackson v. Badham, 162 Ala. 484, 50 So. 131; Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Eggleston v. Pollock, 38 Neb. 188, 56 N. W. 805; Oland v. Malson, 39 Okla. 456, 135 Pac. 1055; Truman v. McCollum, 20 Wis. 70.

As well suggested in Mr. Ewart's admirable work "Waiver Distributed," at p. 130, in such a case of waiver, so called, of the condition on which delivery is made, the condition is to be regarded as being subject, in its creation, to the grantor's option, that is, the grantor has the privilege of having it regarded as conditional or not conditional.

44. Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Haven v. Kramer, 41 Iowa, 382; Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722; Connell v. Connell, 32

immediately operative.⁴⁵ This distinction is strongly asserted in one case in this country,⁴⁶ and in a few others it is referred to in terms of approval.⁴⁷ In others it has been repudiated⁴⁸ or referred to as questionable.⁴⁹ The old books in which this distinction is asserted make it hinge upon the language used by the grantor or obligor in handing the instrument to the intended custodian, that is, upon whether the grantor handed it as his deed or as an escrow, it being regarded as his "deed presently" if referred to by him as his deed.⁵⁰ At the present day it is entirely immaterial whether the grantor refers to the instrument as an escrow or as his deed, and the fact that the grantor directs the person to whom he hands the instrument to hand or "deliver" it to the grantee only upon the satisfaction of a condition would ordinarily be re-

W. Va. 319, 9 S. E. 252. See *ante*, § 461, note 51. That the grantor may have the instrument cancelled if prematurely handed by its custodian to the grantee, see *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679; *Bales v. Roberts*, 189 Mo. 49, 87 S. W. 914. That he may have its record enjoined, see *Matteson v. Smith*, 61 Neb. 761, 86 N. W. 472.

45. *Comyn's Dig. Fait*, A 3; *Perkins, Conveyancing*, §§ 143, 144; *Sheppard's Touchstone*, 59; *Bushell v. Pasmore*, 6 Mod. 217. The distinction is recognized in *Murray v. Stair*, 2 B. & C. 82, but apparently repudiated in *Johnson v. Baker*, 2 B. & Ald. 440.

46. *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66.

47. *Hathaway v. Payne*, 34 N. Y. 92; *Martin v. Flaharty*, 13 Mont. 96, 40 Am. St. Rep. 415;

Ball v. Foreman, 37 Ohio St. 132; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Wells v. Wells*, 132 Wis. 73, 111 N. W. 1111.

48. *State Bank at Trenton v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400; *Hall v. Harris*, 5 Ired. Eq. 303.

49. See *Jackson v. Sheldon*, 22 Me. 569; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235. "The distinction on this point is quite subtle, and almost too evanescent to be relied on." 4 Kent's Comm. 455, n.

50. In *Murray v. Stair*, 2 B. & C. 82, it is said that the word "escrow" need not be used to make a delivery in escrow, but no criterion for the application of the asserted distinction is indicated. See the judicious remarks of Hornblower, C. J., in *State Bank at Trenton v. Evans*, 15 N. J. L. 158, 28 Am. Dec. 400.

garded as showing that the original delivery of the instrument was conditional only. There is, it is submitted, absolutely no distinction between an instrument conditionally delivered as an escrow and one conditionally delivered as a deed, and neither can take effect until the condition is satisfied. There is, it is true, a *dictum* of Chief Justice Shaw to the apparent effect that an instrument can be regarded as an escrow only when the delivery is conditioned upon the performance of some act by the grantee or obligee, while it is the grantor's "deed presently" if conditioned upon the occurrence of some other character of event,⁵¹ but as he cites no authority and states no reason in support of the *dictum*, it may, it is submitted, be disregarded, in view especially of the fact that there are quite a number of cases⁵² in which it is assumed without question that an instrument conditionally delivered is an escrow, although the condition does not involve the voluntary performance of any act by the grantee or obligee.

— **Necessity of contract.** It has been asserted in a number of cases that there can be no delivery in escrow unless it takes place as the result of an actual contract of sale between the parties to the instrument,

51. *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154. The *dictum* is quoted with approval in *Fine v. Lasater*, 110 Ark. 425, Ann. Cas. 1915C, 385, 161 S. W. 1147; *Grilley v. Atkins*, 78 Conn. 380, 4 L. R. A. (N. S.) 816, 112 Am. St. Rep. 152, 62 Atl. 337; *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291; *Stephens v. Rinehart*, 72 Pa. St. 434; *Landon v. Brown*, 160 Pa. St. 538, 28 Atl. 921.

52. See *e. g.*; *Prewitt v. Ashford*, 90 Ala. 294, 70 So. 831; *Conneau v. Geis*, 73 Cal. 176, 2

Am. St. Rep. 785, 14 Pac. 580; *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499; *Raymond v. Smith*, 5 Conn. 555; *Stone v. Duvall*, 77 Ill. 475; *Shults v. Shults*, 159 Ill. 654, 50 Am. St. Rep. 188, 43 N. E. 800; *Fitzgerald v. Allen*, 240 Ill. 80, 88 N. E. 240; *Millett v. Parker*, 2 Metc. (Ky.) 608; *Hoagland v. Beckley*, 158 Mich. 565, 123 N. W. 12; *Price v. Home Ins. Co.*, 54 Mo. App. 119; *Gilbert v. North American Fire Ins. Co.*, 23 Wend. (N. Y.) 44, 35 Am. Dec. 543; *Tooley v. Dibble*, 2 Hill. (N. Y.) 641; *Payne v.*

as, for instance, when the delivery is conditioned upon the payment by the grantee of an agreed price for the land. This view appears to have been first asserted in a California case,⁵³ which, without naming any authority, stated this as one possible ground of its decision, and this was the only authority cited in a subsequent case in Wisconsin,⁵⁴ which explicitly decided that in the absence of a valid and enforceable contract between the parties for the sale of the land, there could be no delivery in escrow. On the authority of this latter case and of one of the text books hereafter referred to, the same view was adopted, without discussion, by the Supreme Court of Utah,⁵⁵ and it was likewise adopted in Oregon⁵⁶ upon the authority of text book statements alone. There are occasional decisions to the same effect in other States,⁵⁷ and various text books, on the authority of one or more of the cases above referred to, state this as settled law.⁵⁸ The idea at the basis of this asserted requirement of an auxiliary contract in connection with conditional delivery appears to be that, in the absence of such a contract, the grantor can control the operation of the instrument, that, in other words,

Smith, 28 Hun (N. Y.) 104;
Clarke v. Eureka County Bank,
123 Fed. 922.

53. Fitch v. Bunch, 30 Cal. 208, approved in Miller v. Sears, 91 Cal. 282, 25 Am. St. Rep. 176; Holland v. McCarthy, 173 Cal. 597, 160 Pac. 1069. Professor R. W. Aigler considers that this case first cited merely asserted, in effect, that the absence of a contract of sale is conclusive, or approximately conclusive, that no delivery has been made, that, in other words, the depository holds it subject to the grantor's control. See article 16 Mich. Law Rev. 569.

54. Campbell v. Thomas, 42

Wis. 437, 24 Am. Rep. 427.

55. Clark v. Campbell, 23 Utah, 569, 54 L. R. A. 508, 90 Am. St. Rep. 716, 65 Pac. 496.

56. Davis v. Brigham, 56 Ore. 41, 107 Pac. 961, Ann. Cas. 1912B, 1340, followed in Foulkes v. Sengstacken, 83 Ore. 118, 163 Pac. 311.

57. Main v. Pratt, 276 Ill. 218, 114 N. E. 576; McLain v. Healy, 98 Wash. 489, 168 Pac. 1; Freeland v. Charuley, 80 Ind. 132. See Seibert v. Lanz, 29 N. D. 139, 150 N. W. 568.

58. 16 Cyclopaedia Law & Proc. 562; 11 Am. & Eng. Encyc. Law (2d Ed.), 335; 1 Devlin, Deeds, 313.

he may revoke the delivery.⁵⁹ Such an idea is, it is conceived, absolutely erroneous,⁶⁰ and involves an entire misapprehension of the nature of conditional delivery. After the delivery of the instrument of conveyance, whether absolutely or conditional, the parties stand in the relation, not of vendor and purchaser under a contract but of grantor and grantee under a conveyance, and consequently the question of the existence of a valid contract of sale, is immaterial.⁶¹ There is no more reason for regarding the conditional delivery of a conveyance as invalid in the absence of an enforceable contract of sale than for so regarding an absolute delivery.

The view referred to, that a contract is necessary to a conditional delivery, has no considerations of policy or convenience in its favor, and its necessary result is considerably to detract from the practical utility of the doctrine of conditional delivery. Apart from the fact that it involves a misapprehension of the nature of conditional delivery, the following additional objections thereto may be suggested. In the first place, the doctrine of conditional delivery is not peculiar to conveyances of land, but is recognized also in connection with contracts under seal and also bills and notes. If there can be no conditional delivery of a conveyance in the absence of a contract of sale, that is, a contract to execute a conveyance, it would seem a reasonable inference that there can be no conditional delivery of a contract under seal or a promissory note unless there is a contract to execute such an instrument. There is no more reason for requiring an auxiliary contract in the one case than in the others. Yet it has never been suggested, so far as the writer is informed, that there

59. See particularly *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427, for an assertion to this effect.

60. *Ante*, this section, note 35.

61. This is well stated in an editorial note in 15 Mich. Law Rev. 579, by Professor R. W. Aigler. See also article by the same writer, 16 *Id.* 569.

can be a conditional delivery of a contract under seal or a promissory note, only when there is a legally valid contract to execute the contract or note. Furthermore, a valid conditional delivery may occur in connection with transactions not involving a sale, in the case of a gift, for instance. There can obviously be no contract of sale in such case to support the validity of the delivery,⁶² yet if a contract of sale is necessary to support a conditional delivery in the one case, how can such a delivery be valid without a contract of sale in the other? Another consideration adverse to the view referred to lies in the fact that, while the doctrine of delivery in escrow was recognized in the common-law courts at least as early as the first half of the fifteenth century,⁶³ a purely executory contract, not under seal, was not there enforceable at that time.⁶⁴ That being the case, the requirement of an extraneous contract in order to make the delivery in escrow effective would, in the fifteenth or sixteenth centuries, have necessitated a contract under seal, and it seems hardly probable that such a delivery of an obligation or conveyance under seal was always accompanied by another obligation under seal calling for its execution. The subject of delivery in escrow is treated with considerable fullness in at least two of the earlier books,⁶⁵ and there is not the slightest suggestion in either as to the necessity of such an auxiliary contract. It is, to say the least, somewhat extraordinary that an integral element in a doctrine dating from the commencement of the fifteenth

62. This is recognized in *Holland v. McCarthy*, 173 Cal. 597, 160 Pac. 1069, where it is accordingly stated that though a contract is necessary in other cases of conditional delivery, it is not necessary when it is made in pursuance of a gift.

63. See Y. B. 13 Hen. 4. 8; Y. B. 8 Hen. 6, 26; Y. B. 10 Hen.

6, 25.

64. Ames, *History of Assumpsit*, 2 Harv. Law Rev. 1, 53, reprinted in *Lectures on Legal History*, 129, 149; 3 Holdsworth, *Hist. Eng. Law* 336-349; Pollock, *Contracts* (8th Ed.) 148.

65. Perkins, *Conveyancing*, §§ 138, 144; Sheppard's *Touchstone*, 58, 59.

century should have remained to be discovered by a California court in the latter half of the nineteenth.

In addition to the cases above referred to which assert that existence of a contract of sale is necessary in order that a conveyance may be delivered in escrow, there are to be found judicial suggestions to the effect that the "deposit in escrow," that is, the physical transfer of the instrument by the grantor or obligor to a third person, to hold until satisfaction of the condition, must be in pursuance of a contract between the parties.⁶⁶ Thus it has been said in one case that the making of a deed in escrow presupposes a contract pursuant to which the deposit is made,⁶⁷ and in another that there must be a contract which prevents the grantor from recalling the deed.⁶⁸ The idea that, in the absence of a contract, the grantor can recall the deed is, as before remarked, without any support in principle, and there is, it is submitted, no more necessity of a contract in regard to its custody when the delivery is conditional than when it is unconditional.

— **Satisfaction of condition.** Properly considered, conditional delivery, or delivery in escrow, is the same as any other delivery, except that it is subject to the satisfaction of a condition. After the condition has been satisfied, there is an operative conveyance⁶⁹ which is to be regarded as having been delivered at the time of its conditional delivery, for the obvious reason that it was then, and then only, that it was delivered, though

66. See *Fitch v. Bunch*, 30 Cal. 208; *Wellborn v. Weaver*, 17 Ga. 267.

67. *Stanton v. Miller*, 58 N. Y. 192.

68. *Anderson v. Messenger* (C. C. A.) 158 Fed. 250, citing *James v. Vanderheyden* (N. Y.) 1 Paige, 385; *Cook v. Brown*, 34 N. H. 460; and *Pruitsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592, none

of which three cases supports the statement in the slightest degree.

69. If the condition is satisfied, the operation of the conveyance is obviously not prevented by the fact that the grantor reacquires possession of the instrument. *Wymark's Case*, 5 Co. Rep. 74; *Regan v. Howe*, 121 Mass. 424; *Baum's Appeal*, 113 Pa. St. 58, 4 Att. 461.

the ownership cannot be regarded as having passed until it actually did pass, that is, until the satisfaction of the condition. The grantor in effect says, at the time of handing the instrument to the intended custodian, "I now deliver this as my deed provided such a thing is done or occurs." That the delivery of the instrument and the passing of the ownership thus occur at different times is, it is conceived, the solution of the somewhat vague statements in the books, that, on the satisfaction of the condition, the deed will relate back to the time of delivery in order to uphold the deed, or to do justice, or to carry out the intention of the parties,⁷⁰ and it will serve to explain most of the decisions in this regard. The analogy may be suggested of an executory limitation contained in a conveyance *inter vivos*, which does not vest an estate until satisfaction of the condition precedent, but which, when the condition is satisfied, takes effect regardless of events or transactions which may have taken place since the time of the delivery of the conveyance. Accordingly, the fact that the grantor dies,⁷¹ or becomes incapacitated,⁷² between the

70. Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13; Hoyt v. McLagan, 87 Iowa, 746, 55 N. W. 18; Mohr v. Joslin, 162 Iowa, 34, 142 N. W. 981; Baker v. Snaveley, 84 Kan. 179, 114 Pac. 370; Taft v. Taft, 59 Mich. 185, 60 Am. Rep. 291; Simpson v. McGlathery, 52 Miss. 723; Frost v. Beekman, 1 Johns. Ch. 288; Craddock v. Barnes, 142 N. C. 89, 54 S. E. 1003; Shirley v. Ayres, 14 Ohio, 307, 45 Am Dec. 546; May v. Emerson, 52 Ore. 262, 16 Ann. Cas. 1129, 96 Pac. 454, 1065; Landon v. Brown, 160 Pa. 538, 28 Atl. 921; Foxley v. Rich, 35 Utah, 162, 99 Pac. 666; Spring Garden Bank v. Hulings Lumber Co., 32 W. Va. 357, 3 L. R. A. 583; Sheppard's Touchstone,

59, 72.

71. Davis v. Clark, 58 Kan. 100, 48 Pac. 563; Cook's Adm'r v. Hendricks, 4 T. B. Mon. (Ky.) 500; Wheelwright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; Tharaldson v. Everts, 87 Minn. 168, 91 N. W. 467; Schooler v. Schooler, 258 Mo. 83, 167 S. W. 444; Webster v. Kings County Trust Co., 145 N. Y. 275, 39 N. E. 964; Jackson v. Jackson, 67 Ore. 44, Ann. Cas. 1915C, 373, 135 Pac. 201; Gammon v. Bunnell, 22 Utah, 421, 64 Pac. 958; Bronx Inv. Co. v. National Bank of Commerce, 47 Wash. 566, 92 Pac. 380; Perryman's Case, 5 Co. Rep. 84.

72. Perkins, Conveyancing, §§ 10, 140; Jennings v. Bragg, Cro.

time of the delivery of the instrument and the satisfaction of the condition, does not affect the validity of the instrument as a conveyance. And likewise, if the grantee dies during such interval of time, the possibility of ownership vests in his heir.⁷³ So the instrument is to be regarded as having been delivered at the time of the conditional delivery, as against an intermediate purchaser from the grantor, and is entitled to priority, unless such purchaser is a *bona fide* purchaser for value, and as such protected against a conveyance prior in time.⁷⁴ And as against a creditor of the grantor in favor of whom a lien accrues by attachment or judgment intermediate the delivery and the satisfaction of the condition, the grantee takes priority,⁷⁵ unless such creditor is, by the recording law of the particular jurisdiction, entitled to the protection accorded a *bona fide* purchaser.⁷⁶ On the other hand, since the title does not

Eliz. 447; *Butler's Case*, 3 Co. Rep. 25; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Simpson v. McGlathery*, 52 Miss. 723.

73. *Perryman's Case*, 5 Co. Rep. 84; *Prewitt v. Ashford*, 90 Ala. 294, 7 So. 831; *Stone v. Duvall*, 77 Ill. 475; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Webster v. Kings County Trust Co.*, 145 N. Y. 275, 39 N. E. 964; *Perry v. Perry*, 170 App. Div. 525, 155 N. Y. Supp. 954.

74. *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499; *Whitmer v. Schenck*, 11 Idaho. 702, 83 Pac. 775; *Leiter v. Pike*, 127 Ill. 287; 20 N. E. 23; *Wright v. Astoria Co.*, 45 Ore. 224, 77 Pac. 599; *Wilkins v. Somerville*, 80 Vt. 48, 11 L. R. A. (N. S.) 1183, 130 Am. St. Rep. 906, 66 Atl. 893. As against equities accruing before the con-

ditional delivery, the grantee in the deed conditionally delivered, like any other grantee, cannot claim as a *bona fide* purchaser for value unless he paid value before receiving notice. See *Baker v. Snavelly*, 84 Kan. 179, 114 Pac. 370.

75. *Whitfield v. Harris*, 48 Miss. 710; *Simpson v. McGlathery*, 52 Miss. 723; *Hall v. Harris*, (N. C.), 5 Ired. Eq. 303; see *Dettmer v. Behrens*, 106 Ia. 585, 68 Am. St. Rep. 326, 76 N. W. 853; *Shirley's Lessee v. Ayres*, 14 Ohio, 307. *Contra*. *Jackson v. Rowland*, (N. Y.), 6 Wend. 66; *Wolcott v. Johns*, 7 Col. App. 360, 44 Pac. 675 (*dictum*); *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291.

76. See *May v. Emerson* 52 Ore. 262, 16 Ann. Cas. 1129, 96 Pac. 454; *Riddle v. Miller*, 19 Ore. 468, 23 Pac. 807.

pass as of the time of the conditional delivery, a distress levied by the grantor before the satisfaction of the condition is valid.⁷⁷ And the grantor is entitled to the rents and profits of the land until the condition is satisfied,⁷⁸ except when, owing to the payment by the grantee of interest on the purchase price, the court, in the equitable adjustment of the rights of the parties, gives the rents and profits to the grantee.⁷⁹ And the grantor has been properly considered the owner of the land for the purpose of signing a petition for the organization of a drainage district,⁸⁰ as well as for the purpose of imposing upon him a liability for taxes.⁸¹ Decisions to the effect that, upon the satisfaction of the condition, the grantee's title, that is, his ownership, relates back to the time of the delivery, for the purpose of validating an intermediate quit-claim conveyance by the grantee,⁸² appear to be questionable, as are, it is submitted, decisions that, while a conveyance to a non-existent corporation is ordinarily invalid, such a conveyance is valid if its delivery is conditional upon the formation of the corporation named, and such a corporation is subsequently formed.⁸³

As the death of the grantor before the satisfaction of the condition does not affect the validity of the

77. *Oliver v. Mowat*, 34 Up. Can. Q. B. 472.

78. *Perkins*, Conveyancing, § 10.

79. *Price v. Pittsburg R. Co.*, 34 Ill. 13; *Scott v. Stone*, 72 Kan. 545, 84 Pac. 117.

80. *Hull v. Sangamon River Drainage District*, 219 Ill. 454, 76 N. E. 701.

81. *Mohr v. Joslin*, 142 N. W. 981.

The decision in *McMurtrey v. Bridges*, 41 Okla. 264, 137 Pac. 721, that a warranty against taxes at the "time of delivery" of the conveyance meant taxes at

the time of the delivery, so called, involved in the manual transfer of the instrument by the depository to the grantee, appears questionable.

82. *Beekman v. Frost* (N. Y.) 18 Johns. 544, 9 Am. Dec. 246; *Tooley v. Dibble* (N. Y.) 2 Hill, 641. That it does not relate back for this purpose, see 2 Williams, *Vendor & Purchaser* (2d Ed.) 1251, note (d), referred to in 10 Halsbury's *Laws of England*, 390, note (m).

83. *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 3 L. R. A. 583; *Santaquin*

delivery made by him, so one may make delivery subject to a condition which cannot, by its terms, be satisfied until after his death. A judicial statement to the effect that if the condition cannot be satisfied until after the grantor's death, the instrument is necessarily testamentary in character,⁸⁵ appears to be based on the mistaken view that such a condition makes the transfer revocable so long as the grantor lives.

Since so long as the condition is not satisfied, the title does not pass, it results that when it becomes assured that the condition will never be satisfied, the instrument loses all possible efficacy. In such case the grantor will ordinarily desire to have the instrument returned to him, to preclude the possibility of its afterwards being utilized to his detriment, but the depositary may properly retain the instrument so long as there is the slightest uncertainty as to the ultimate satisfaction of the condition. Occasional expressions⁸⁶ to the effect that the action of the depositary in retaining the instrument or returning it to the grantor has in itself some effect on the rights of the grantor and grantee are, it is submitted, erroneous. If the condition can never be satisfied, the instrument can never be operative, regardless of who has the possession, and if the condition is satisfied, that the instrument has in some way passed into the possession of the grantor does not prevent its operation.⁸⁷

Min. Co. v. High Roller Min. Co., 25 Utah, 282, 71 Pac. 77. In these two cases a significance is imputed to the "second delivery" to which it is not entitled.

84. *Dettmer v. Behrens*, 106 Iowa, 585, 68 Am. St. Rep. 326; *Nolan v. Otney*, 75 Kan. 311, 9 L. R. A. (N. S.) 317, 89 Pac. 690; *Stockwell v. Shalit*, 204 Mass. 270, 90 N. E. 570; *Jackson v. Jackson*, 67 Ore. 44, Ann.

Cas. 1915C, 373, 135 Pac. 201; *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958.

85. *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, approved in *Culy v. Upham*, 135 Mich. 131, 106, Am. St. Rep. 388.

86. *Brown v. Allbright*, 110 Ark. 394, Ann. Cas. 1915D, 692, 161 S. W. 1036; *Hall v. Yaryan*, 25 Idaho, 470, 138 Pac. 339.

87. *Ante*, this section, note 69.

The cases upon the question of the burden of proof in connection with a conditional delivery are few and not entirely satisfactory. In view of the ordinary presumption of delivery from the grantee's possession of the instrument,⁸⁸ it would seem that, if the grantee has such possession, it is for the grantor to show that though the instrument was delivered, the delivery was conditional,^{88a} and for the grantee to show that the condition was satisfied.^{88b}

— **Delivery conditioned on death.** Not infrequently the grantor hands the instrument to a third person with a request or direction that he hand it to the grantee named upon the grantor's death, or otherwise indicates his intention that it shall become fully operative only upon his death. Such action has usually been regarded as involving a delivery of a conditional or *quasi*-conditional character, in that an instrument so delivered does not operate in exactly the same manner in which it would have operated had there been no reference to the grantor's death. There is, however, an obvious distinction between such a delivery and an ordinary conditional delivery. In the latter case the condition may never be satisfied, while in the former the condition, that of death, must necessarily be satisfied. A delivery conditioned upon a condition which cannot fail to be satisfied is strictly speaking, not a conditional delivery. The courts might have taken this view, that such a delivery is not properly subject to any condition, and that consequently the instrument operates exactly as if there had been no reference to the grantor's death, but this they have not done. They

88. *Ante*, § 461, note 67.

88a. *Evans v. Gibbs*, 6 *Humph. (Tenn.)* 405; *Union Bank v. Ridgely*, 1 *Harr. & G. (Md.)* 324; *Black v. Shreve*, 13 *N. J. Eq.* 455. But see *Kavanaugh v.*

Kavanaugh, 260 *Ill.* 179, 103 *N. E.* 65.

88b. *Black v. Shreve*, 13 *N. J. Eq.* 455; *Kavanaugh v. Kavanaugh*, 260 *Ill.* 179, 103 *N. E.* 65. *Contra*, *Swain v. McMillan*, 30 *Mont.* 433, 76 *Pac.* 943.

have regarded the reference to death in such case, in connection with the delivery, as in some way affecting the operation of the conveyance, without, however, any entirely satisfactory elucidation of the matter.

The courts have not infrequently said that, upon such a delivery, the title passes immediately, subject to a life estate in the grantor,⁸⁹ or with the right of possession postponed.⁹⁰ If this means that a conveyance so delivered creates two estates, a particular estate for life in the grantor and an estate in the nature of a remainder or reversion in the grantee, the propriety of the statement appears to be somewhat open to question. Thus to give to a conveyance in terms creating only an estate in fee simple, the additional effect of creating an estate for life in the grantor, does considerable violence to its language, and furthermore it gives to the matter of delivery an operation to which it is not entitled. The function of delivery is to determine whether the instrument shall be operative, not the estate or estates which the instrument shall create when it does become operative.

Another theory which may be suggested as to such a delivery with reference to the grantor's death is that, by reason of the language used at the time of handing the instrument to its custodian, the conveyance, though in terms creating a vested estate in fee simple in the grantee, creates merely a prospect of an estate, which

89. *Bury v. Young*, 98 Cal. 797; *Maxwell v. Harper*, 51 446, 35 Am. St. Rep. 186, 33 Pac. Wash. 351, 98 Pac. 756.
338; *Hunt v. Wicht*, 174 Cal. 90. *Kirkwood v. Smith*, 212 205, 162 Pac. 639; *Grilley v. At-* Ill. 395, 72 N. E. 427; *Owen v.* *kins*, 78 Conn. 380, 4 L. R. A. Williams, 114 Ind. 179, 15 N. E. (N. S.) 816, 112 Am. St. Rep. 678; *Gideon v. Gideon*, 99 Kan. 152, 62 Atl. 337; *Wheeler v.* 332, 161 Pac. 595; *Meech v.* *Loesch*, 51 Ind. App. 562, 99 N. Wilder, 130 Mich. 29, 89 N. W. E. 502; *Rowley v. Bowyer*, 75 556; *Dickson v. Miller*, 124 Minn. N. J. Eq. 80, 71 Atl. 398; 346, 145 N. W. 112; *Shaffer v.* *Arnegaard v. Arnegaard*, 7 N. D. Smith, 53 Okla. 352, 156 Pac. 475, 41 L. R. A. 258, 75 N. W. 1158.

will ripen into a vested estate only on the death of the grantor, as if a springing use had been created, the fee simple remaining in the meanwhile in the grantor. Such a result may be attained by regarding a delivery with reference to the grantor's death as but one case of conditional delivery, ignoring the fact that the condition named, that of death, is certain to be satisfied. This involves a fiction, it is true, but it is a beneficial fiction, conducive to simplicity and harmony, as bringing into a single category all the cases of qualified delivery.

Applying this latter theory, in accordance with the views previously indicated, while the delivery is to be regarded as occurring at the time at which it actually does occur, the title does not pass, that is, the grantee does not acquire any estate, until the death of the grantor. The delivery is effective as against subsequent donees, grantees and attaching and judgment creditors, except in so far as they stand in the position of innocent purchasers for value.⁹¹ And so the death of the grantee after the delivery and before the grantor's death does not affect the validity of the delivery and, upon the grantor's death, an estate becomes vested in the grantee's heir.⁹² On the other hand, no estate vests in the grantee or grantee's heir until the grantor's death, until, that is, the condition named is satisfied.

That the grantor, in handing the instrument to the depositary, retains a right to control its operation, a

91. To this effect appear to be *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300; *Grilley v. Atkins*, 78 Conn. 380, 4 L. R. A. (N. S.) 816, 112 Am. St. Rep. 152, 62 Atl. 337; *Nowakowski v. Sobeziak*, 270 Ill. 622, 110 N. E. 809; *Smiley v. Smiley*, 114 Ind. 258, 16 N. E. 585; *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678; *Brown v. Austen* (N. Y.) 35 Barb. 341; *Ranken v. Donovan*, 166 N. Y. 626, 46 App. Div. 225. But in *Rath-*

mell v. Shirley, 69 Ohio St. 187, persons who gave credit to the grantor in ignorance of the conveyance so delivered were given priority, and in *Ladd v. Ladd*, 14 Vt. 185, the widow by a marriage subsequent to such delivery was regarded as entitled to dower.

92. *Stone v. Duvall*, 77 Ill. 475. And compare *Stonehill v. Hastings*, 202 N. Y. 115, 91 N. E. 1068.

right, for instance, to withdraw and cancel it, precludes the physical transfer to the depositary from operating as a delivery, in the case of an instrument which is to take effect on the grantor's death,⁹³ as in the case of an instrument which is to take effect on the satisfaction of any other condition.⁹⁴ As before remarked, a delivery which the grantor can, at his option, treat as not a delivery, is incomprehensible, and cases which recognize a delivery in spite of such retention of control,⁹⁵ cannot be supported on principle. If, however, no such power of control is retained, the mere fact that the depositary allows the grantor to resume possession of the instrument,⁹⁶ or that he would do so if requested,⁹⁷ does not affect the fact of delivery.

93. Seeley v. Curts, 180 Ala. 445, Ann. Cas. 1915C, 381, 61 So. 807; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Wilson v. Wilson, 158 Ill. 567, 49 Am. St. Rep. 176; Kunkel v. Johnson, 268 Ill. 422, 109 N. E. 279; Osborne v. Eslinger, 155 Ind. 351, 80 Am. St. Rep. 240; Brown v. Brown, 66 Me. 316; Burk v. Sproat, 96 Mich. 404, 55 N. W. 985; Dickson v. Miller, 124 Minn. 346, 145 N. W. 112; Cook v. Brown, 34 N. H. 460; Saltzsieder v. Saltzsieder, 219 N. Y. 523, 114 N. E. 856; Huddleston v. Hardy, 164 N. C. 210, 80 S. E. 158; Arnegard v. Arnegard, 7 N. D. 475, 41 L. R. A. 258, 75 N. W. 797; Williams v. Schatz, 42 Ohio St. 47; Thrush v. Thrush, 63 Ore. 143, 125 Pac. 267, 126 Pac. 994; Johnson v. Johnson, 24 R. I. 57; Showalter v. Spangler, 93 Wash. 43, 160 Pac. 1042; Williams v. Daubner, 103 Wis. 521, 74 Am. St. Rep.

902.

94. *Ante*, this section, notes 29-35.

95. Woodward v. Camp, 22 Conn. 457 (but see Grilley v. Atkins, 78 Conn. 380, 4 L. R. A. (N. S.) 816, 112 Am. St. Rep. 154, 62 Atl. 337); Lippold v. Lippold, 112 Iowa, 134, 84 Am. St. Rep. 331; Daggett v. Simonds, 173 Mass. 340, 46 L. R. A. 332; Ruggles v. Lawson, 13 Johns. (N. Y.) 285, 7 Am. Dec. 375; Henry v. Phillips, 105 Tex. 459, 151 S. W. 533.

96. Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483; Foreman v. Archer, 130 Iowa, 49; Peterson v. Bisbee, 191 Mich. 439, 158 N. W. 134; Thrush v. Thrush, 63 Ore. 143, 125 Pac. 267, 126 Pac. 994. But this has been referred to as evidence that there was originally no valid delivery. Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483; O'Brien v. O'Brien, 19 N. D. 713, 125 N. W. 307.

97. Loomis v. Loomis, 178

Decisions to the effect that there is no valid delivery if it is conditioned on the grantor's death within a period named,⁹⁸ or on his death before the death of the grantee,⁹⁹ appear to be decidedly questionable. They are based on the assumption, erroneous, it is submitted, that in such case the grantor retains control of the operation of the instrument. It would hardly be contended that in the analogous case of a delivery conditioned on the payment of the purchase money within a time named, the grantor retains such control, and that there is consequently no valid delivery. That the grantor expressly retains the privilege of cancelling the instrument in case the grantee fails to support her for the balance of her life involves no such retention of control as to affect the validity of the delivery, it involving merely a right to terminate the estate created, in case the named contingency occurs.¹

It is sometimes said of such a delivery with reference to the grantor's death, that the deed becomes operative upon its "delivery" by the custodian to the grantee after the grantor's death,² but, it is conceived, any such reference to a "second delivery," so called, meaning thereby a manual transfer by the custodian of the instrument to the grantee, introduces an entirely erroneous conception. Assuming, as is no doubt ordinarily the case, that the grantor intends the instrument to be fully effective upon his death even though the custodian does not hand the instrument to the grantee, such physi-

Mich. 221, 144 N. W. 552; *White v. Watts*, 118 Iowa, 549, 92 N. W. 660; *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756.

98. *Long v. Ryan*, 166 Cal. 442, 137 Pac. 29.

99. *Kenney v. Parks*, 125 Cal. 146, 57 Pac. 772; *Dunlap v. Marnell*, 95 Neb. 535, 145 N. W. 1017.

1. *Malley v. Quinn*, 132 Minn. 254, 156 N. W. 263; *Phifer v.*

Mullis, 167 N. C. 405, 83 S. E. 582.

2. *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678; *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. 1114; *Dickson v. Miller*, 124 Minn. 346, 145 N. W. 112; *Williams v. Latham*, 113 Mo. 165, 20 S. W. 99; *Tooley v. Dibble*, 2 Hill. (N. Y.) 641; *Rosseau v. Bleau*, 131 N. Y. 177, 27 Am. St. Rep. 578, 30 N. E. 52; *Stonehill*

cal transfer to the grantee is absolutely immaterial, and the instrument becomes operative upon his death by reason of "the first and only delivery."³ If the grantor intends such a manual transfer to be a part of the condition of the delivery, it must of course be made in order to render the instrument operative, but the manual transfer would not constitute the delivery of the conveyance, in the technical sense. This has already taken place, and moreover a deed of conveyance cannot be delivered after the death of the grantor.⁴

§ 463. **Acceptance.** In many of the states, perhaps a majority, an acceptance of the conveyance by the grantee named therein has been stated to be essential to its validity.⁵ And it has accordingly been decided in a number of cases that the conveyance is not effective as against the claim of a third person which accrued, by reason of attachment, recovery of a judgment, or purchase for value, between the time of delivery of the instrument and the grantee's subsequent assent thereto.⁶

v. Hastings, 202 N. Y. 115, 94 N. E. 1068; Crooks v. Crooks, 34 Ohio St. 610; Stephens v. Rinehart, 72 Pa. St. 434; Wilson v. Wilson, 32 Utah, 169, 89 Pac. 643; Ladd v. Ladd, 14 Vt. 185.

3. Per Hosmer, C. J., in Stewart v. Stewart, 5 Conn. 317.

4. *Ante*, § 461, note 59.

5. Russell v. May, 77 Ark. 89, 90 S. W. 617; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726; Knox v. Clark, 15 Colo. App. 356, 62 Pac. 334; Stallings v. Newton, 110 Ga. 875, 36 S. E. 227; Hulick v. Scovill, 9 Ill. 159; Abernathie v. Rich, 256 Ill. 166, 99 N. E. 883; Woodbury v. Fisher, 20 Ind. 387, 83 Am. Dec. 325; Kyle v. Kyle, 175 Iowa, 734, 157 N. W. 248; Alexander v. De Kermely, 81 Ky. 345; Cates v. Cates, 152 Ky. 47, 153 S. W. 10; Houlton

v. Houlton, 119 Md. 180, 86 Atl. 514; Meigs v. Dexter, 172 Mass. 217, 52 N. E. 75; Watson v. Hillman, 57 Mich. 607, 24 N. W. 663; Miller v. McCaleb, 208 Mo. 562, 106 S. W. 655; Rennebaum v. Rennebaum, 78 N. J. Eq. 507, 79 Atl. 309, 79 N. J. Eq. 654, 83 Atl. 1118; Arnegard v. Arnegard, 7 N. D. 475, 41 L. R. A. 258, 75 N. W. 797; Couch v. Addy, 35 Okla. 355, 129 Pac. 709; Larisey v. Larisey, 93 S. C. 450, 77 S. E. 129; Reid v. Gorman, 37 S. D. 314, 158 N. W. 780; Kempner v. Rosenthal, 81 Tex. 12, 16 S. W. 639; Welsh v. Sackett, 12 Wis. 243.

6. Parmelee v. Simpson, 5 Wall. (U. S.) 81; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726; Knox v. Clark, 15 Colo. App. 356, 62 Pac. 334; Evans v. Cole-

A conveyance was effective at common law although the transferee did not assent thereto or even know thereof, he always having, however, the right to "disclaim," that is, to repudiate the conveyance and thereby revest the title in the grantor.⁷ Such is the rule in England at the present day.⁸ And in spite of the constant assertion and reassertion by the courts in this country of the necessity of acceptance, it is difficult to avoid the conclusion that in a number of states the rule in this regard is the same as in England, that no acceptance of the conveyance is necessary, though the grantee may, if he choose, dissent and disclaim.^{8a} That no acceptance is necessary appears to be involved in the statement, made with great frequency, that, provided the conveyance can be regarded as beneficial in character, and as not involving any burden on the grantee, his acceptance will be presumed in the absence of any showing of dissent.⁹

man, 101 Ga. 152, 28 S. E. 645; Partridge v. Chapman, 81 Ill. 137; Woodbury v. Fisher, 20 Ind. 387, 83 Am. Dec. 325 (but see Emmons v. Harding, 162 Ind. 154, 1 Ann. Cas. 864, 70 N. E. 142); Day v. Griffith, 15 Iowa, 104; Bell v. Farmers' Bank of Kentucky, 11 Bush (Ky.) 34, 21 Am. Rep. 205; Simpson v. Yocum, 172 Ky. 449, 189 S. W. 439; Field v. Fisher, 65 Mich. 606, 32 N. E. 838; Kuh v. Garvin, 125 Mo. 547, 28 S. W. 847; Fischer Leaf Co. v. Whipple, 51 Mo. App. 181; Rogers v. Heads Iron Foundry, 51 Neb. 52, 37 L. R. A. 433; Derry Bank v. Webster, 44 N. H. 264; Kempner v. Rosenthal, 81 Tex. 12, 16 S. W. 639; Welch v. Sackett, 12 Wis. 243.

7. Litt. §§ 684, 685; Butler & Baker's Case, 3 Co. Rep. 260; Thompson v. Leach, 2 Vent. 198;

Sheppard's Touchstone, 284. See Skipwith's Ex'r v. Cunningham, 8 Leigh (Va.) 272.

8. Siggers v. Evans, 2 El. & Bl. 367; Standing v. Bowring, 31 Ch. D. 286; Mallott v. Wilson (1903), 2 Ch. 494. See article on the nature of disclaimer by F. E. Farrer, Esq., in 32 Law Quart. Rev. 83.

8a. See editorial note, 19 Harv. Law Rev. at p. 612; Harri-man, Contracts, (2d Ed.) §§ 82, 83.

9. Arrington v. Arrington, 122 Ala. 510, 26 So. 152; Graham v. Suddeth, 97 Ark. 283, 133 S. W. 1033; De Levillian v. Edwards, 39 Cal. 120; Merrills v. Swift, 18 Conn. 257, 46 Am. Dec. 315; Moore v. Giles, 49 Conn. 570; Baker v. Hall, 214 Ill. 364, 73 N. E. 351; Bremmerman v. Jennings, 101 Ind. 253; Emmons v. Harding, 162 Ind. 154, 70 N. E. 142; Pod-

and this though he is in entire ignorance of the conveyance.¹⁰ Such a statement represents a tendency, which appears to be open to criticism,¹¹ to express rules of substantive law in the form of rules of presumption, a mode of expression which is particularly objectionable when, as in this case, the thing presumed to exist is a thing which concededly does not exist. If there is no acceptance, no rule of law, whether or not designated a presumption, can create an acceptance. And the only conclusion, it is submitted, to be drawn from the decisions upholding a beneficial conveyance even in the ab-

hajskey's Estate, 137 Iowa, 745, 115 N. W. 596; Gideon v. Gideon, 99 Kan. 322, 161 Pac. 595; Jefferson County Building Ass'n v. Heil, 81 Ky. 513; Houlton v. Houlton, 119 Md. 180, 86 Atl. 514; Ingersoll v. Odendahl, 136 Minn. 428, 162 N. W. 525; Metcalfe v. Brandon, 60 Miss. 685; Ensworth v. King, 50 Mo. 477; Jones v. Swayze, 42 N. J. L. 279; Rennebaum v. Rennebaum, 78 N. J. Eq. 427, 79 Atl. 309, 79 N. J. Eq. 654, 83 Atl. 1118; Spencer v. Carr, 45 N. Y. 406, 6 Am. Rep. 112; Ten Eyck v. Whitbeck, 156 N. Y. 341, 50 N. E. 963; Lynch v. Johnson, 171 N. C. 611, 89 S. E. 61; Arne-gaard v. Arnegaard, 7 N. Dak. 475, 41 L. R. A. 258, 75 N. W. 797; Shaffer v. Smith, 53 Okla. 352, 156 Pac. 1188 (voluntary deed); *In re Braley's Estate*, 85 Vt. 351, 82 Atl. 5; Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. 874. In *Ward v. Rittenhouse Coal Co.*, 152 Ky. 228, 153 S. W. 217, it is said that acceptance is not to be implied or presumed if the grantee is competent and is present in person.

10. *Elsberry v. Boykin*, 65 Ala.

336; *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 53 So. 812; *Russell v. May*, 77 Ark. 89, 90 S. W. 617; *Tibballs v. Jacobs*, 31 Conn. 428; *Graham v. Suddeth*, 97 Ark. 283, 133 S. W. 1033; *Burch v. Nicholson*, 157 Iowa, 502, 137 N. W. 1066; *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490; *Clark v. Creswell*, 112 Md. 339, 21 Ann. Cas. 338, 76 Atl. 579; *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 21 Atl. 627; *Everett v. Everett*, 48 N. Y. 218; *Munoz v. Wilson*, 111 N. Y. 295, 18 N. E. 855; *Robbins v. Roscoe*, 120 N. C. 79, 38 L. R. A. 238, 58 Am. St. Rep. 774; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377.

So acceptance has been said to be presumed in the case of a delivery on condition or to take effect on the grantor's death. *Kyle v. Kyle*, 175 Iowa, 734, 157 N. W. 248. And the grantee's ignorance of the conveyance is immaterial. *Roepke v. Nutzmänn*, 95 Neb. 589, 146 N. W. 939; *Saltzsieder v. Saltzsieder*, 219 N. Y. 523, 114 N. E. 856.

11. See *Thayer, Preliminary Treatise on Evidence*, pp. 326,

sence of acceptance, is that acceptance is not necessary in the case of such a conveyance. The adoption of the double fiction, that acceptance is necessary, and that it exists although confessedly it does not exist, has, it is conceived, no reason whatsoever of policy or convenience in its favor.

The assertion of a presumption of acceptance, as it appears in the cases referred to, is objectionable, it is submitted, not only as involving the introduction of confusing and unnecessary fictions, but also because it in effect differentiates, as regards the necessity of acceptance, between conveyances which are and are not beneficial. Since the grantee, so long as he has not actually accepted the transfer, can disclaim, and so exclude any possibility of prejudice to him by reason of the conveyance, it is not readily perceived why the courts should undertake to discriminate in this regard. Whether the conveyance shall be eventually availed of by the grantee is a matter for him to decide, and it does not appear to be the province of the court to indulge in suppositions as to his probable action in this respect. If acceptance is otherwise not necessary, why should the non beneficial character of the conveyance render it necessary? If it is otherwise necessary, why should the beneficial character of the conveyance render it unnecessary? Such a distinction, based on the beneficial or onerous character of the conveyance, has been repudiated in England,¹² but has been applied in several cases in this country,¹³ with the effect of invalidating a

335, 351; 2 Chamberlayne, Evidence, §§ 1087, 1145, 1146, 1160 *et seq.*

12. "Almost every conveyance, in truth, entails some charge or obligation which may be onerous in the way of covenant or liability; and we think it much safer that one general rule should prevail, than that the

courts should be asked in each particular instance if the deed may not be considered onerous." Campbell, C. J., in *Siggers v. Evans*, 5 El. & Bl. 367.

13. Occasionally a conveyance has been regarded as not beneficial because it was made in the performance of a contract of sale, which imposed an obligation for

conveyance not actually accepted, because not regarded by the court as beneficial in character, although, in these same jurisdictions, a "beneficial" conveyance would have been upheld without any acceptance. If an actual assent or acceptance, it may be remarked, is to be regarded as necessary whenever any burden or obligation is imposed on the grantee, it is somewhat difficult to understand the decisions, hereafter referred to¹⁴ which uphold the validity of a conveyance in trust, although the trustee has not assented thereto.

The view that assent or acceptance on the part of the grantee is necessary appears to have had its origin, for the most part, in the notion that a conveyance is a contract, and that consequently there must be a meeting of minds.¹⁵ But a conveyance is not a contract,¹⁶ and there is no intrinsic difficulty in regarding a conveyance as effective to vest property in the grantee even before the latter has consented to receive it. In the case of a

the purchase money upon the purchaser. *Derry Bank v. Webster*, 44 N. H. 268; *Boardman v. Dean*, 34 Pa. 252; *Wood v. Montpelier*, (Vt.) 82 Atl. 671. And a mortgage or conveyance to secure several creditors has been regarded as not beneficial for the reason that its acceptance by any one of the creditors might result in precluding his recovery of the whole of his claim. *Johnson v. Farley*, 45 N. H. 505. A conveyance made to one merely as a conduit of title has been regarded as not beneficial for this purpose. *Little v. Eaton*, 267 Ill. 263, 108 N. E. 727. Compare *Ferrell v. Childress*, 172 Ky. 160, 189 S. W. 1149. where a conveyance so made was regarded as properly accepted by the person beneficially interested in its execution.

14. *Post*, this section, notes 19, 20.

15. See *Welch v. Sackett*, 12 Wis. 243; *Rogers v. Heads Iron Foundry*, 51 Neb. 52, 37 L. R. A. 433.

16. *Anson, Contracts* (13th Ed.) 3, 4; *Pollock, Contracts, Appendix A*; *Hammon, Contracts*, §§ 6, 7, note 11; *Clark Contracts*, 11.

Nor does a contract necessarily involve a meeting of the minds of the parties. "The contractual obligations which the common law recognized were enforced, and are still enforced, not because those obligations are the result of agreement, but because certain forms of procedure afforded remedies for certain wrongs." *Harriman, Contracts*, 2d Ed.) § 611.

devise, as well as in that of a transfer by operation of law, the ownership passes without reference to whether the transferee has consented to take the property, and the same might well occur in the case of a voluntary transfer *inter vivos*, provided only the transferee has the privilege of subsequently refusing the transfer.¹⁷ In support of this view reference may be made to the case of conveyances to infants, and persons *non compos mentis*, and to that of conveyances in trust, discussed in the two following paragraphs.

In the case of a conveyance to an infant, or to a person *non compos mentis* the courts, even those which assert most positively the necessity, in the ordinary case, of an actual acceptance, undertake to avoid the difficulty of requiring acceptance on the part of one incapable of giving it, by asserting that in such case the assent of the grantee will be conclusively presumed, provided at least the conveyance is beneficial in character.¹⁸ But, as before remarked, the conceded lack of acceptance cannot well be supplied by a presumption that the

17. If a father should die testate, devising an estate to his daughter, and the latter should afterwards die without a knowledge of the will, it would hardly be contended that the devise became void for want of acceptance, and that the heirs of the devisee must lose the estate. Neither will it be denied that equitable estates are every day thrust upon people by deeds, or assignments, made in trust for their benefit. nor will it be said that such beneficiaries take nothing until they assent. Add to these the estates that are thrust upon people by the statute of descent, and we begin to estimate the value of the argument, that a man shall not be made a property holder against his will.

Thurman, C. J., in *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377.

18. *Staggers v. White*, 121 Ark. 328, 181 S. W. 139; *Turner v. Turner* 173 Cal. 782, 161 Pac. 980; *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577; *Vaughan v. Godman*, 94 Ind. 191; *Tansel v. Smith*, 49 Ind. App. 263, 93 N. E. 548, 94 N. E. 890; *Fitzgerald v. Tvedt*, 142 Iowa, 40, 120 N. W. 465; *Combs v. Ison*, 168 Ky. Ky. 728, 182 S. W. 953; *Campbell v. Kuhn*, 45 Mich. 513, 40 Am. Rep. 479; *Fenton v. Fenton*, 261 Mo. 202, 168 S. W. 1152; *Chambers v. Chambers*, 227 Mo. 262, 137 Am. St. Rep. 567, 127 S. W. 86; *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. 113; *Bjmerland v. Eley*, 15 Wash. 101, 45 Pac. 730.

grantee would, if he had an opportunity, accept the conveyance, and moreover, even supposing this could be done, the presumed acceptance, in the case of a conveyance to an infant, or to a person *non compos mentis*, would be an acceptance by a person lacking in legal capacity, and therefore a nullity.

In the case of a conveyance in trust, the legal title is usually regarded as vesting in the trustee without any acceptance by him, or even any knowledge on his part of the conveyance,¹⁹ this result being not infrequently attained on the theory of a presumption of assent.²⁰ Even though he subsequently dissents, and refuses to accept, the conveyance does not become nugatory, but equity will appoint another trustee.²¹ The equitable interest under a deed of trust likewise vests in the beneficiary named without any acceptance thereof

19. *Adams v. Adams*, 21 Wall. (U. S.) 185, 22 L. Ed. 504; *Devol v. Dye*, 123 Ind. 321, 7 L. R. A. 439; *Minot v. Tilton*, 64 N. H. 371, 10 Atl. 682; *Gulick v. Gulick*, 39 N. J. Eq. 401; *Myrover v. French*, 73 N. C. 609; *Read v. Robinson*, 6 Watts & S. (Pa.) 329; *First Bank v. Holmes*, 85 Pa. 231; *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912C, 1221, 78 Atl. 535; *Cloud v. Calhoun*, 10 Rich. Eq. (S. Car.) 358; *Furman v. Fisher*, 4 Cold. (Tenn.) 626, 94 Am. Dec. 210; *Fletcher v. Fletcher*, 4 Hare 67; *Ames*, Cases on Trusts (2d Ed.) 229.

But statements are occasionally found to the effect that no title vests in the trustee until he expressly or by implication accepts the trust. 1 *Perry*, Trusts, § 259, *Armstrong v. Morrill*, 14 Wall. (U. S.) 138; *Oxley Stave Co. v. Butler County*, 121 Mo. 614, 26 S. W. 367; *McFall v.*

Kirkpatrick, 236 Ill. 281, 86 N. E. 139.

20. *Kennedy v. Winn*, 80 Ala. 165; *Devol v. Dye*, 123 Ind. 321, 7 L. R. A. 439; *Howry v. Gardner*, 41 Ohio St. 642; *McKinney v. Rhoads*, 5 Watts (Pa.) 343; *Eyrick v. Hetrick*, 13 Pa. 488; *Goss v. Singleton*, 2 Head (Tenn.) 67; *Bowden v. Parrish*, 86 Va. 67, 19 Am. St. Rep. 873.

21. *Irvine v. Dunham*, 111 U. S. 327, 28 L. Ed. 444; *Smith v. Davis*, 90 Cal. 25, 25 Am. St. Rep. 92, 27 Pac. 26; *Dailey v. New Haven*, 60 Conn. 314, 14 L. R. A. 69, 22 Atl. 945; *Braswell v. Downs*, 11 Fla. 62; *French v. Northern Trust Co.*, 197 Ill. 30, 64 N. E. 105; *Brandon v. Carter*, 119 Mo. 572, 41 Am. St. Rep. 673; *King v. Donnelly*, 5 Paige (N. Y.) 46; *Roseman v. Roseman*, 127 N. C. 494, 37, S. E. 518; *Talbot v. Talbot*, 32 R. I. 72, Ann. Cas. 1912C, 1221, 78 Atl. 535; *Cloud*

by him, or even any knowledge by him of the trust.²² It is sometimes said, in this connection, that one is presumed to accept the benefit of a trust.²³

The courts, in referring to the necessity of acceptance, do not always clearly indicate whether it is to be regarded as an element of delivery, or as something additional to, and separate from, delivery. Perhaps they more frequently suggest the former view,²⁴ and this they apparently do in effect when they state that the grantor's record of the instrument does not create any presumption of delivery if without the knowledge or assent

v. Calhoun, 10 Rich. Eq. (S. C.) 358; Ames, Cases on Trusts, 230.

22. Brooks v. Marbury, 11 Wheat. (U. S.) 78; Security Trust & Safe Deposit Co. v. Farrady, 9 Del. Ch. 306, 82 Atl. 24; Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072; Milholland v. Whalen, 89 Md. 212, 44 L. R. A. 205, 43 Atl. 43; Boston v. Turner, 201 Mass. 190, 87 N. E. 634; Marquette v. Wilkinson, 119 Mich. 414, 43 L. R. A. 840, 78 N. W. 474; Gulick v. Gulick, 39 N. J. Eq. 401; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Moloney v. Tilton, 22 N. Y. Misc. 682, 51 N. Y. Supp. 682; Breedlove v. Stump, 3 Yerg. (Tenn.) 257; Connecticut River Sav. Bank v. Albee's Estate, 64 Vt. 571, 33 Am. St. Rep. 944, 25 Atl. 487; Skipwith's Ex'r v. Cunningham, 8 Leigh (Va.) 272; Fleenor v. Hensley, 121 Va. 367, 93 S. E. 582; See McEwen v. Bamberger, 3 Lea, (Tenn.) 576.

23. Brunson v. Henry, 140 Ind. 455, 39 N. E. 256; Emporia First Nat. Bank v. Ridenour, 46 Kan. 718, 26 Am. St. Rep. 167; H. B. Cartwright & Bro. v. United States Bank & Trust Co., 23 N.

M. 82, 167 Pac. 436; Stone v. King, 7 R. I. 358, 84 Am. Dec. 557; Cloud v. Calhoun, 10 Rich. Eq. (S. C.) 358; Furman v. Fisher, 4 Coldw. (Tenn.) 626, 94 Am. Dec. 557.

24. Stallings v. Newton, 110 Ga. 875, 36 S. E. 227; Byers v. Spencer, 101 Ill. 429, 40 Am. Rep. 212; Bremmerman v. Jennings, 101 Ind. 253; O'Connor v. O'Connor, 100 Iowa, 476, 69 N. W. 676; Sullivan v. Sullivan, 179 Ky. 686, 201 S. W. 24; Melgs v. Dexter, 172 Mass. 217, 52 N. E. 75; Miller v. McCaleb, 208 Mo. 562, 106 S. W. 655; Jaskson v. Phipps, 12 Johns. (N. Y.) 418; Spencer v. Carr, 45 N. Y. 406, 6 Am. Rep. 112.

Occasionally it has been said that delivery and acceptance must be simultaneous. Church v. Gilman, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82; Hulick v. Scovill, 9 Ill. 159. *Contra*, Sullivan v. Sullivan, 179 Ky. 686, 201 S. W. 24; Regan v. Howe, 121 Mass. 424; Welch v. Sackett, 12 Wis. 243; And see Stone v. New England Box Co., 216 Mass. 8, 102 N. E. 949.

of the grantee.²⁵ There would seem, however, to be some difficulties in the way of regarding the grantor's indication of intention as constituting delivery only when accompanied or immediately followed by acceptance. Adopting such a view, the grantor would, after having indicated his intention that the conveyance should operate, have the right until acceptance to change his intention, and to dispose otherwise of the property, and yet the cases regard his indication of intention, in the case both of conditional²⁶ and unconditional delivery,²⁷ as concluding him in this regard. It is more satisfactory, it is submitted, conceding that acceptance is necessary, to regard it as something outside of delivery, as, in effect, an indication of the grantee's intention, as delivery is an indication of the grantor's intention.²⁸ The contrary view, above referred to, is apparently to some extent the outcome of the mistaken tendency to regard delivery as involving a manual transfer of the instrument, such a transfer being ordinarily impossible without the assent of the person to whom the transfer is made.

The acceptance may, it has been said, be given by another person acting on behalf of the grantee, such acceptance being sufficient if afterwards ratified by the grantee.²⁹ Such a statement is somewhat ambiguous. If it means that, provided an unauthorized person ac-

25. *Ante*, § 461, note 84.

26. *Ante*, § 462, notes 31-36.

27. *Ante*, § 461, note 60.

28. Such a view is involved in the occasional statements that the acceptance may be given by the grantee even after the grantor's death. *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 53 So. 812; *Cates v. Cates*, 152 Ky. 47, 153 S. W. 10; *Burkey v. Burkey*,—Mo.—175 S. W. 623; *Taylor v. Sanford*, 108 Tex. 340, 193 S. W. 661.

29. *Meigs v. Dexter*, 172 Mass.

217, 52 N. E. 75; *Couch v. Addy*, 35 Okla. 355, 129 Pac. 709.

In *Blackwell v. Blackwell*, 196 Mass. 186, 12 A. & E. Ann. Cas. 1070, it was decided that there may be a valid acceptance by the grantor in behalf of the grantee, whose general agent he was. The cases cited in support of the decision merely involved the principle that no manual transfer of the instrument is necessary.

cepts on behalf of the grantee, title immediately vests in the latter, subject to an option on his part as to whether he will ratify the acceptance, this appears to be the equivalent of a statement that, although there is no valid acceptance, title immediately passes to the grantee subject to an option in him subsequently to repudiate the transfer, this being the common law and present English rule. It may, however, mean that an unauthorized acceptance being invalid, title does not pass until the grantee, by indicating his adoption of the acceptance, in effect himself accepts the conveyance, this in effect recognizing the asserted American rule, that the grantee's acceptance is necessary. Whichever meaning is given to the statement, it does not appear that the unauthorized acceptance has any legal significance, the grantee's ratification of such acceptance, so called, being merely his acceptance of the transfer, of which there had previously been no valid acceptance.

§ 464. **Execution by agent.** The owner of land may transfer it, not only by himself executing the instrument of transfer, but also by empowering another so to do in his absence. The execution of a conveyance by the agent of the grantor, in the grantor's absence, by virtue of the authority given the agent for this purpose, is to be distinguished from the case, before referred to,³⁰ in which the signing of an instrument by the hand of another is adopted by the grantor as his own act, this being for all purposes his own signature.

A written instrument by which one is authorized to act as the agent of another, in connection with the transfer of land, as in other connections, is frequently, indeed ordinarily, referred to as a power of attorney.

The common law rule that authority to execute an instrument under seal must itself be under seal appears to be still recognized in a considerable number of

30. Ante, § 457, notes 76, 77.

states,^{30a} and, in so far as a seal may, in a particular jurisdiction, be necessary to the legal validity of a conveyance, an authority to one as agent to execute a conveyance must be under seal.³¹ But without reference to such a common law requirement of a seal, which obviously involves a requirement of a written instrument, the statutes of most of the states expressly require such an authority to be in writing, and some require it to be under seal.³²

Since delivery is part of the execution of the instrument, it would seem that, in so far as a written or sealed authority may be necessary to enable an agent to sign or seal a conveyance of land, such an authority is also necessary to enable him to deliver the instrument. The question has been previously discussed.³³

It is a technical rule of the common law that only those are bound by a sealed instrument who purport to be parties thereto and in whose names it is signed and sealed,³⁴ and, applying this rule it has occasionally been decided that a conveyance executed by an agent was insufficient because it purported to be the deed, not of the intended grantor, but of the agent himself, even though the body of the instrument indicated that the person who signed and sealed it was acting merely as agent,³⁵ or even though a statement of his agency was appended to his signature.³⁶ In other cases, however,

30a. Huffcut, Agency, § 26; Mechem, Agency, § 212.

31. Tilton v. Cofield, 2 Colo. 392; Watson v. Sherman, 84 Ill. 263; Montgomery v. Dorion, 6 N. H. 250; Heath v. Nutter, 50 Me. 378; Shuetze v. Bailey, 40 Mo. 69; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Cadell v. Allen, 99 N. C. 542.

32. 1 Stimson's Am. St. Law, § 1670.

33. *Ante*, § 461, notes 53-58.

34. Huffcut, Agency (2d Ed.) § 188; Mechem Agency, § 1093.

35. Taylor v. Agricultural & Mechanical Ass'n, 68 Ala. 229; Stinchfield v. Little, 1 Me. 231, 10 Am. Dec. 65; Elwell v. Shaw, 16 Mass. 42, 8 Am. Dec. 126; Stone v. Wood, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; Bellas v. Hays, 5 Serg. & R. 427, 9 Am. Dec. 385.

36. Echols v. Cheney, 28 Cal. 157; Morrison v. Bowman, 29 Cal. 337; Harpér v. Hampton, 1 Harr. J. 622; Brinley v. Mann, 2 Cush. 337, 48 Am. Dec. 669; Townsend v. Corning, 23 Wend. 442; Farmers v. Respass, 5 T. B. Mon.

such strictness of view is not adopted, it being regarded as sufficient that it appears, either from the signature or from the body of the instrument, that it is intended to be the deed, not of the agent, but of the principal,³⁷ and in some states there is a statutory provision to this general effect.³⁸

The question whether an intention appears from the face of the instrument that it shall take effect as the deed of the principal is, in its nature, a question of the construction of the language used, as to which no absolute rule can be laid down.³⁹ Such an intention does not ordinarily appear to be inferred from the fact that the person who executes the instrument is described therein as the agent of the principal, or that he professes to be acting under authority from the latter,⁴⁰ though in some cases this appears to be regarded as sufficient for the purpose.⁴¹ That the convey-

(Ky.) 562; *Crawford v. Crawford*, 77 S. C. 205.

37. *Carter v. Chaudron*, 21 Ala. 72; *Magill v. Hinsdale*, 6 Conn. 464a; *Doe d. Tenant v. Roe*, 27 Ga. 418; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; *Nobleboro v. Clark*, 68 Me. 87; *Herbert v. Pue*, 72 Md. 307; *Hutchins v. Byrnes*, 9 Gray, 367; *Murphy v. Welch*, 128 Mass. 489; *Bigelow v. Livingston*, 28 Minn. 57; *McClure v. Herring*, 70 Mo. 18; *Hubbard v. Swafford etc. Co.*, 209 Mo. 495, 123 Am. St. Rep. 488, 108 S. W. 15; *Hale v. Woods*, 10 N. H. 471; *Donovan v. Welch*, 11 N. D. 113, 90 N. W. 262; *Hefferman v. Addams*, 7 Watts (Pa.) 116; *Rogers v. Bracken's Adm'r*, 15 Tex. 564; *Shanks v. Lancaster*, 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

38. 1 *Stimson's Am. St. Law*, § 1675; 1 *Mechem, Agency*, § 1096, note 22.

39. See *Haven v. Adams*, 4 Allen (Mass.) 80; *Nobleboro v. Clark*, 68 Maine 87.

40. *Jones v. Morris*, 61 Ala. 518; *Sheridan v. Pease*, 93 Ill. App. 219; *Fowler v. Shearer*, 7 Mass. 14; *First Baptist Church of Sharon v. Harper*, 191 Mass. 196, 77 N. E. 778; *Kiersted v. Orange & A. R. Co.*, 69 N. Y. 343, 25 Am. Rep. 199; *Cadell v. Allen*, 99 N. C. 542, 6 S. E. 399; *Norris v. Dains*, 52 Ohio St. 215, 39 N. E. 660, 49 Am. St. Rep. 716; *Quigley v. De Haas*, 82 Pa. St. 267; *North v. Henneberry*, 44 Wis. 306; See *Hill v. Conrad*, 91 Tex. 341, 43 S. W. 789.

41. *Donovan v. Welch*, 11 N. Dak. 113, 90 N. W. 262; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 423, 52 Am. Rep. 680; *Magill v. Hinsdale*, 6 Conn. 464a, 16 Am. Dec. 70; *Hubbard v. Swafford etc. Co.*, 209 Mo. 495, 123 Am. St. Rep. 488.

ance is made by the agent as if in his own right, without any reference to the fact of agency, and without any mention of his principal by name, would obviously preclude the conveyance from operating to divest the principal's rights.⁴² That the instrument is signed in the name of A the principal "by" B the agent, is, it seems, sufficient to make the instrument effective as the deed of A, although it reads as the deed of B,⁴³ while a signature B "for" A would be sufficient to make it A's deed if the instrument itself reads as the deed of A, and not otherwise.⁴⁴

The fact that the name of the principal is signed by the agent without any addition to the signature showing that the signing was by an agent has been held not to affect the validity of the signature.⁴⁵ It has been suggested that it must appear somewhere upon the face of the instrument that it was executed, not by the grantor, but by an agent of the grantor,⁴⁶ but it may be questioned whether this is essential, however desirable.⁴⁷

A conveyance which fails at law, because its execution is by the agent in his own name, instead of in that of his principal, will be sustained in equity as an agreement to convey, and, as such, will be effective, not only

42. *Bassett v. Hawk*, 114 Pa. St. 502, 8 Atl. 18.

43. See *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 631; *Shanks v. Lancaster*, 5 Gratt. (Va.) 110, 50 Am. Dec. 108; *McClure v. Herring*, 70 Mo. 18, 35 Am. Rep. 404.

44. *Smith v. Morse*, 9 Wall. (U. S.) 76, 19 L. Ed. 597; *Carter v. Chaudron*, 21 Ala. 72; *Hancock v. Younker*, 83 Ill. 208; *Hunter's Adm'rs v. Miller's Adm'rs*, 6 B. Mon. (Ky.) 612; *Nobleboro v. Clark*, 68 Me. 87; *Mussey v. Scott*, 7 Cush. (Mass.) 215, 54 Am. Dec. 719; *Hale v. Woods*, 10 N. H. 470,

34 Am. Dec. 176; *Cadell v. Allen*, 99 N. C. 542, 6 S. E. 399; *Donovan v. Welch*, 12 N. D. 113; *Norris v. Dains*,—Ohio—39 N. E. 660, 49 Am. St. Rep 716; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

45. *Forsyth v. Day*, 41 Me. 382; *Berkey v. Judd*, 22 Minn. 287; *Devinney v. Reynolds*, 1 Watts & S. (Pa.) 328.

46. *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

47. See *Forsyth v. Day*, 41 Me. 382; *Hunter v. Giddings*, 96 Mass. 41, 93 Am. Dec. 54.

between the parties, but as against subsequent purchasers with notice.⁴⁸

A married woman has power to transfer her rights in land only in the mode named by statute, and consequently, in the absence of express statutory authority, or a declaration that she may transfer her separate estate as if she were sole, she cannot execute the conveyance by an agent or attorney, and, if so executed, it will, as against her, be void both at law and in equity.⁴⁹

The validity of the execution of a conveyance in behalf of a corporation by an officer thereof is to be determined by the same considerations as determine the validity of a conveyance executed by any other agent of the intended grantor. The instrument should properly name the corporation rather than the officer as the grantor, and should be signed with the corporate name and sealed with the corporate seal.⁵⁰ If, however, the fact that the conveyance is intended to be the deed of the corporation clearly appears from the language of the instrument, the fact that it is signed in the name of the officer does not affect its validity as a conveyance by the corporation.⁵¹ And in such case the seal affixed to the signature, though a mere scroll, will be presumed to

48. *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229; *Love v. Sierra Nevada Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Robbins v. Butler*, 24 Ill. 387; *Wilkinson v. Getty*, 13 Iowa, 157, 81 Am. Dec. 428; *McCaleb v. Pradat*, 25 Miss. 257; *Kearney v. Vaughan*, 50 Mo. 284; *Ramage v. Ramage*, 27 S. C. 39, 2 S. E. 834. See *Stark v. Starr*, 94 U. S. 477, 24 L. Ed. 276.

49. *Randall v. Kreiger*, 23 Wall. (U. S.) 137; *Mexia v. Oliver*, 148 U. S. 664; *Waddell v. Weaver's Adm'rs*, 42 Ala. 293; *Holland v. Moon*, 39 Ark. 120;

Dentzel v. Waldie, 30 Cal. 138; *Wilkinson v. Getty*, 13 Iowa, 157; *Earle's Adm'rs. v. Earle*, 20 N. J. L. 347.

50. See *Cook, Corporations*, § 722.

51. *Magill v. Hinsdale*, 6 Conn. 464a, 16 Am. Dec. 70; *Purinton v. Security etc. Co.*, 72 Me. 22; *Haven v. Adams*, 4 Allen (Mass.) 80, distinguishing *Brinley v. Mann*, 2 Cush. (Mass.) 337; *Sherman v. Fitch*, 98 Mass. 59; *Tenney v. East Warren Lumber Co.*, 43 N. H. 343; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

be the seal of the corporation, for this particular occasion at least.⁵² And even though the instrument purports to be merely the deed of the officer, the fact that it is signed and sealed in the name of the corporation will, it seems, render it effective as the deed of the corporation.⁵³ If it does not appear from the language of the instrument or from the signature that it is the deed of the corporation, it would not usually be regarded as such, even though the officer is referred to by his official name.⁵⁴

— **Acknowledgment by agent.** An acknowledgment may, in the absence of an express statutory provision to the contrary, be made by the agent or attorney in fact of the grantor. The cases do not indicate what formality of authorization is necessary, but there would seem to be little question that the same formality is necessary to enable an agent to acknowledge as to sign or seal the instrument, that, for instance, a written power of attorney is necessary for the one purpose if it is necessary for either of the others. An authority in terms to “execute” the instrument is no doubt sufficient to authorize its acknowledgment,⁵⁵ though, strictly speaking, an acknowledgment can not be regarded as a part of the execution, except in jurisdictions where it is necessary in order to transfer the title.

The certificate of acknowledgment should show that the agent of the grantor made the acknowledgment in behalf of his principal, and not in his own behalf,⁵⁶ but the courts ordinarily appear disposed to disregard

52. See cases cited Cook, Corporations, § 721, 1 Clark & Marshall, Corporations, § 192c.

53. See *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 631; *Shaffer v. Hahn*, 111 N. Car. 1, 15 S. E. 1033.

54. *Ante*, this section, note 42.

55. *Robinson v. Mauldin*, 11 Ala. 977; *Basshor v. Stewart*, 44

Md. 376; *Bigelow v. Livingston*, 28 Minn. 57, 9 N. W. 31; *Richmond v. Voorhees*, 10 Wash. 316, 38 Pac. 1014.

56. *Pfeiffer v. Cressey*, 85 Ill. App. 11; *Campbell v. Hough*, 73 N. J. Eq. 601, 68 Atl. 759; *Peters v. Condrion*, 2 Serg. & R. (Pa.) 80.

any such requirement, or to construe the language used with the utmost liberality in this regard.⁵⁷

The mode of acknowledgment on behalf of a corporation is frequently prescribed by statute. In the absence of any statutory designation of the person who is to make the acknowledgment on behalf of the corporation, it may ordinarily be made by any officer who has authority to affix the corporate seal.⁵⁸ The certificate should show that the officer taking the acknowledgment was satisfied that the person making the acknowledgment was actually the corporate officer which he purported to be,⁵⁹ and that he acknowledged the instrument as the act and deed of the corporation.⁶⁰ But a recital that he acknowledged it as his own act and deed has usually been regarded as sufficient, it being inferable from the context and the instrument itself that the acknowledgment was in behalf of the corporation.⁶¹

57. *Robinson v. Mauldin*, 11 Ala. 977; *Talbert v. Stewart*, 39 Cal. 602; *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125; *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273; *Bigelow v. Livingston*, 28 Minn. 57, 9 N. W. 31; *McAdow v. Black*, 6 Mont. 601; *Moses v. Dibrell*, 2 Tex. Civ. App. 457, 21 S. W. 414; *Ferguson v. Ricketts*,—(Tex. Civ. App.)—57 S. W. 19; *Richmond v. Voorhees*, 10 Wash. 316;

58. See *Gray v. Waldron*, 101 Mich. 612, 60 N. W. 288; *Morris v. Keil*, 20 Minn. 531; *Bowers v. Hechtman*, 45 Minn. 238, 47 N. W. 792; *Hoopes v. Auburn Water Works Co.*, 37 Hun. (N. Y.) 568; *Sheehan v. Davis*, 17 Ohio St. 571. Compare *Johnson v. Bush*, 3 Barb. Ch. 207.

59. *Kelly v. Calhoun*, 95 U. S. 710, 24 L. Ed. 544; *Klemme v.*

McLay, 68 Iowa, 158, 26 N. W. 533; *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111; *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 12 L. R. A. 588, 21 Atl. 298; *Withrell v. Murphy*, 154 N. C. 82, 69 S. E. 748; *Holt v. Metropolitan Trust Co.*, 11 S. D. 456, 78 N. W. 947.

60. See *Chicago First Nat. Bank v. Baker*, 62 Ill. App. 154; *Gessner v. Minneapolis etc. R. Co.*, 15 N. D. 560.

61. *Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94; *Chicago etc. R. Co. v. Lewis*, 53 Iowa, 101, 4 N. W. 842; *Frostburg Mut. Bldg. Ass'n v. Brae*, 51 Md. 508; *Eppwright v. Nickerson*, 78 Mo. 482; *Descombes v. Wood*, 91 Mo. 196, 60 Am. Rep. 239; *Tenney v. East Warren Lumber Co.*, 43 N. H. 343; *Muller v. Boone*, 63 Tex. 91; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt.

§ 465. Effect of execution—Return or cancellation.

After the instrument has been delivered, and the title has consequently passed to the grantee named, it cannot, it has usually been held, be revested in the grantor by the mere physical transfer to him of the instrument, or by the cancellation of the instrument, although this is by agreement. In order to reconvey to his grantor, as to any other person, the grantee must execute a conveyance to him.⁶² In a few states, however, the view has been adopted that the grantee in an unrecorded conveyance, after returning the instrument to the grantor, with the intention of revesting the title in him, or after cancelling the instrument with this intention, cannot introduce secondary evidence of the instrument, the practical effect of this being to divest him of the title in favor of the original grantor.⁶³ And in other jurisdictions it is recognized that, under particular circumstances, the grantee may, by reason of such return or cancellation of the instrument, be estopped to assert title in him-

274; *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67.

62. *Gimon v. Davis*, 36 Ala. 589; *White v. Moffett*, 108 Ark. 490, 158 S. W. 505; *Cranmer v. Porter*, 41 Cal. 462; *Weygant v. Bartlett*, 102 Cal. 224, 36 Pac. 417; *Botsford v. Morehouse*, 4 Conn. 550; *Metropolitan Trust & Sav. Bk. v. Perry*, 259 Ill. 183, 102 N. E. 218; *Gibbs v. Potter*, 166 Ind. 471, 77 N. E. 942; *Hatch v. Hatch*, 9 Mass. 311, 6 Am. Dec. 67; *Tabor v. Tabor*, 136 Mich. 255, 99 N. W. 4; *Green v. Hayes*, 120 Minn. 201, 139 N. W. 139; *McAllister v. Mitchner*, 68 Miss. 672, 9 So. 829; *Potter v. Adams*, 125 Mo. 118, 28 S. W. 490; *Raynor v. Wilson*, 6 Hill (N. Y.) 469; *Parshall v. Shirts*, 54 Barb. (N. Y.) 99; *Jeffers v. Philo*, 35 Ohio St. 173; *Tate v. Clement*, 176 Pa.

St. 550, 35 Atl. 214; *Wilke v. Wilke*, 28 Wis. 296; *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. 591; *Slaughter v. Bernards*, 97 Wis. 184, 72 N. W. 977; *Bolton v. Carlisle*, 2 H. Bl. 263; *Ward v. Lumley*, 5 Hurlst. N. 87. And see cases cited *ante*, § 440 note 29.

63. *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Farrar v. Farrar*, 4 N. H. 191; *Mussey v. Holt*, 24 N. H. 248; *Emery v. Dana*, 76 N. H. 482, 84 Atl. 976; *Gugins v. Van Gorder*, 10 Mich. 523, *Potter v. Adams*, 125 Mo. 118, 28 S. W. 490; *Arrington v. Arrington*, 114 N. C. 115. 19 S. E. 145; *Simpkins v. Windsor*, 21 Ore. 382, (*semble*); *Howard v. Huffman*, 3 Head (Tenn.) 562; *Wilke v. Wilke*, 28 Wis. 296, and cases cited *ante*, §

self.⁶⁴ In one or two states the return of the instrument to the grantor, or its destruction, with the intention of revesting the ownership in him, has been regarded as divesting the grantee of the equitable though not of the legal title,⁶⁵ and in two states, apparently, of the legal title as well.⁶⁶ In all these cases, however, in which the return or cancellation of the instrument has been regarded as effective, directly or indirectly, in favor of the grantor, the instrument was at the time unrecorded, and the return or cancellation of an instrument previously recorded would, in every jurisdiction, presumably, be absolute nugatory.⁶⁷

440, note 34. But that it does not so operate as against a third person, see *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Wilke v. Wilke*, 28 Wis. 296. Compare *Pollock, Contracts* (Williston's Edition) p. 849.

64. *Whisenant v. Gordon*, 101 Ala. 256, 13 So. 914 (*semble*); *Brown v. Brown*, 142 Iowa, 125, 120 N. W. 724; *Rowe v. Epling*, 163 Ky. 381, 173 S. W. 861; *Patterson v. Yeaton*, 47 Me. 308; *Comm. v. Dudley*, 10 Mass. 403; *Trull v. Skinner*, 17 Pick. (Mass.) 213; *Howe v. Wilder*, 11 Gray (Mass.) 267; *McAllister v. Mitchner*, 68 Miss. 672, 9 So. 829; *Dukes v. Spangler*, 35 Ohio St. 119; *Stanley v. Epperson*, 45 Tex. 645.

65. *Reavis v. Reavis*, 50 Ala. 60; *Sanford v. Finkle*, 112 Ill. 146; *Happ v. Happ*, 156 Ill. 183, 41 N. E. 39; *Cossman v. Keister*, 223 Ill. 69, 8 L. R. A. (N. S.) 698, 114 Am. St. Rep. 305, 79 N. E. 58; *Matheson v. Matheson*, 139 Iowa, 511, 18 L. R. A. (N. S.) 1167, 117 N. W. 755; *Russell v. Meyer*, 7

N. D. 335, 75 N. W. 262. A like view was applied when the instrument was not returned or cancelled, but, having been lost, it was regarded by the parties as having been returned and cancelled. *Hays v. Dean*,—Iowa,—164 N. W. 770.

66. *Huffman v. Huffman*, 1 Lea (Tenn.) 491; *Peterson v. Carson*,—(Tenn.)—48 S. W. 383; *Respass v. Jones*, 102 N. Car. 5, 8 S. E. 770.

The making of a second conveyance of the same property, by the same grantor to the same grantee, but excepting a part of that previously conveyed, has been held to render the first conveyance nugatory. *Wardman v. Harper*, 156 Iowa, 453, 136 N. W. 893; *Hall v. Wright*, 137 Ky. 39, 127 S. W. 16.

67. See *Pollock, Contracts*, (Williston's Ed.) 850; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Rifeiner v. Bowman*, 53 Pa. St. 313; *Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569.

CHAPTER XX

TRANSFER BY WILL.

- § 466. General considerations.
- 467. Will and conveyance distinguished.
- 468. Signing by testator.
- 469. Acknowledgment and publication.
- 470. Competency of witnesses.
- 471. Attestation and subscription.
- 472. Holographic and nuncupative wills.
- 473. Undue influence.
- 474. Lapsed and void devises.
- 475. The revocation of a will.
- 476. Children or issue omitted from will.
- 477. Revival of will.
- 478. Republication.

§ 466. **General considerations.** While, before the Norman Conquest, and for a century thereafter, persons were allowed to make *post obit* gifts of land, to take effect in possession after the death of the donor, the rule was established by the king's court, late in the twelfth century, in favor of the heir, that a transfer of a freehold interest in land, though to take effect only after the death of the transferor, must be by livery of seisin, and so any transfer of such an interest, answering to our modern will or devise, became impossible, except in the case of certain lands devisable by local custom.¹ Eventually the invention of uses enabled one to devise his land by making a feoffment to uses to be declared by his last will, in which case chancery would enforce the use so declared.² The power of thus making a will by the declaration of a use was, however, put an end to by the Statute of Uses, this being in fact one of

1. 2 Pollock & Maitland, Hist. (5th Ed.) 64; Williams, Real Eng. Law, 324-329. Prop. (21st Ed.) 168. See *ante*, §

2. 1 Sanders, Uses & Trusts 96.

the purposes of its passage, as recited in the preamble. But the inconvenience of this prohibition of testamentary disposition was so greatly felt that, five years later, the Statute of Wills³ was passed, by which statute tenants in fee simple were empowered to dispose by will of all their lands held in socage tenure, and two-thirds of those held by knight service, and, after the change of all tenures into socage tenures,⁴ all lands came within the operation of this statute, and were devisable.⁵

A will of real property was in early times, and likewise after the Statute of Wills, regarded as a species of conveyance, to take effect at a future time, that is, on the death of the testator.⁶ This theory had important results upon the law of wills of real property, as distinct from wills of personalty. One most important result of this theory was that, since one could convey only such land as he owned, a will could operate upon such real property only as the testator owned at the time of making the will.⁷ And for this reason, if one, after having made a will, aliened property covered by the will, such property did not pass under the will, even though he subsequently reacquired it.⁸

The rule that after-acquired real property does not pass under a will has been changed by statute in most, if not all, jurisdictions. In England the Wills Act⁹ provided that a testator might dispose of all real and personal estate to which he might be entitled at the time of his death, and that every will should, in the absence of indications of a contrary intention, be construed to take effect, with reference to the real and personal estate comprised in it, as if executed immediately before the death of testator. The effect of these

3. 32 Hen. VIII. c. 1 (A. D. 1540).

4. *Ante*, § 12.

5. Digby, Hist. Real Prop. c. 8.

6. Pollock & Maitland, Hist. Eng. Law, 313; Williams, Real Prop. (21st Ed.) 250.

7. Harwood v. Goodright, 1 Cowp. 87; Brydges v. Chandos, 2 Ves. Jr. 417, 427; Williams, Real Prop. 250.

8. *Post*, § 475.

9. 7 Wm. IV. and 1 Vict. c. 26 §§ 3, 24 (A. D. 1837).

provisions is that a gift in general terms, such as "all my real estate," or "all my property," or "all my land," passes after-acquired interests, unless a contrary intention appears, and that a "residuary devise," that is, a devise of all one's property not otherwise disposed of, has the same effect.¹⁰

In some of the states there are statutes substantially similar to those in England,¹¹ and having a similar operation.¹² In other states the statute provides that after-acquired real property shall pass by the will only when it appears from the will that such was the testator's intention.¹³

Another effect of the theory that a devise was a conveyance was that a residuary devise was regarded as a specific devise of such land as the testator owned at the time of making the will, and did not otherwise dispose of therein, a matter which will be considered hereafter more particularly in connection with "lapsed and void devises."¹⁴

A further result of the theory that a disposition of real property by will was in effect a conveyance appeared in the fact that a devise of real property, unlike a legacy of personalty, was regarded as passing the land directly to the devisee, without the intervention of the executor or administrator. This rule still prevails in the majority of jurisdictions, though it has been changed by recent statutes in England and some states.¹⁵

The king's courts, in the twelfth century, having established the principle that there could be no testamen-

10. 1 Jarman, Wills, 291, 612.

11. 1 Stimson's Am. St. Law, §§ 2806, 2809.

12. See Webb v. Archibald, 128 Mo. 299, 34 S. W. 54; Jacobs' Estate, 140 Pa. St. 268, 11 L. R. A. 767, 23 Am. St. Rep. 230, 21 Atl. 318.

13. 1 Stimson's Am. St. Law, § 2809 (C.). See Church v. Warren Mfg. Co., 14 R. I. 539; Briggs v.

Briggs, 69 Iowa, 617, 29 N. W. 632; Paine v. Forsaith, 84 Me. 66, 24 Atl. 590; Woman's Union Missionary Soc. of America v. Mead, 131 Ill. 33, 23 N. E. 603; Kimball v. Ellison, 128 Mass. 41.

14. See *post*, § 474.

15. 2 Woerner, Administration, § 337; 11 Am. & Eng. Enc. Law (2d Ed.) 1037 *et seq.*

tary gift of land, relinquished the jurisdiction of the personal property of decedents to the ecclesiastical courts, and thereafter the law of succession to personal property, including chattels real, was developed by these latter courts.¹⁶ As a result, the civil-law conception of a will, not as a conveyance, but as a secret and revocable instrument, which was to take effect at the death of testator only, has always been applied in the case of personalty;¹⁷ and likewise the position of an executor or administrator as the personal representative of the deceased, to whom all his personal property passes on his death, including that disposed of by will, became established at an early date.¹⁸

§ 467. Will and conveyance distinguished. The question frequently arises whether a particular instrument is to be regarded as a conveyance *inter vivos* or as an instrument of a testamentary character, that is, a will. The distinction would seem to be clear, however difficult of application. If the instrument is intended to be immediately operative, it cannot be regarded as a will, and conversely, if it is intended to be operative only upon the death of the maker, it cannot be regarded as a conveyance *inter vivos*.¹⁹ The question is, in the last

16. 2 Pollock & Maitland, Hist. Eng. Law, 329, 331.

17. Holdsworth & Vickers, Law of Succession, 31; Maine, Anc. Law (4th Ed.) 173 *et seq.*; Harwood v. Goodright, Cowp. 87.

18. 2 Pollock & Maitland, Hist. Eng. Law, 334, 345; Digby, Hist. Real Prop. (5th Ed.) 380.

19. The statement frequently made that whether an instrument is a deed or a will depends upon whether it passes a "present interest (See *e. g.* Ransom v. Pottawattamie County, 168 Iowa, 570, 150 N. W. 657; Glover v. Fillmore, 88 Kan. 545, 129 Pac.

144; Sappingford v. King, 49 Ore. 102, 8 L. R. A. N. S. 1006, 89 Pac. 142, 90 Pac. 150; Trumbauer v. Rust, 36 S. D. 301, 154 N. W. 801; *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041; and cases cited in note to Phillips v. Phillips, A. & E. Ann. Cas. 1916D, 996) is in a sense correct, but it is open to criticism as suggesting that the distinction depends on the character of the interest which passes rather than on the time at which it is to pass. Until the testator's death, nothing passes by a will.

analysis, merely whether the maker of the instrument intended, by its execution, immediately to transfer an interest to another, or whether he intended merely to declare in whom an interest should vest upon his death, in case he did not subsequently indicate a different intention. The difficulty in the practical application of the distinction lies in the difficulty of ascertaining the intention of the maker of the instrument in this regard. That no estate in favor of the person named is to commence until the death of the maker of the instrument does not show that the instrument is testamentary in character,²⁰ since an estate to commence at his death can, as previously stated,²¹ be created by a conveyance *inter vivos*. And the fact that the maker expressly reserves a life estate,²² or the possession and control of the property during his life,²³ is perfectly compatible with the operation of the instrument as a conveyance *inter vivos*. Nor is the instrument necessarily a will because the beneficiary named has merely a possibility, and no assured prospect, of an estate, to commence upon the testator's death. For instance a conveyance may be made *inter vivos* of a life estate to commence in

20. *West v. Wright*, 115 Ga. 277, 41 S. E. 602; *Kytile v. Kytile*, 128 Ga. 387, 57 S. E. 748; *Bowler v. Bowler*, 176 Ill. 541, 52 N. E. 437; *Love v. Blauw*, 61 Kan. 496, 48 L. R. A. 257, 59 Pac. 1059; *O'Day v. Meadows*, 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637; *Fellbush v. Fellbush*, 216 Pa. 141, 65 Atl. 28.

21. *Ante*, § 159.

22. *Mays v. Burleson*, 180 Ala. 396, 61 So. 75; *Sharpe v. Matthews*, 123 Ga. 794, 51 S. E. 706; *Timmons v. Timmons*, 49 Ind. App. 21, 96 N. E. 622; *Lefebure v. Lefebure*, 143 Iowa, 293, 121 N. W. 1025; *Love v. Blauw*, 61 Kan. 496, 48 L. R. A. 257, 78 Am.

St. Rep. 334, 59 Pac. 1059; *Deckenbach v. Deckenbach*, 65 Ore. 160, 130 Pac. 729; *Muntz v. Whitcomb*, 40 Pa. Super Ct. 553.

23. *Adair v. Craig*, 135 Ala. 332, 33 So. 902; *Guthrie v. Guthrie*, 105 Ga. 86, 31 S. E. 40; *Spencer v. Razor*, 251 Ill. 278, 96 N. E. 300; *Tansel v. Smith*, 49 Ind. App. 263, 93 N. E. 548, 94 N. E. 890; *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329; *Dozier v. Toalson*, 180 Mo. 546, 102 Am. St. Rep. 586, 79 S. W. 420; *Ranken v. Donovan*, 166 N. Y. 626, 60 N. E. 119; *Cook v. Cooper*, 59 S. C. 560, 38 S. E. 218; *Jones v. Caird*, 153 Wis. 384, 141 N. W. 228.

interest upon the grantor's death, in which case the beneficiary has, previous to the grantor's death, merely a possibility of an estate, dependent on his survival of the grantor.²⁴ And one may, by a conveyance *inter vivos*, limit an estate to commence on the death of the maker of the instrument provided a particular contingency occurs, provided, for instance the transferee named survives the maker.²⁵ In such a case the grantee would have merely a possibility of an estate, but the possibility becomes his immediately upon the delivery of the conveyance, and he cannot be deprived of the possibility by any act on the part of the maker.

While a will is in its nature revocable and a conveyance *inter vivos* is in its nature not revocable, the fact that the instrument contains an express power of revocation does not show it to be a will.²⁶ The right to revoke a will, which is based on the fact that the will does not become operative until the testator's death, is in effect a right to render the instrument absolutely nugatory, while an express power of revocation contained in a conveyance *inter vivos* does not involve a right to render the instrument absolutely nugatory, but merely empowers the grantor to divest an estate or interest which is created by the conveyance. Occasionally, language is used by the courts suggesting that the absence of an express power of revocation tends to show that the instrument

24. See *e. g.* Lindemann v. Dobossy, —(Tex. Civ. App.)— 107 S. W. 111; West v. West, 155 Mass. 317, 29 N. E. 582.

25. See *e. g.*, Thomas v. Williams, 105 Minn. 88, 117 N. W. 155; Phifer v. Mullis, 167 N. C. 405, 83 S. E. 582. If Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Dunlap v. Marnell, 95 Neb. 535, 145 N. W. 1017; *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041, are to be regarded

as deciding the contrary, they cannot, it is submitted, be upheld.

26. Mays v. Burleson, 180 Ala. 396, 61 So. 75; Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244; Tennant v. John Tennant Memorial, 167 Cal. 570, 140 Pac. 242; Brady v. Fuller, 78 Kan. 448, 96 Pac. 854; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Stamper v. Venable, 117 Tenn. 557, 97 S. W. 812; 1 Jarman, Wills, 22.

was intended as a conveyance *inter vivos*,²⁷ but the property of such an inference seems most questionable. The absence of an express power of revocation might quite as well be regarded as tending to show that the instrument was intended as a will, since a will is always revocable, and there is no possible object in inserting such an express power therein.

That an instrument has been expressly delivered as a conveyance would seem to be conclusive that it is not intended to operate as a will, unless it is susceptible of division into two instruments, one a will and the other a conveyance. Usually, however, even though the circumstances are such as to create a presumption of delivery, so as to validate the instrument if regarded as a conveyance, they are not such as to show conclusively that the instrument was intended to operate as a conveyance. If, for instance, the maker hands the instrument to the transferee named, though this creates a presumption of delivery in case the instrument is to be regarded as a conveyance,²⁸ and may tend to show that the instrument was intended as a conveyance,²⁹ it is perfectly possible that the instrument was put in such transferee's care as a will, and that it was not intended to operate as a conveyance.³⁰ On the other hand, the fact that there is no evidence of delivery of the instrument, such as is necessary to support it as a conveyance *inter vivos*, that

27. See *e. g.* Abney v. Moore, 106 Ala. 131, 18 So. 60; Harper v. Reaves, 132 Ala. 625, 32 So. 721; Stroup v. Stroup, 140 Ind. 179, 27 L. R. A. 523, 39 N. E. 864; Lacy v. Comstock, 39 Kan. 86, 39 Pac. 1024; Kelleher v. Kernan, 60 Md. 440; Ellis v. Pearson, 104 Tenn. 591, 58 S. W. 318.

28. *Ante*, § 463, note 67.

29. Abney v. Moore, 106 Ala. 131, 18 So. 60; Driscoll v. Dris-

coll, 143 Cal. 528, 77 Pac. 471; Youngblood v. Youngblood, 74 Ga. 614; Hathaway v. Cook, 258 Ill. 92, 101 N. E. 227; Fellbush v. Fellbush, 216 Pa. 141, 65 Atl. 28; Billings v. Warren, 21 Tex. Civ. App. 77, 50 S. W. 625.

30. See Fellbush v. Fellbush, 216 Pa. 141, 65 Atl. 28; Griffin v. McIntosh, 176 Mo. 392, 75 S. W. 677; Tewkesbury v. Tewkesbury, 222 Mass. 595, 111 N. E. 394.

is, no evidence of an expression, by word or act, of an intention that it shall operate as such, would seem to afford some room for an inference that it was intended to operate only at the maker's death,³¹ though an instrument which is in form clearly a conveyance *inter vivos* cannot, it would seem evident, be regarded as a will merely because it has not been delivered as a conveyance.³² In so far as a lack of delivery can be inferred from the maker's retention of possession of the instrument,³³ and in so far as testamentary intention can be inferred from a lack of delivery,³⁴ such intention can be inferred from the retention of possession. But the retention of possession is not conclusive of a lack of delivery,³⁵ and it is certainly not conclusive of an intention that the instrument shall operate as a will rather than as a conveyance.

The fact that an instrument of doubtful character is invalid if regarded as a conveyance while valid if regarded as a will, has been referred to as a ground for regarding it as a will,³⁶ and conversely, the fact that an instrument is invalid if regarded as a will while valid if regarded as a conveyance has been considered a ground for regarding it as a conveyance.³⁷ This view is based partly upon the policy of the courts to give

31. Sharp v. Hall, 86 Ala. 110, 11 Am. St. Rep. 28; Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Nichols v. Chandler, 55 Ca. 369; Nichols v. Huddleson, 13 B. Mon. (Ky.) 299; Bromley v. Mitchell, 155 Mass. 509, 30 N. E. 83; Edwards v. Smith, 35 Miss. 197; Miller v. Holt, 68 Mo. 584; Kresecker's Estate, 170 Pa. St. 476; Rountree v. Rountree, 85 S. C. 383, 67 S. E. 471.

32. See Dexter v. Witte, 138 Wis. 74, 119 N. W. 891.

33. *Ante*, § 461, note 62.

34. *Ante*, this section, note 31.

35. *Ante*, § 461, note 43.

36. Heaston v. Kreig, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805; Symes v. Arnold, 10 Ga. 506; Sharp v. Hall, 86 Ala. 110, 11 Am. St. Rep. 28; Trumbauer v. Rust, 36 S. D. 301, 154 N. W. 801; 1 Jarman, Wills, 22. And see *ante*, this section, note 31.

37. Jacoby v. Nichols, 23 Ky. L. Rep. 205, 62 S. W. 734; Thomas v. Williams, 105 Minn. 88, 117 N. W. 155; Abney v. Moore, 106 Ala. 131, 18 So. 60; Wynn v. Wynn, 112 Ga. 214, 37 S. E. 378.

to an instrument a legal operation wherever possible, and partly upon the consideration that the maker of the instrument must have intended it to operate in the mode in which he rendered it capable of operating. The fact, however, that an instrument which is clearly intended to operate as a will is not executed with the formalities required in the case of a will is not sufficient, it would seem, to give it validity as a conveyance *inter vivos*, but it is totally inoperative.³⁸ The maker's intention that the instrument shall not be operative until his death excludes an intention that it shall be immediately operative, which latter intention is necessary to constitute delivery.³⁹ With this intention lacking, the fact that the maker hands the instrument to the transferee named therein could not make the instrument effective as a conveyance *inter vivos*.⁴⁰

That an instrument otherwise in the form of a conveyance *inter vivos* contains a clause to the effect that it is not to take effect until the maker's death has in some cases been regarded as showing a testamentary intent,⁴¹ while in others this has been regarded as not inconsistent with the operation of the instrument as a conveyance *inter vivos*, and as merely postponing the

38. See *Murray v. Cazier*, 23 Ind. App. 600, 53 N. E. 476; *Priester v. Hohloch*, 70 N. Y. App. Div. 256, 75 N. Y. Supp. 405; *Tuttle v. Raish*, 116 Iowa, 331, 90 N. W. 66; *Larson v. Lund*, 109 Minn. 372, 123 N. W. 1070.

39. *Ante*, § 461, notes 40-47.

40. See *Griffin v. McIntosh*, 176 Mo. 392, 75 S. W. 677. And see cases cited, *ante*, § 461, note 47; *Murphy v. Gabbert*, 166 Mo. 596, 89 Am. St. Rep. 733, 66 S. W. 536; *Terry v. Glover*, 235 Mo. 544, 139 S. W. 337; *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Sappingfield v. King*, 49 Ore.

102, 8 L. R. A. (N. S.) 1066, 89 Pac. 142, 90 Pac. 150; *Turner v. Scott*, 51 Pa. 26; *Coulter v. Shelmadine*, 204 Pa. 120, 53 Atl. 638; *Fellbush v. Fellbush*, 216 Pa. 141, 65 Atl. 28.

41. *Seay v. Huggins*, 194 Ala. 496, 70 So. 113; *Donald v. Nesbit*, 89 Ga. 290, 15 S. E. 367; *Ransom v. Pottawattamie County*, 168 Iowa, 570, 150 N. W. 657; *In re Bybee's Estate*, 179 Iowa, 1089, 160 N. W. 900; *Leonard v. Leonard*, 145 Mich. 563, 108 N. W. 985; *Moody v. Macomber*, 159 Mich. 657, 124 N. W. 549; *Simpson v. McGee*, 112 Miss. 344, 73 So. 55.

transferee's right of enjoyment.⁴² Such language would seem, *prima facie*, to indicate a testamentary intention, but when read in connection with the context and the surrounding circumstances, it may no doubt be susceptible of a different construction. The decisions which regard such a clause as merely postponing the right of enjoyment are to a considerable extent, it appears, based on the consideration that otherwise the instrument would be a nullity because not executed as a will. It does not seem that any absolute rule that such a clause shows, or that it does not show, a testamentary intention, should properly be asserted, it being a question merely of the construction of the language used. One may, if he chooses, by conveyance *inter vivos*, create in another an estate to commence upon his, the grantor's, death,^{42a} and the fact that in the particular instrument he indicates an intention to create such an estate is certainly not conclusive that the instrument is a will and not a conveyance.

That an instrument undertakes to dispose only of such property as the maker may have at the time of his death has been regarded as strong, if not conclusive, evidence of an intention that the instrument shall operate as a will and not as a conveyance.⁴³

42. *Abney v. Moore*, 106 Ala. 131, 18 So. 60; *Phillips v. Phillips*, 186 Ala. 545, 65 So. 89; *Burch v. Nicks*, 50 Ark. 367, 7 S. W. 563; *West v. Wright*, 115 Ga. 277, 41 S. E. 602; *Griffith v. Douglas*, 120 Ga. 582, 48 S. E. 129; *Harshbarger v. Carroll*, 163 Ill. 636, 45 N. E. 565; *Hathaway v. Cook*, 258 Ill. 92, 101 N. E. 227; *Kelly v. Shimer*, 152 Ind. 290, 53 N. E. 233; *Rust v. Rutherford*, 95 Kan. 152, 147 Pac. 805; *Phillips v. Lumber Co.*, 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652; *Hunt v. Hunt*, 119 Ky. 39, 68 L. R. A. 180, 82 S. W. 998; *Abbott v. Holway*, 72 Me. 298; *Vessey v. Dwyer*, 133 N. W. 613; *Rogers v. Rogers* (Miss.) 43 So. 946; *Wimpey v. Ledford* (Mo.) 177 S. W. 302; *Merck v. Merck*, 83 S. C. 329, 65 S. E. 347; *Trumbauer v. Rust*, 36 S. D. 301, 154 N. W. 801; *Garrison v. McLain*, (Tex. Civ. App.) 112 S. W. 773; *Lauck v. Logan*, 45 W. Va. 25, 31 S. E. 986.
- 42a. *Ante*, § 159.
43. *Nichols v. Nichols*, 168 Cal. 444, 143 Pac. 712; *Robinson v. Schley*, 6 Ga. 515; *Brewer v.*

That an instrument, in form a conveyance *inter vivos*, is handed to a person other than the grantee, with instructions to retain it until the grantor's death, is not, by reason of the reference to the grantor's death, testamentary in character, is generally recognized,⁴⁴ such a physical transfer being regarded as involving delivery, of a *quasi* conditional character, of the instrument as a conveyance.⁴⁵ If, however, the grantor, at the time of handing the instrument to a third person,⁴⁶ or to the grantee himself,⁴⁷ indicates an intention that the instrument shall have no operation whatsoever until the grantor's death, and that in the meanwhile he may revoke or cancel it, or treat it as not legally existent, the instrument cannot be regarded as having been delivered as a conveyance, and it must be regarded, either as an instrument of conveyance which is nugatory for lack of delivery, or as a testamentary instrument which is valid only if executed as such.^{47a}

Baxter, 41 Ga. 512, 5 Am. Rep. 530; Roth v. Michalis, 125 Ill. 325, 17 N. E. 809; Heaston v. Kreig, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805; Poore v. Poore, 55 Kan. 687, 41 Pac. 973; Watkins v. Dean, 10 Yerg. (Tenn.) 321, 31 Am. Dec. 583; See Kyle v. Perdue, 87 Ala. 423, 6 So. 296; Roth v. Michaelis, 125 Ill. 325, 17 N. E. 809; Gage v. Gage, 12 N. H. 371.

44. Griswold v. Griswold, 148 Ala. 239, 121 Am. St. Rep. 64, 42 So. 554; Fine v. Lasater, 110 Ark. 425, 161 S. W. 1147; Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639; Thurston v. Tubbs, 257 Ill. 465, 100 N. E. 947; American Nat Bank of Lincoln v. Martin, 277 Ill. 629, 115 N. E. 721; Wheeler v. Loesch, 51 Ind. App. 262, 99 N. E. 502; Schillinger v. Bawek, 135 Iowa, 131, 112 N. W.

210; Hoagland v. Beckley, 158 Mich. 565, 123 N. W. 12; Peterson v. Bisbee, 191 Mich. 439, 158 N. W. 134; Dickson v. Miller, 124 Minn. 346, 145 N. W. 112; Saltz-sieder v. Saltzsieder, 219 N. Y. 523, 114 N. E. 856; Shaffer v. Smith, 53 Okla. 352, 156 Pac. 1188.

45. *Ante*, § 462.

46. Williams v. Kidd, 170 Cal. 631, Ann. Cas. 1916E, 703, 151 Pac. 1; Shipley v. Shipley, 274 Ill. 506, 113 N. E. 906; Tewkes-bury v. Tewkesbury, 222 Mass. 595, 111 N. E. 394; Felt v. Felt, 155 Mich. 237, 118 N. W. 953.

47. Benner v. Bailey, 234 Ill. 79, 84 N. E. 638; Felt v. Felt, 155 Mich. 237, 118 N. W. 953; Watson v. Magill, 85 N. J. Eq. 592, 97 Atl. 43.

47a. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509.

Extrinsic facts and circumstances may usually be considered in order to ascertain whether a particular instrument was or was not intended to operate as a will.⁴⁸ That is, the *animus testandi*, if not apparent from the face of the instrument, may be shown otherwise, and consequently, although the phrasing of an instrument is strongly suggestive of a conveyance *inter vivos*, or even of a contract, it may operate as a will.⁴⁹ Conversely, although the instrument contains phrases suggestive of a will, it may be shown that it was intended to operate, not as a will but as a conveyance *inter vivos*.⁵⁰ There are several decisions, however, that if an instrument contains no language suggestive of a testamentary intent, such intent cannot be shown by proof of extrinsic circumstances.⁵¹ And there are also decisions that if the language of the instrument clearly shows a testamentary intent, it cannot be shown to have been intended to take effect as a conveyance.⁵²

48. *Nichols v. Nichols*, 2 Phillim. 183; *Lister v. Smith*, 3 Swab. & Tris. 282; *Sharp v. Hall*, 86 Ala. 110, 11 Am. St. Rep. 28; *Clarke v. Ransom*, 50 Cal. 595; *Tuttle v. Raish*, 116 Iowa, 331, 90 N. W. 66 (*semble*); *Wareham v. Sellers*, 9 G. & J. (Md.) 98; *McGrath v. Reynolds*, 116 Mass. 566; *Prather v. Prather*, 97 Miss. 311, 52 So. 449; *Outlaw v. Hurdle*, 46 N. C. 150; *Tozer v. Jackson*, 164 Pa. 373, 30 Atl. 400; *White v. Helmes*, 1 McCord (S. C.) 430; *Ferguson v. Ferguson*, 27 Tex. 339; *Belgarde v. Carter*, —Tex. Civ. App. —, 146 S. W. 964; *Smith v. Smith*, 112 Va. 205, 33 L. R. A. (N. S.) 1018, 70 S. E. 491.

49. *Gomez v. Higgins*, 130 Ala. 493, 30 So. 417; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Blackman v. Preston*,

123 Ill. 381, 15 N. E. 42; *Ison v. Halcomb*, 136 Ky. 523, 124 S. W. 813; *Moody v. Macomber*, 159 Mich. 657, 124 N. W. 549; *Sartor v. Sartor*, 39 Miss. 760; *In re Belcher*, 66 N. C. 51; *Kiesecker's Estate*, 190 Pa. St. 476, 42 Atl. 886; *Ingram v. Porter*, 4 McCord (S. C.) 198.

50. *Ward v. Ward*, 104 Ky. 857, 48 S. W. 411; *Clayton v. Liverman*, 29 N. C. 92; *Tozar v. Jackson*, 164 Pa. 373; *Faulk v. Faulk*, 23 Tex. 653.

51. *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458; *Dodson v. Dodson*, 142 Mich. 586, 105 N. W. 1110; *Elliott v. Cheney*, 183 Mich. 561, 150 N. W. 163; *Noble v. Fickes*, 230 Ill. 594, 82 N. E. 950, 13 L. R. A. N. S. 1203. And see *Fellbush v. Fellbush*, 216 Pa. 141, 65 Atl. 28.

52. *Goodale v. Evans*, 263 Mo.

Upon the question whether an instrument which purports on its face to be a will, and is duly executed as such, can be shown to have been executed without any intention that it have a legal effect, whether it can be shown, for instance, that it was executed merely as a memorandum, or to illustrate how a will should be made, or to obtain immunity from the solicitation of a person named therein, the cases are not entirely in accord. The tendency of the authorities in this country is rather adverse to the introduction of evidence for this purpose, the solemnity of the execution of the instrument in the statutory mode being regarded as sufficient to exclude the possibility of thus asserting a lack of testamentary intent.⁵³ The English authorities are to the effect that a lack of such intent may be shown.⁵⁴

§ 468. Signing by testator. In all states the statute requires, as did the English Statute of Frauds, that a will shall be signed by the testator, or, in the majority of states, by some other person, by the testator's express direction, and in his presence.⁵⁵ The testator's own signature may be by means of a mark, even though he is able to write, provided the mark is intended as a signature;⁵⁶ and so, in signing, he may use

219, 172 S. W. 370; *Phifer v. Mullis*, 167 N. C. 405, 83 S. E. 582.

53. *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831; *In re Kennedy*, 159 Mich. 548, 28 L. R. A. (N. S.) 417, 134 Am. St. Rep. 743, 18 A. & E. Ann. 892; *Heaston v. Krieg*, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805; *Brown v. Avery*, 63 Fla. 376, Ann. Cas. 1914A, 90, 58 So. 34. And see *Sewell v. Slingluff*, 57 Md. 537. As to the admissibility of the maker's declarations upon this question, see 3 Wigmore, Evidence, § 1736, and note in

52 Am. Dec. at p. 167.

54. *Nicholls v. Nicholls*, 2 Phillim. 183; *Lister v. Smith*, 3 Swab. & Tr. 282; 1 Jarman, Wills, 23. And such is the rule in Massachusetts. *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499.

55. 1 Stimson's Am. St. Law, § 2640.

56. *In re Clark's Estate*, 170 Cal. 418, 149 Pac. 828; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Rook v. Wilson*, 142 Ind. 24, 51 Am. St. Rep. 163; *Ahnert v. Ahnert*, 98

only his initials, or his Christian name, or even adopt another name than his own.⁵⁷ When the signature is by a person other than the testator, the requirements that it be by his direction and in his presence must be strictly complied with.⁵⁸ Even in the absence of language in the statute expressly authorizing the signature to be made by another than the testator, by the latter's direction and in his presence, such a signature would, it seems, ordinarily be upheld as being in effect the signature of the testator himself, in the absence of language in the statute clearly showing a contrary intention.⁵⁹ This would be in accord with the rule which prevails in the case of a conveyance *inter vivos*,⁶⁰ as well as in other connections,⁶¹ and a different construction of the statute would have the unfortunate effect of disabling any person, incapacitated by physical disability to make a mark, from making a will. There appears no reason why a signature by another in one's own presence, properly proven, should not be as effective for the purpose of a will as for other purposes.

In regard to the position of the signature, the rules in the different states are not in accord. Under statutes which follow the English Statute of Frauds in merely

Kan. 768, 160 Pac. 201; Nickerson v. Buck, 12 Cush. (Mass.) 332; Plate's Estate, 148 Pa. St. 55, 33 Am. St. Rep. 305; *In re Herperger's Estate*, 245 Pa. 569, 91 St. 942; *Wilson v. Craig*, 86 Wash. 465, 150 Pac. 1179.

57. 1 Jarman, Wills, 79; *In re Savory*, 15 Jur. 1042; *Knox's Estate*, 131 Pa. 220, 6 L. R. A. 353, 17 Am. St. Rep. 798, 18 Atl. 1021.

58. Page, Wills, §§ 175, 176; *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. 1069; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470; *Armstrong's Ex'r v. Armstrong's Heirs*, 29 Ala. 538;

Greenough v. Greenough, 11 Pa. St. 489. See *Pool v. Buffum*, 3 Ore. 438, 443.

59. *In re McElwaine*, 18 N. J. Eq. 499, the statute was construed as requiring the physical act of signature to be the act of the testator, and *Robins v. Coryell*, 27 Barb. (N. Y.) 559 contains a *dictum* that such would be the case in the absence of words in the statute indicative of a contrary intention.

60. *Ante*, § 457.

61. See authorities cited 25 Am. & Eng. Encyc. Law (2nd Ed.), 1066.

requiring that the will be signed, it has been decided that the place of the signature, whether by the testator himself, or by another for him, is immaterial, and that it may be made in the margin, in the body of the will, or elsewhere. Accordingly, the writing of the testator's name in the body of the will, as when he commences it, "I, John B.," is sufficient, under such statutes, as a signature, provided, it seems, it is so intended, or at least another signature is not intended to be added.⁶² The statutes of a number of states, however, require the testator to "subscribe" the will, or contain some other express requirement that the signature appear at the end of the will,⁶³ and there are a number of decisions upon the question of whether the signature to a particular will was at the end thereof, so as to comply with the statute.⁶⁴ The solution of this question involves the consideration, not only of whether some particular language is to be regarded as following the signature,⁶⁵ but also of whether this language is of such a dispositive character as properly to constitute a part of the will, so that its occurrence after the signature can be regarded as conclusive that this is not at the end of the will.⁶⁶ It has, moreover, occasionally been con-

62. *Lemayne v. Stanley*, 3 Lev. 1; *Armstrong's Ex'r v. Armstrong's Heirs*, 29 Ala. 538; *Miles' Will*, 4 Dana. (Ky.) 1; *Armstrong v. Walton*, 105 Miss. 337, 62 So. 173; *Catlett v. Catlett*, 55 Mo. 330; *Peace v. Edwards*, 170 N. C. 64, Ann. Cas. 1918A, 778, 86 S. E. 807; *Lawson v. Dawson*, 21 Tex. Civ. App. 361, 53 S. W. 64. See *In re Phelan's Estate*, 82 N. J. 316, 87 Atl. 625; *In re Booth*, 127 N. Y. 109, 24 Am. St. Rep. 429.

63. 1 *Stimson's Am. St. Law*, § 2640; 1 *Woerner, Administration*, § 39.

64. The cases upon the sub-

ject up to 1907 are collected in a note in 17 L. R. A. N. S. at p. 353. See also editorial note, 12 *Columbia Law Rev.* 380.

65. See *c. g. Irwin v. Jacques*, 71 Ohio St. 395, 69 L. R. A. 422, 73 N. E. 683; *In re Swire*, 225 Pa. St. 188, 73 Atl. 1110.

66. See *Baker v. Baker*, 51 Ohio St. 217; *In re Andrews*, 162 N. Y. 1, 48 L. R. A. 662, 76 Am. St. Rep. 294; *Wineland's Appeal*, 118 Pa. St. 37, 4 Am. St. Rep. 37.

That a clause appointing an executor is part of the will, so that if the signature precedes

tended that the will is not signed at the end thereof by reason of the fact that a very considerable blank space exists between the last clause of the will and the signature.⁶⁷ The signature may be either before or after the "attestation" clause,⁶⁸ the nature of which is explained in another section.⁶⁹ If writing is added below the signature subsequently to the execution and publication of the will, it is merely an attempted codicil, not affecting the validity of the will as expressed in the writing before the signature.⁷⁰

§ 469. **Acknowledgment and publication.** The statute sometimes requires the testator's signature to be acknowledged by him before witnesses, usually as an alternative to his actual signature of the will in their presence.⁷¹ No particular words of acknowledgment are necessary, it being sufficient that he indicates to the witnesses, either by words or acts, that the signature is his and the instrument his act.⁷² In at least three states, on a construction of the statute, it has been regarded as necessary that the witness see the signa-

such clause, the signature is not at the end of the will, see *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N. Y. 409. *Contra*, *Ward v. Putnam*, 119 Ky. 889, 85 S. W. 179.

67. *In re Seaman*, 146 Cal. 455, 106 Am. St. Rep. 53, 80 Pac. 700; *Morrow's Estate*, 204 Pa. St. 479, 54 Atl. 313. See *Sears v. Sears*, 77 Ohio St. 104, 17 L. R. A. (N. S.) 353, 11 A. & E. Ann. Cas. 1008.

68. *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156; *In re Young's Will*, 153 Wis. 337, 141 N. W. 226; *Hallowell v. Hallowell*, 88 Ind. 251; *Page, Wills*, § 183.

69. *Post*, § 471.

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70. *In re Jacobson*, 6 Dem. Sur. (N. Y.) 298; *Chaplin, Wills*, 229.

71. 1 *Stimson's Am. St. Law*, § 2642. See *Limbach v. Bolin*, 169 Ky. 204, L. R. A. 1916D, 1059, 183 S. W. 495; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N. Y. 409.

72. *Thompson v. Karme*, 268 Ill. 168, 108 N. E. 101; *Turner v. Cook*, 36 Ind. 129; *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447; *Nickerson v. Buck*, 12 Cush. (Mass.) 332; *In re Landy*, 148 N. Y. 403; *In re Herring*, 152 N. C. 258, 67 S. E. 570; *In re Clafin*, 73 Vt. 129, 87 Am. St. Rep. 693.

ture which the testator acknowledges to be his,⁷³ while in others this is regarded as unnecessary, it being sufficient that the witness is told by the testator that the instrument has been signed by him, or that he otherwise indicates to the witness that such is the case.⁷⁴⁻⁷⁵

There is also, in some states, a requirement that the testator acknowledge, in the presence of witnesses, that the instrument is his last will and testament, this constituting what is known as the "publication" of the will.⁷⁶ The publication, however, like the acknowledgment of the signature, need not be by express declaration, the testator's mere assent to a statement by another, or incidental reference to the instrument as his will, being sufficient, if it plainly informs the witnesses that the instrument is his will.⁷⁷ In the absence of a statutory requirement, it is unnecessary that the testator inform the witnesses that the instrument is his will.⁷⁸

73. *In re Mackay's Will*, 110 N. Y. 611, 1 L. R. A. 491, 6 Am. St. Rep. 409, 18 N. E. 433; *Nunn v. Ehlert*, 218 Mass. 471, 196 N. E. 163; *Pope v. Rogers*, 92 Conn. 248, 102 Atl. 583. See editorial notes, 28 Harv. Law Rev., 217; 27 Yale Law Journ., 847.

74-75. *White v. Trustees of British Museum*, 6 Bing. 310; *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151; *Gould v. Chicago Theological Seminary*, 189 Ill. 282, 59 N. E. 536; *Dougherty v. Crandall*, 168 Mich. 281, 134 N. W. 24.

76. 1 *Stimson's Am. St. Law*, § 2642; *Bigelow, Wills*, 47.

77. *In re Cullberg's Estate*, (Cal.), 146 Pac. 888; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 604; *In re Williams' Will*, 50 Mont. 142,

145 Pac. 957; *In re Ayers' Estate*, 84 Neb. 16, 120 N. W. 491; *Hildreth v. Marshall*, 51 N. J. Eq. 241, 27 Atl. 465; *Gilbert v. Knox*, 52 N. Y. 125; *In re Meurer*, 44 Wis. 392, 28 Am. Rep. 591.

78. *White v. Trustees of British Museum*, 6 Bing. 310; *Moodie v. Reid*, 7 Taunt. 355; *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831; *Canada's Appeal from Probate*, 47 Conn. 450; *In re Barry's Will*, 219 Ill. 391, 76 N. E. 219; *Turner v. Cook*, 36 Ind. 129; *Scott v. Hawks*, 107 Iowa, 723, 70 Am. St. Rep. 228; *Osburn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; *Watson v. Pipes*, 32 Miss. 451; *In re Skinner*, 40 Ore. 571, 67 Pac. 951; *Dauphin County Historical Soc. v. Kelker*, 226 Pa. St. 16, 134 Am. St. Rep. 1010; *Long v. Michler*, 133 Tenn. 51, 179 S. W. 477; *In re Claffin's*

§ 470. **Competency of witnesses.** The state statutes, with few, if any, exceptions, require the signature, or acknowledgment thereof, to be in the presence of two and sometimes three witnesses,⁷⁹ and also, as just stated, publication of the will as such in the presence of witnesses is frequently required. If there be less than the statutory number of competent witnesses, the will is void.⁸⁰ The statute usually requires the witness to be "competent" or "credible,"⁸¹ and the term "credible" is construed as meaning the same as "competent."⁸² It is sufficient that the competency exists at the date of the will; and the fact that the witness becomes subsequently incompetent to testify does not invalidate the will, though it may necessitate that the will be proven by secondary evidence.⁸³ In other words, the statutory requirement as to the witnesses necessary to attest the execution of a will is entirely distinct from the question as to how the will shall be proved after the testator's death, though such proof is by means of the attesting witnesses, if they are then competent to testify, and are accessible.⁸⁴

Will, 75 Vt. 19, 58 L. R. A. 261, 52 Atl. 1053.

79. 1 Stimson's Am. St. Law, § 2644.

80. See *Cureton v. Taylor*, 89 Ga. 490, 15 S. E. 643; *Poore v. Poore*, 55 Kan. 687; *Johnson v. Delome Land & Planting Co.*, 77 Miss. 15, 26 So. 360; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875.

81. 1 Stimson's Am. St. Law, § 2646.

82. *Hudson v. Flood*, 5 Del. 450, 94 Atl. 760; *Gillis v. Gillis*, 96 Ga. 1, 30 L. R. A. 143, 51 Am. St. Rep. 121, 23 S. E. 107; *In re Noble's Will*, 124 Ill. 266, 15 N. E. 850; *Clark's Appeal*, 114 Me. 105, 95 Atl. 517; *Amory*

v. Fellowes, 5 Mass. 219; *Combs' Appeal*, 105 Pa. St. 158; *Brown v. Pridgen*, 56 Tex. 124.

83. *Brograve v. Winder*, 2 Ves. Jr. 636; *Gillis v. Gillis*, 96 Ga. 1, 30 L. R. A. 143, 51 Am. St. Rep. 121, 23 S. E. 107; *Fisher v. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360; *Warren v. Baxter*, 48 Me. 193; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Sears v. Dillingham*, 12 Mass. 358; *In re Holts' Will*, 56 Minn. 33, 45 Am. St. Rep. 434; *Stewart v. Harriman*, 56 N. H. 25, 22 Am. Rep. 408; *Hoff v. State*, 72 Tex. 281. The statute so provides in a number of states. 1 Stimson's Am. St. Law, § 2647.

84. *Cheatham v. Hatcher*, 30

The competency of an attesting witness is, as a general rule, determined by the consideration whether the witness is a person competent to testify in a court of justice in regard to the will, and questions have frequently arisen as to the competency of particular persons at common law, and under modern statutory provisions. At common law, a beneficiary under the will was not a competent witness, because, by the rules prevailing in courts of justice, one interested in litigation could not testify therein.⁸⁵ Since this rule had the effect of frequently invalidating a will merely because a witness had a small interest thereunder, it was provided by statute that the testamentary provision in favor of the witness should be void, and that he should be regarded as a competent witness.⁸⁶ In this country there are statutes of a more or less similar character in most of the states, it being usually declared, as in England, that the devise or bequest to the witness shall be void, but frequently with a provision giving such witness what he would have taken, in the absence of the will, by descent or distribution, to the extent that this does not exceed the devise or bequest.⁸⁷ A mere charge upon land in favor of a witness for the payment of debts due him will not, however, in most states, affect his competency.⁸⁸ And the statute also, in effect, frequently provides that the witness shall not lose the benefit of such a provision if there are enough witnesses without him.⁸⁹ In a few states a witness to a will is no longer regarded as disqualified by reason of his beneficial interest thereunder, since the adoption of statutes allowing even interested parties to testify in judicial pro-

Grat. (Va.) 56, 32 Am. Rep. 650; Trustees of Theological Seminary of Auburn v. Calhoun, 25 N. Y. 422; Carlton v. Carlton, 40 N. H. 14.

85. 1 Jarman, Wills, 69; Holdfast v. Dowsing, 2 Strange, 1253.

86. 25 Geo. II. c. 6; 7 Wm. IV.

and 1 Vict. c. 26, § 14.

87. 1 Stimson's Am. St. Law, §§ 2650, 2651.

88. 1 Stimson's Am. St. Law, § 2648.

89. 1 Stimson's Am. St. Law, § 2650; 1 Woerner, Administration, § 41.

ceedings.⁹⁰ An executor named in the will is not usually regarded as so interested, by reason of his right to commissions, as to be disqualified as a witness thereto.⁹¹ In two or three states, however, a different view obtains.⁹²

At common law, a husband or wife is incompetent as a witness in regard to any matter in which the other has a pecuniary interest,⁹³ and it has accordingly been decided that the husband or wife of a devisee or a legatee is not a competent witness to the will.⁹⁴ Modern statutes, however, removing the disability of the husband and wife of a party in interest to testify, have in some states been construed as removing the incompetency as an attesting witness to a will,⁹⁵ and the same effect has in one state at least been given to a statute

90. See *White v. Bower*, 56 Colo. 575 136 Pac. 1053; *Leitch v. Leitch* 114 Md. 336 79 Atl. 600; *In re Wiese's Estate* 98 Neb. 463, 153 N. W. 556, L. R. A. 1915E, 832.

91. *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 41; *Davenport v. Davenport*, 116 La. 1009, 114 Am. St. Rep. 575, 41 So. 240; *Wyman v. Symmes*, 10 Allen (Mass.) 153; *Sears v. Dillingham*, 12 Mass. 358; *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *Stewart v. Harriman*, 56 N. H. 25, 22 Am. Rep. 408; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *Snyder v. Bull*, 17 Pa. St. 54; *Coalter v. Byan*, 1 Gratt. (Va.) 18; *Richardson v. Richardson*, 35 Vt. 298.

92. *Tucker v. Tucker*, 27 N. C. 161, (as regards personal property); *Jones v. Grieser*, 238 Ill. 183, 15 A. & E. Ann. Cas. 787 &

note, 87 N. E. 295. And the disqualification has been held to extend to the wife of an executor. *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1054; *Huie v. McConnell*, 47 N. C. 455.

93. See the discussion and criticism of this rule in 1 Wigmore, Evidence, § 600 *et seq.*

94. *Windham v. Chetwynd*, 1 Burrows, 414, 424; *Sloan's Estate*, 184 Ill. 579, 56 N. E. 952; *Sullivan v. Sullivan*, 106 Mass. 474; *Rucker v. Lambdin*, 12 Smedes & M. (Miss.) 230; *Hodgman v. Kittredge*, 67 N. H. 254, 68 Am. St. Rep. 661, 32 Atl. 158; *Giddings v. Turgeon*, 58 Vt. 106, 4 Atl. 711.

95. *Hawkins v. Hawkins*, 54 Iowa, 443, 6 N. W. 699; *In re Holt's Will*, 56 Minn. 33, 22 L. R. A. 481, 45 Am. St. Rep. 434, 57 N. W. 219; *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. 305.

modifying the common law doctrine of unity of interest of husband and wife.⁹⁶

A statute invalidating a provision in favor of a witness in order to render the witness competent has occasionally been construed to apply to a provision in favor of the husband of a witness.⁹⁷ Such a statute has not, however, usually been given such a construction.⁹⁸ In a number of states a devise or legacy to the husband or wife of a subscribing witness is expressly made void by the statute.⁹⁹

§ 471. Attestation and subscription. The witnesses as to the execution or publication of a will are required, usually, not only to witness the performance of these acts by testator, but also to sign their names upon the instrument "in the presence of" testator, and sometimes "in the presence of" each other.¹ The question of what constitutes "presence," within this requirement, has been the subject of numerous decisions, of a somewhat conflicting character.² The testator and the witnesses need not, it has been held, be in the same room, in order to render the signatures of the latter "in the presence of" the former, it being sufficient that he sees them, as through a door or window;³ and though the testator does not actually see the witnesses sign, this is

96. *Gamble v. Butchee*, 87 Tex. 643, 30 S. W. 861.

97. *Winslow v. Kimball*, 25 Me. 493; *Jackson v. Durland*, 2 Johns. Cas. (N. Y.) 314; *Moore v. McWilliams*, 3 Rich. Eq. (S. C.) 10.

98. *White v. Bower*, 56 Colo. 575, 136 Pac. 1053; *Fisher v. Spence*, 150 Ill. 253, 37 N. E. 314, 41 Am. St. Rep. 314; *In re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434, 22 L. R. A. 481; *Hodgman v. Kittredge*, 67 N. H. 254, 68 Am. St. Rep. 661; *Giddings v. Turgeon*, 58 Vt. 106, 41 Am. St.

Rep. 360, 37 N. E. 314.

99. 1 *Stimson's Am. St. Law* § 2650.

1. 1 *Stimson's Am. St. Law*, § 2644.

2. The cases are collected in note in 6 A. & E. Ann. Cas. at p. 414. See also editorial note, 14 *Columbia Law Rev.* 180.

3. *Shires v. Glascock*, 2 Salk. 688; *Casson v. Dade*, 1 Brown. Ch. 99; *Ambre v. Weishaar*, 74 Ill. 109; *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464; *In re Meurer*, 44 Wis. 392 28 Am. Rep. 591.

usually regarded as taking place in his presence, if he is physically able, by shifting his gaze, to see the act of signing, provided at least he can do this without pain or danger to life.⁴ He must know what the witnesses are doing,⁵ and the signing is not in his presence if he is in such a state mentally as not to have such knowledge.⁶ When the will is signed in the room in which testator is, there is, it seems, a presumption that the requirement is satisfied.⁷ The statutory requirement is not usually regarded as satisfied by an acknowledgment by the witness, in the testator's presence, of a signature previously affixed by him out of the testator's presence.⁸

The statute occasionally provides in express terms that the witnesses shall attest the will at the request of the testator, and even though the statute makes no reference to a request, it has been held that there must

4. 1 Jarman, Wills, 89 *et seq.*; Bigelow, Wills, 55; Schouler, Wills, §§ 340-342. See Gordon v. Gilmer, 141 Ga. 347, 80 S. E. 1007; Drury v. Connell, 177 Ill. 43, 52 N. E. 368; Raymond v. Wagner, 178 Mass. 315, 59 N. E. 811; Maynard v. Vinton, 59 Mich. 139; Watson v. Pipes, 32 Miss. 451; Jones v. Turk, 48 N. C. 202. Compare McKee v. McKee's Ex'r, 155 Ky. 738, 160 S. W. 261; Cunningham v. Cunningham, 80 Minn. 180, 81 Am. St. Rep. 256, 51 L. R. A. 642; Healey v. Bartlett, 73 N. H. 110, 6 A. & E. Ann. Cas. 413.

5. 1 Jarman, Wills, 89; Orndorff v. Hummer, 12 B. Mon. (Ky.) 619; Watson v. Pipes, 32 Miss. 451; Baldwin v. Baldwin, 81 Va. 405. But if testator is blind, he may take cognizance through his other senses of the signing by a witness. Riggs v. Riggs, 135 Mass. 238, 46 Am. Rep.

464; *In re Allred's Will*, 170 N. C. 153, 86 S. E. 1047; Ray v. Hill, 3 Strobb. (S. C.) 297.

6. Right v. Price, 1 Doug. (Mich.) 241; Chappel v. Trent, 90 Va. 849, 19 S. E. 314.

7. *In re Howard*, 51 B. Mon. (Ky.) 199, 17 Am. Dec. 40; Watson v. Pipes, 32 Miss. 451; Stewart v. Stewart, 56 N. J. Eq. 761, 57 N. J. Eq. 664; Neil v. Neil, 1 Leigh. (Va.) 6; Baldwin v. Baldwin, 81 Va. 405.

8. Calkins v. Calkins, 216 Ill. 458, 1 L. R. A. (N. S.) 393 and note, 108 Am. St. Rep. 233; Mendell v. Dunbar, 169 Mass. 74 61 Am. St. Rep. 277; Den v. Milton, 12 N. J. L. 70; Ragland v. Huntingdon, 23 N. Car. 561; Pawtucket v. Ballou, 15 R. I. 58, 2 Am. St. Rep. 868. But see *contra*, Cook v. Winchester, 81 Mich. 581, 8 L. R. A. 822 and note; Sturdivant v. Birchett, 10 Gratt. (Va.) 67, 11 Gratt. 220.

be a request.⁹ But the request need not be in express terms,¹⁰ and it appears to be sufficient that the circumstances are such as to show that, in attesting the will, the witnesses are acting in accordance with the testator's wish at the time,¹¹ as when the request is made by a third person in the testator's presence and the latter's conduct indicates an acquiescence in such request.¹² There is evidently no such assent on the part of testator if he is not in a condition to know what is being done.¹³

An "attestation clause," which consists of a recital, signed by the witnesses, of a compliance with the necessary requirements in execution of the will, should always be appended to the will, since it furnishes *prima facie* evidence of its due execution, and may serve to refresh the memory of the witnesses as to the circumstances of the execution. Such a clause is not however, necessary to the validity of the will, the statutes merely requiring the witnesses to sign their names upon the document, or, in some states, upon the document at the end or foot of the will itself.¹⁴

9. *Gross v. Burneston*, 91 Md. 383, 46 Atl. 993; *Burney v. Allen*, 125 N. C. 314, 74 Am. St. Rep. 637; *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668; *Skinner v. American Bible Soc.*, 92 Wis. 209, 65 N. W. 1037.

10. *Rogers v. Diamond*, 13 Ark. 474; *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 604; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668; *Skinner v. American Bible Soc.* 92 Wis. 209, 65 N. W. 1037.

11. *In re Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Gross v. Burneston*, 91 Md. 383, 46 Atl. 993; *In re Voorhis*, 125 N. Y. 765, 26 N. E. 935;

Savage v. Bowen, 103 Va. 540, 49 S. E. 668.

12. *Huff v. Huff*, 41 Ga. 696; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Conway v. Vizzard*, 122 Ind. 266, 23 N. E. 771; *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227; *Matter of Nelson*, 141 N. Y. 152, 36 N. E. 3; *Burney v. Allen*, 125 N. Car. 314, 74 Am. St. Rep. 637, 34 S. E. 500; *In re Skinner*, 40 Ore. 571, 63 Pac. 523, 67 Pac. 951.

13. *McMeichen v. McMeichen*, 17 W. Va. 683, 41 Am. Rep. 682.

14. 1 Jarman, Wills, (Bige-low's Ed.), 123; Schouler, Wills, § 346.

§ 472. **Holographic and nuncupative wills.** By statute in a number of states, "holographic" wills, that is, wills entirely written by testator himself, are valid, though not executed in accordance with the ordinary statutory requirements, if signed by him, and if, in two states at least, found among the valuable papers and effects of deceased, or entrusted by him to another for safe keeping.¹⁵

"Nuncupative" wills, that is, wills consisting of merely oral declarations by testator in the presence of witnesses, were allowed before the passage of the Statute of Frauds, but by that statute the right to make them was much restricted, the amount of property which could be so disposed of being greatly limited, and it also being provided that they could be made only in the last sickness of deceased, before three witnesses, and usually in his own habitation. In this country there are usually statutory provisions of a somewhat similar character, providing especially, however, for the making of such wills by soldiers in actual military service, and by mariners at sea. The law of nuncupative wills never applied in England to real property, in the absence of a local custom to the contrary, since, before the Statute of Wills, such property could not be devised, and since, by the terms of that statute, as well as by the Statute of Frauds, a will of lands was required to be "in writing." The statutes on the subject in this country usually restrict such wills to personal property.¹⁶

§ 473. **Undue influence.** The question whether a certain testamentary disposition was the result of the exercise of "undue influence" upon the testator is the subject of frequent litigation. The courts have not been very successful in defining what constitutes undue

15. 1 Stimson's Am. St. Law, § 2645. See Page, Wills, §§ 229-231; Schouler, Wills (5th Ed.), § 255.

16. Bigelow, Wills, 63 *et seq.*; Page, Wills, §§ 232-240; 1 Stimson's Am. St. Law, §§ 2700-2705; Schouler, Wills, § 359, *et seq.*

influence sufficient to defeat a testamentary provision, but it is stated, in a general way, that it must be such persuasion or importunity as to overpower the will of the testator, without convincing his judgment,¹⁷ that is, it involves a substitution of another person's will for that of testator.¹⁸ But the mere fact that one persuades the testator to make a will in his favor, or induces him to do so by argument or flattery, does not, of itself, show undue influence,¹⁹ and so "appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like," are legitimate, and do not affect the validity of the will.²⁰

The question of undue influence is entirely distinct from that of the mental capacity of the testator to make a will, which will hereafter be considered;²¹ but the fact that, though mentally capable of making a will, he is wanting in physical and mental vigor, is usually an

17. Hall v. Hall, L. R. 1 Prob. & Div. 481; Coghill v. Kennedy, 119 Ala. 641, 24 So. 459; *In re Clark's Estate*, (Cal.), 149 Pac. 828; Wiley v. Gordan, 181 Ind. 252, 104 N. E. 500; Kennedy v. Kennedy, 124 Md. 38, 91 Atl. 759; Gay v. Gillilan, 92 Mo. 250, 1 Am. St. Rep. 712; *In re Tunison's Will*, (N. J.), 93 Atl. 1087; *In re Diggins' Estate*, 76 Ore. 341, 149 Pac. 73; Herster v. Herster 122 Pa. 239, 9 Am. St. Rep. 95; Scott v. Townsend, 106 Tex. 322, 166 S. W. 1138.

18. Wingrove v. Wingrove, 11 Prob. Div. 81; Phillips v. Gaither, 191 Ala. 87, 67 So. 1001; Maynard v. Vinton, 59 Mich. 139, 60 Am. Rep. 276; Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598; Riley v. Sherwood, 144 Mo. 354, 45 S. W. 1077; Waddington v. Buzby, 45 N. J. Eq. 173,

14 Am. St. Rep. 706; *In re Mueller's Will*, 170 N. C. 28, 33 S. E. 719; Cook v. Bolduc, 24 Wyo. 281, 157 Pac. 580, 158 Pac. 266.

19. 1 Woerner, Administration, § 31; McDaniel, v. Crosby, 19 Ark. 533; Yoe v. McCord, 74 Ill. 33; Bush v. Lisle, 89 Ky. 393, 12 S. W. 762; *In re McIntyre's Estate*, 193 Mich. 257, 159 N. W. 517; Hughes v. Murtha, 32 N. J. Eq. 288; Trost v. Dingler, 118 Pa. St. 259, 4 Am. St. Rep. 593.

20. Hall v. Hall, L. R. 1 Prob. & Div. 481; Bevelot v. Lestrade, 153 Ill. 625, 38 N. E. 1056; Gay v. Gillilan, 92 Mo. 250, 1 Am. St. Rep. 712; *In re Mondorf's Will*, 110 N. Y. 450, 18 N. E. 256; *In re Craven's Will*, 169 N. C. 561, 86 S. E. 587.

21. See *post*, § 595.

important consideration in determining the question of undue influence.²²

The fact that a beneficiary under the will sustains a confidential relation towards testator, such as that of attorney or guardian, does not of itself, according to some authorities, raise a presumption of undue influence sufficient to overthrow the will, though, under such circumstances, much slighter evidence of improper acts on the part of the beneficiary will be required than ordinarily.²³ By some decisions, however, the mere existence of the confidential relation raises a presumption that the will is invalid.²⁴ That a beneficiary who is not a near relative himself prepared the instrument is usually regarded as tending to show undue influence.²⁷

§ 474. **Lapsed and void devises.** As a consequence of the "ambulatory" nature of a will, which prevents its

22. *Griffith v. Diffenderffer*, 50 Md. 466; *Sullivan v. Foley*, 112 Mich. 1, 70 N. W. 322; *Shailer v. Bumstead*, 99 Mass. 112; *Waddington v. Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706, 16 Atl. 690; *Turner v. Butler*, 253 Mo. 202, 161 S. W. 765.

23. *Parfitt v. Lawless*, L. R. 2 Prob. & Div. 462; *Bancroft v. Otis*, 91 Ala. 279, 24 Am. St. Rep. 904, 8 So. 286; *Lockridge v. Brown*, 184 Ala. 106, 63 So. 524; *Carter v. Dixon*, 69 Ga. 82; *Pilstrand v. Swedish Methodist Church*, 275 Ill. 46, 113 N. E. 958; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *In re Smith's Will*, 95 N. Y. 516; *Bigelow, Wills*, 89.

24. *Connor v. Stanley*, 72 Cal. 556, 1 Am. St. Rep. 84; *Kirby's Appeal*, 91 Conn. 40, 98 Atl. 349; *Meek v. Perry*, 36 Miss. 190, *Wendling v. Bowden*, 252 Mo.

647, 161 S. W. 774; *Carroll v. Hause*, 48 N. J. Eq. 269, 27 Am. St. Rep. 469; *Miller v. Miller*, 187 Pa. 572, 41 Atl. 277; *Hartman v. Strickler*, 82 Va. 225; 1 *Woerner, Administration*, § 32.

25. *Barry v. Butlin*, 1 Curt. Ecc. 637; *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459; *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85; *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628; *Yardley v. Cuthbertson*, 108 Pa. St. 395, 56 Am. Rep. 218; *In re Barney's Will*, 70 Vt. 352, 40 Atl. 1027; *Montague v. Allan's Ex'r*, 78 Va. 592, 49 Am. Rep. 384; *Bigelow, Wills* 87, 89,

26. 1 *Jarman, Wills*, 307; 2 *Woerner, Administration*, § 434.

27. *Page, Wills*, § 740; *Merrill v. Hayden*, 86 Me. 133, 29 Atl. 949; *Crum v. Bliss*, 47 Conn. 592.

operation until the death of the testator, the death of a devisee or legatee during the testator's lifetime will, in the absence of a statute to the contrary, render the gift absolutely void.²⁶ And so a devise or legacy to a corporation may lapse or become void by the dissolution of the corporation before testator's death.²⁷ The testator may, however, make a substitutionary gift of that particular property in case the other gift fails, owing to the death of the beneficiary or for other reasons, and this will be carried out by the courts.²⁸ The fact that the gift is in terms to one "and his heirs" does not, of itself, show any intention to make a substitutionary gift to the heirs, since this is a word merely of limitation, and not of purchase.²⁹ In some cases, however, the use of the words "and heirs" has been construed as constituting a substitutional gift to the heirs,³⁰ and this is the effect usually given to a provision for one "or his heirs."³¹

In most of the states there is at the present day a statutory provision naming a class of persons who may take in case of the death of the beneficiary during the lifetime of the testator. In many states it is provided that a devise or bequest to a child or other descendant of the testator shall, in case of the death of the devisee or legatee before the testator, pass to the issue or occasionally the heirs of such devisee or lega-

28. 1 Jarman, Wills, 308; Page, Wills, § 741; Wilde v. Bell, 86 Conn. 610, 87 Atl. 8; Gilmor's Estate, 154 Pa. St. 523, 35 Am. St. Rep. 855, 26 Atl. 614; Rivers v. Rivers, 36 S. C. 302, 15 S. E. 137. See *ante*, § 26.

29. Gibbons v. Ward, 115 Ark. 184, 171 S. W. 90; Maxwell v. Featherston, 83 Ind. 339; *In re* Wells, 113 N. Y. 396, 10 Am. St. Rep. 137; Kimball v. Story, 108

Mass. 382; Hand v. Marcy, 28 N. J. Eq. 59.

30. Gilmor's Estate, 154 Pa. St. 523, 35 Am. St. Rep. 855, 26 Atl. 614; Gittings v. McDermott, 2 Mylne & K. 69, 73; 2 Woerner, Administration, § 434.

31. 2 Woerner, Administration, §§ 417, 434; Hand v. Marcy, 28 N. J. Eq. 59; O'Rourke v. Beard, 151 Mass. 9, 23 N. E. 576. See Keniston v. Adams, 80 Me. 290, 14 Atl. 203.

tee.³² In some, the same provision is made in favor of the issue of any devisee or legatee who is a relation of the testator, while, in others, the issue of any devisee or legatee dying before the testator takes the gift, unless a contrary intention appears.³³

In the case of a devise of land to two or more individuals, to take as tenants in common and not as joint tenants,³⁴ if one of them dies before testator, the devise will, at common law, lapse as to his share, in the absence of controlling language to the contrary, while the other donee or donees will take the same interest as if such death had not occurred.³⁵ On the other hand, in the case of a devise to members of a class, such as children or nephews, if one who would otherwise be a member of the class dies before the testator, his share does not lapse, even at common law, but the property is divided between the members of the class, as ascertained at the time of testator's death, or at such later date as may be indicated in the will.³⁶ And even

32. 1 Stimson's Am. St. Law, § 2823(A).

33. 1 Stimson's Am. St. Law, § 2823(B), (C). See Page, Wills, §§ 742, 743; 2 Woerner, Administration, § 435.

34. If the gift is to them as joint tenants, those of them who survive the testator will take all. See *ante*, § 191.

35. *Bill v. Payne*, 62 Conn. 140, 25 Atl. 354; *Magnuson v. Magnuson*, 197 Ill. 496; *Morse v. Hayden*, 82 Me. 227, 19 Atl. 443; *Best v. Berry*, 189 Mass. 510, 109 Am. St. Rep. 651; *Moffett v. Elmendorff*, 152 N. Y. 475, 57 Am. St. Rep. 529, 46 N. E. 845; *Twitty v. Martin*, 90 N. C. 643; *Strong v. Ready*, 9 Humphr. (Tenn.) 168; *In re Sharpless' Estate*, 214 Pa. 335, 63 Atl. 884.

36. *In re Warner's Appeal*, 39 Conn. 253; *Lancaster v. Lancaster*, 187 Ill. 540, 79 Am. St. Rep. 234, 58 N. E. 462; *In re Nicholson's Will*, 115 Iowa, 493, 91 Am. St. Rep. 175, 88 N. W. 1064; *Stetson v. Eastman*, 84 Me. 366, 24 Atl. 868; *Shots v. Poe*, 47 Md. 513, 28 Am. Rep. 485; *Dove v. Johnson* 141 Mass. 287, 5 N. E. 520; *In re Woodward's Estate*, 84 Minn. 161, 86 N. W. 1004; *Carter v. Long*, 181 Mo. 701, 81 S. W. 162; *Campbell v. Clark*, 64 N. H. 328, 10 Atl. 702; *Campbell v. Rawdon*, 18 N. Y. 412; *Pimel v. Betjemann*, 183 N. Y. 194, 2 L. R. A. (N. S.) 580, 5 A. & E. Ann. Cas. 289; *Robinson v. McDiarmid*, 87 N. C. 643.

though the class is to be ascertained as of a date prior to testator's death, if a member of the class, ascertained as of that date, subsequently dies before the testator, his share, it seems, does not lapse, but the survivors take the whole.³⁷ In the case of such a gift to a class, the survivors take the whole, by reason of a construction of the language used in the will as indicating an intention that the beneficiaries of the devise shall be those members of the class who survive the testator, and it is accordingly somewhat difficult to see the applicability to such a case of a statute intended to prevent lapse. It has accordingly been decided, in several states, that the statutory provisions above referred to, enabling the issue of a deceased devisee or legatee to take in the latter's place, do not apply to a devise or legacy to a class,³⁸ but in a greater number these statutes have been held to apply to such a case, in the absence of a showing of a different intention, with the result that the share which would have gone to the deceased member of the class passes to his issue.³⁹ These decisions appear ordinarily to be based on a presumption that the testator, in drafting the will, had in mind the statute in question and intended by the naming of a class, to include issue of a deceased member thereof. It is also to be observed that in the states in which this view has been adopted, the statute ordi-

37. See 1 Jarman, Wills 312.

38. *Davie v. Wynn*, 80 Ga. 673, 6 S. E. 183; *Craycroft v. Craycroft*, 6 Harr. & J. (Md.) 54; *Trenton Trust & Safe Deposit Co. v. Sibbitts*, 62 N. J. Eq. 131, 49 Atl. 530; *Olney v. Bates*, 3 Drew, 319.

39. *Rudolph v. Rudolph*, 207 Ill. 266, 99 Am. St. Rep. 211; *In re Nicholson*, 115 Iowa, 493, 91 Am. St. Rep. 175; *Moses v. Allen*, 81 Me. 268, 17 Atl. 66; *Moore v. Weaver*, 16 Gray (Mass.) 305; *Howland v. Slade*, 155 Mass.

415, 29 N. E. 631; *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183; *Jamison's Executors v. Hay*, 46 Mo. 546; *Wooley v. Paxson*, 46 Ohio St. 307; *In re Bradley's Estate*, 166 Pa. 300, 31 Atl. 96; *Moore v. Dimond*, 5 R. I. 121; *Missionary Society v. Pell*, 14 R. I. 456; *Jones v. Hunt*, 96 Tenn. 369.

40. *Billingsley v. Tongue*, 9 Md. 575; *Twitty v. Martin*, 90 N. C. 643; *Moss v. Helsley*, 60 Tex. 426.

narly does not provide that no lapse shall result by reason of the death of a devise or legatee, nor refer to the matter of lapse, but merely declares that in case of such death, the issue of the deceased devisee or legatee shall take in his place.

A devise or legacy to one who is dead at the time of the execution of the will is absolutely void,⁴⁰ except in so far as the rule in this regard may have been changed by statute. Such a devise or legacy is sometimes referred to as lapsing;⁴¹ but the expression "lapse" would seem to be more properly confined to the case of a devise or legacy which fails by reason of some occurrence subsequent to the execution of the will. Statutes which provide who shall take in case the devisee or legatee dies before the testator have more usually been applied regardless of whether such death occurred before or after the execution of the will,⁴² though occasionally a different construction has been adopted.⁴³ In the case of a devise to a class of persons, the question is, not of the construction of the statute, but rather of the construction of the language of the testator as showing his intention, and the adoption of a statute obviating the failure of a devise by reason of the death of the devisee is no reason for assuming that the testator meant to include within the class named the issue or heirs of a person who, had he been living would have been a member of the class, but who died before the execution of the will. This view

41. *Baybank v. Brooks*, 1 Bro. Ch. 84; *Dildine v. Dildine*, 32 N. J. Eq. 78.

42. *Cheney v. Selman*, 71 Ga. 384; *Chenault v. Chenault*, 10 Ky. L. Rep. 840, 9 S. W. 775, 88 Ky. 83; *Nutter v. Vickery*, 64 Me. 490; *Bray v. Pullen*, 84 Me. 185, 24 Atl. 811; *Guitar v. Gordon*, 17 Mo. 408; *Jamison v. Hay*, 46 Mo. 546; *Pimel v. Betjemann*, 183

N. Y. 194, 2 L. R. A. (N. S.) 580, 5 Ann. Cas. 239; *Mintner's Appeal*, 40 Pa. St. 11; *Wildberger v. Cheek's Ex'rs*, 94 Va. 517, 27 S. E. 441.

43. *Billingsley v. Tongue*, 9 Md. 575; *Lindsay v. Pleasants*, 39 N. C. 320; *Almy v. Jones*, 17 R. I. 265, 12 L. R. A. 414; *Suber v. Nash*, 84 S. C. 12, 65 S. E. 947;

has been adopted in the majority of the jurisdictions in which the question has arisen, including some in which the applicability of the statute to the case of an individual donee who is dead at the time of the execution of the will is fully recognized.⁴⁴

— **Effect of residuary clause.** One result of the theory that a devise of land was a present conveyance of the land, and of the rule that a will did not pass after-acquired land,^{44a} was that a residuary devise of land, however general in its terms, was in its nature specific, as operating only on such land as the testator owned at the time of executing the will and did not devise to another person, and was equivalent to a devise of such land by name or specific description. Consequently, although a devisee of specific land in the will died before testator, causing a “lapse” of the devise, the land could not pass under the residuary devise, but descended to the heir.⁴⁵ A different view has, in one or two cases, been taken as to a devise which was originally void, as distinguished from one which lapsed, it being held that the property included therein would pass under a residuary clause, on the theory that the devise being a nullity from the beginning, the property must be regarded as part of the residuum.⁴⁶

44. *Davie v. Wynn*, 80 Ga. 673, 6 S. E. 183; *In re Nicholson*, 115 Iowa, 493, 91 Am. St. Rep. 175, 88 N. W. 1064; *Howland v. Slade*, 155 Mass. 415, 29 N. E. 631; *Pimel v. Betjemann*, 183 N. Y. 194, 2 L. R. A. (N. S.) 580, 5 Ann. Cas. 239; *In re Harrison*, 202 Pa. St. 331, 51 Atl. 976. *Contra*, *Nutter v. Vickery*, 64 Me. 490; *Moses v. Allen*, 81 Me. 268, 17 Atl. 66; *Guitar v. Gordon*, 17 Mo. 408; *Jameson v. Hays*, 46 Mo. 546.

44a. *Ante*, § 466, note 6.

45. *Williams*, Real Prop., 251,

1 *Jarman*, Wills 609; *Johnson v. Holifield*, 82 Ala. 123, 2 So. 753; *Deford v. Deford*, 36 Md. 168; *Prescott v. Prescott*, 7 Metc. (Mass.) 141; *Kip v. Van Cortland*, 7 Hill (N. Y.) 346; *Holton v. Jones*, 133 N. C. 399; *Williams v. Neff*, 52 Pa. St. 326; *Stonestreet v. Doyle*, 75 Va. 356, 40 Am. Rep. 731.

46. *Doe*, Lessee of *Stewart*, v. *Sheffield*, 13 East, 526, 534; *Doe d. Ferguson v. Roe*, 1 Har. (Del.) 524, 528. That no such distinction between void and lapsed devises exists, see 1 *Jarman*, Wills,

The rule that a residuary devise will not operate upon land included in a devise which has lapsed or has otherwise failed has been changed in England by the provision of the Wills Act that, unless a contrary intention appears from the will, real estate comprised in any void or lapsed devise shall be included in the residuary devise.⁴⁷ There is a substantially similar provision in a number of states in this country.⁴⁸ The operation of such a statute is, however, much restricted by the statutes previously referred to, naming persons to take in case of the death of the devisee named.

Even in the absence of a statute expressly making the residuary devise operative upon land included in a lapsed devise, the courts of a number of states have held that, since the passage of the statutes making a will pass after-acquired realty, the reason for treating the residuary devise as a specific provision no longer exists, and that consequently it covers all land included in a devise which has lapsed or become void.⁴⁹ In some states, however, a different view has been taken, it being held that such a statute as to after-acquired property does not cause land included in a lapsed devise to pass under the residuary clause.⁵⁰

§ 475. The revocation of a will. A will remains subject to revocation by the testator at any time. Such revocation may be effected either by cancellation or

610, note; *Lingan v. Carroll*, 3 Har. & McH. (Md.) 333, 338; *Deford v. Deford*, 36 Md. 168, 179.

47. 7 Wm. IV. and 1 Vict. c. 26, § 25; 2 Woerner, Administration, § 438.

48. 1 Stimson's Am. St. Law, § 2822.

49. *In re Upham's Estate*, 127 Cal. 90, 59 Pac. 315; *Drew v. Wakefield*, 54 Me. 291; *Thayer v.*

Wellington, 9 Allen (Mass.) 283, 296; *Molineaux v. Reynolds*, 55 N. J. Eq. 187, 36 Atl. 276; *Cruikshank v. Home for Friendless*, 113 N. Y. 337, 4 L. R. A. 140, 21 N. E. 64; *Albany Hospital v. Hanson*, 214 N. Y. 435, 108 N. E. 812.

50. *Massey's Appeal*, 58 Pa. St. 470; *Rizer v. Perry*, 58 Md. 112. See 2 Woerner, Administration, § 438.

destruction of the will, or by the execution of another testamentary instrument, expressly revoking the former will or making an inconsistent disposition of the property. The Statute of Frauds provides that no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable otherwise than by some will or codicil in writing, or other writing declaring the same, signed in the presence of three or four witnesses, or by burning, canceling, tearing, or obliterating the previous will.⁵¹ In this country the statutory provisions are usually of a substantially similar character.⁵²

— **By cancellation or destruction of the instrument.** In order that a will be revoked by cancellation or destruction, it is necessary that the act be done with the intention of revoking the will, *animo revocandi*, as it is expressed.⁵³ Consequently, the destruction of the will by accident,⁵⁴ or by mistake,⁵⁵ as when the testator wrongly believes it to be invalid,⁵⁶ or during the insanity of the testator,⁵⁷ does not revoke it. On the other hand, the mere intention to revoke is insufficient unless accompanied by some act constituting a legal

51. 29 Car. II, c. 3, § 6. See Swinton v. Bailey, 4 App. Cas. 70.

52. 1 Stimson's Am. St. Law, §§ 2672, 2673.

53. 1 Jarman, Wills, 118; 1 Woerner, Administration, § 48. The statute frequently contains a provision to this effect. 1 Stimson's Am. St. Law, § 2672(C).

54. Burtenshaw v. Gilbert, Cowp. 52; Burns v. Burns, 4 Serg. & R. (Pa.) 295. See Lord's Estate, 106 Me. 51, 75 Atl. 286.

55. Strong's Appeal, 79 Conn. 123, 6 L. R. A. (N. S.) 1107; Semmes v. Semmes, 7 H. & J. (Md.) 388. See, as to dependent

relative revocation, *post*, this section, notes 70-73.

56. Giles v. Warren, L. R. 2 Prob. & Div. 401.

57. Rich v. Gilkey, 73 Me. 595; Brunt v. Brunt, L. R. 3 Prob. & Div. 37; Lang's Estate, 65 Cal. 19; Sprigge v. Sprigge, L. R. 1 Prob. & Div. 608; Forbing v. Weber, 99 Ind. 588; Delafield v. Parish, 25 N. Y. 9. In Billington v. Jones, 108 Tenn. 234, 91 Am. St. Rep. 751, 56 L. R. A. 654, it was held that, in the absence of a statute fixing the mode of revocation, the writing in pencil, below the signature, of a statement that the will was null and void, was sufficient.

revocation,⁵⁸ and it is immaterial that the testator wrongly supposes that the will has been destroyed as directed by him.⁵⁹

The act of destruction, whether by burning, tearing, or other means, must, to constitute a revocation, be carried through to its end, and consequently, if the testator desists from his purpose after having partly torn or destroyed the instrument, there is no revocation, provided he would have made the act more complete had he not changed his mind.⁶⁰ A partial destruction is sufficient, however, if the testator supposed that the act was carried far enough for the purpose, and the preservation of the will in its mutilated condition by a third person will not affect the validity of the revocation.⁶¹

In a considerable number of states it is provided that the cancellation or destruction of the will which effects its revocation may be the act of a third person as well as of the testator himself, provided, ordinarily, this is by the testator's direction and in his presence, and in some states the fact of destruction with the testator's consent must be proven by at least two witnesses.

The cancellation or destruction, *animo revocandi*, of any essential part of the will, has the effect, unless the statute otherwise provides,⁶² of revoking the will, as

58. *Mundy v. Mundy*, 15 N. J. Eq. 290; *Hoitt v. Hoitt*, 63 N. H. 475; *Kent v. Mahaffey*, 10 Ohio St. 204; *Delafield v. Parish*, 25 N. Y. 9. So in *Doe d. Reed v. Harris*, 6 Adol. & E. 209, it was decided that throwing the will on the fire, if it was snatched off by another person before more than the envelope was singed, did not constitute a revocation.

59. *Trice v. Shipton*, 113 Ky. 102, 101 Am. St. Rep. 351, 67 S. W. 377; *Hise v. Fincher*, 32 N.

C. 139, 51 Am. Dec. 204; *Clingan v. Micheltree*, 31 Pa. St. 25.

60. *Doe d. Perkes v. Perkes*, 3 Barn. & Ald. 489; *Elms v. Elms*, 1 Swab. & Tr. 155.

61. *Bibb v. Thomas*, 2 W. Bl. 1043; *Sweet v. Sweet*, 1 Redf. Surr. (N. Y.) 451; *White v. Casten*, 46 N. C. 197, 59 Am. Dec. 585; *Lawyer v. Smith*, 8 Mich. 411.

62. *Gay v. Gay*, 60 Iowa, 415, 46 Am. Rep. 78.

when the signature is scratched or erased,⁶³ or so much of the paper as contains the signature is torn off,⁶⁴ or the seal is destroyed.⁶⁵

In some jurisdictions the statute expressly authorizes the revocation of a particular clause of the will by cancellation or obliteration, without affecting the balance of the will. Whether, in the absence of an express recognition in the statute of such a right of partial revocation, the statute should be regarded as authorizing it, is a question as to which the statutes have been differently construed.⁶⁶ But even though a right of partial revocation by cancellation or obliteration is recognized, this does not involve a right, by cancelling or obliterating some of the words of a will, to make a new and different testamentary disposition, this

63. *Olmstead's Estate*, 122 Cal. 224, 54 Pac. 745; *Woodfill v. Patton*, 76 Ind. 575, 40 Am. Rep. 269; *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; *Semmes v. Semmes*, 7 Har. & J. (Md.) 388; *In re White's Will*, 25 N. J. Eq. 501; *Evans' Appeal*, 58 Pa. St. 238.

64. *Bell v. Fothergill*, L. R. 2 Prob. & Div. 148; *Sanders' Adm'r v. Babbitt*, 106 Ky. 646, 51 S. W. 163; *Whitehead v. Kirk*, 104 Miss. 776, 51 L. R. A. (N. S.) 187, Ann. Cas. 1916A, 1051, 61 So. 737, 62 So. 432; *Smock v. Smock*, 11 N. J. Eq. 156; *Cutler v. Cutler*, 130 N. C. 1, 57 L. R. A. 209, 89 Am. St. Rep. 854, 40 S. E. 689; That the signature was torn "through" has been regarded as creating a presumption of revocation. *In re Wellborn's Will*, 165 N. C. 636, 81 S. E. 1023.

65. This is so, even though the seal is not necessary to the validity of the will. *Price v.*

Powell, 3 Hurl. & N. 341; *Avery v. Pixley*, 4 Mass. 460. See *In re White's Will*, 25 N. J. Eq. 501.

66. That such a partial revocation may be effected, see *Miles' Appeal*, 68 Conn. 237, 36 L. R. A. 176; *Brown's Will*, 1 B. Mon. (Ky.) 56; *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; *Safe Deposit & Trust Co. v. Thom*, 117 Md. 154, 83 Atl. 45; *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32; *Michigan Trust Co. v. Fox*, 192 Mich. 699, 159 N. W. 332; *Re Kirkpatrick*, 22 N. J. Eq. 463; *Barfield v. Carr*, 169 N. C. 574, 86 S. E. 498; *In re Wood's Estate*, 247 Pa. 377, 93 Atl. 483; *Brown v. Brown*, 91 S. C. 101, 74 S. E. 135. That it cannot, see *Law v. Law*, 83 Ala. 432, 3 So. 752; *Lovell v. Quitman*, 88 N. Y. 377, 42 Am. Rep. 254; *Giffin v. Brooks*, 48 Ohio St. 211, 31 N. E. 734; *Hartz v. Sobel*, 136 Ga. 565, 71 S. E. 995.

involving, not the mere revocation of a will, but the making of a will.⁶⁷

In case the will of a decedent, which he is known to have made, and of which he retained the custody, cannot be found, it is presumed to have been destroyed by him with the intention of revoking it.⁶⁸ This presumption may, however, be rebutted by evidence to the contrary, as when it is shown that there was no change in the testator's desire to benefit the persons named in the will, or circumstances appear calculated to raise a suspicion that the will was wrongfully destroyed by a person other than testator.⁶⁹

— **Dependent relative revocation.** "Where the act of destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation or any other cause, the revocation fails also, and the original will remains in force."⁷⁰ This principle of "dependent relative" revocation, as it is termed, has been applied in the case of the cancellation of clauses in the will by

67. *Miles' Appeal*, 68 Conn. 237, 36 L. R. A. 176, 36 Atl. 39; *Eschbach v. Collins*, 61 Md. 478; *Gardner v. Gardiner*, 65 N. H. 230, 8 L. R. A. 383, 19 Atl. 651.

68. *Griffith v. Higinbottom*, 262 Ill. 126, 104 N. E. 233; *Idley v. Bowen*, 11 Wend. (N. Y.) 227; *Knapp v. Knapp*, 10 N. Y. 276; *Foster's Appeal*, 87 Pa. St. 67; *Harris v. Harris*, 10 Wash. 555; *In re Valentine's Will*, 93 Wis. 46, 67 N. W. 12..

69. *Patten v. Poulton*, 1 Swab. & Tr. 55; *Schultz v. Schultz*, 35 N. Y. 653; *Scoggins v. Turner*, 98

N. C. 135, 3 S. E. 719; *Jackson v. Hewlett*, 114 Va. 573, 77 S. E. 518; *Harris v. Harris*, 10 Wash. 555; See note 28 Am. St. Rep. at p. 347; *Schouler, Wills*, § 402.

70. 1 *Jarman, Wills*, 119; See, also, 1 *Williams, Executors* (9th Ed.) 126 *et seq.*; *Onions v. Tyrer*, 2 Vern. 742; *McIntyre v. McIntyre*, 120 Ga. 67, 102 Am. St. Rep. 71, 1 A. & E. Ann. Cas. 606; *Thompson's Appeal*, 114 Me. 338, 96 Atl. 238; and article by *Armistead M. Dobie, Esq.* 2 *Virginia Law Rev.* 327.

testator with the intention of substituting other clauses, but without re-executing the will after making such alterations, and the cancellation has been held to be nugatory as a revocation.⁷¹ The same doctrine was held to apply when the testator destroyed a will under the mistaken impression that a previous will would be thereby validated, and with the intention of setting up such former disposition.⁷² The fact, however, that the act of destruction is accompanied by an intention to make another will in the future cannot prevent such act from operating as a revocation.⁷³

— **Subsequent will.** As stated above, a will can ordinarily, by force of the statute, be revoked by a subsequent writing only when such writing is executed as a will.⁷⁴ Such revocation may result either from the language of the later instrument revoking the earlier will, or the later will may make a disposition of testator's property, or part thereof, inconsistent with the earlier disposition.⁷⁵ If the second will neither in terms

71. Winsor v. Pratt, 2 Brod. & B. 650; Wolf v. Bollinger, 62 Ill. 368; Doane v. Hadlock, 42 Me. 72; Wilbourn v. Shell, 59 Miss. 205; Gardner v. Gardiner, 65 N. H. 230, 8 L. R. A. 383, 19 Atl. 651; *In re Penniman's Will*, 20 Minn. 245 (Gil. 220), 18 Am. Rep. 368.

72. Powell v. Powell, L. R. 1 Prob. & Div. 209.

73. Olmstead's Estate, 122 Cal. 224, 54 Pac. 745; McIntyre v. McIntyre, 120 Ga. 67, 102 Am. St. Rep. 71, 1 A. & E. Ann. Cas. 606; Townshend v. Howard, 86 Me. 285, 29 Atl. 1077; Semmes v. Semmes, 7 Har. & J. (Md.) 388; Brown v. Thorndike, 15 Pick. (Mass.) 388; Banks v. Banks, 65 Mo. 432.

74. 1 Stimson's Am. St. Law, § 2673. So it has been held that

words written upon another part of the paper, to the effect that the will is revoked or "cancelled," though signed by the testator, do not revoke the will, unless witnessed as required in the case of a will. Howard v. Hunter, 115 Ga. 357, 90 Am. St. Rep. 121, 41 S. E. 638; Matter of Akers, 74 N. Y. App. Div. 461, 77 N. Y. Supp. 643, 173 N. Y. 620, 66 N. E. 1103; Lewis v. Lewis, 2 Watts & S. (Pa.) 455; Ladd's Will, 60 Wis. 187; Matter of Gosling, 11 Prob. & Div. 79. But see Evans' Appeal, 58 Pa. St. 238; Billington v. Jones, 108 Tenn. 234, 56 L. R. A. 654, 91 Am. St. Rep. 751; Warner v. Warner, 37 Vt. 356.

75. 1 Jarman, Wills, 139; Bigelow, Wills. 136.

revokes the previous will nor is inconsistent therewith, then both are in force, the later being in effect a codicil to the former instrument,⁷⁶ and, if the later will is only partially inconsistent with the earlier will, the latter remains in force in other respects.⁷⁷ The subsequent will may contain no provision other than that revoking the earlier will,⁷⁸ and it has the effect of revocation if it so provides, although the attempted disposition therein of the testator's property is for some reason invalid.⁷⁹

The contents of a lost will may be shown for the purpose of establishing the revocation of a previous will.⁸⁰ But the mere fact of the execution of a later will, without evidence as to its contents, is not sufficient to show a revocation.⁸¹

A revocation by a will or codicil of a previous disposition of property is invalid if expressly made upon an assumption of fact which turns out to be mistaken.⁸² But the fact that the revocation was the result of mis-

76. 1 Jarman, Wills, 139; *In re Dunabaugh*, 130 Iowa, 692, 107 N. W. 925; *Deppen's Trustee v. Deppen*, 132 Ky. 755, 117 S. W. 352; *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393; *Smith v. McChesney*, 15 N. J. Eq. 359; *Wetmore v. Parker*, 52 N. Y. 450; *In re Venable's Will*, 127 N. C. 344, 37 S. E. 465; *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. 342.

77. *Freeman v. Freeman*, 5 De Gex. M. & G. 704; *Lemage v. Goodban*, L. R. 1 Prob. & Div. 57; *Kelly v. Richardson*, 100 Ala. 584, 13 So. 785; *In re DeLaveaga's Estate*, 119 Cal. 651; *Williams v. Miles*, 68 Neb. 463, 110 Am. St. Rep. 431, 62 L. R. A. 383, 4 A. & E. Am. Cas. 306; *Wetmore v. Parker*, 52 N. Y. 450; *Price v. Maxwell*, 28 Pa. St. 23.

78. *Barksdale v. Hopkins*, 23

Ga. 332; *Bayley v. Bailey*, 5 Cush. (Mass.) 245.

79. *Ex parte Flecheater*, 7 Ves. 348, 373; *Burns v. Travis*, 117 Ind. 44, 18 N. E. 45; *Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; *In re Scott*, 88 Minn. 386, 93 N. W. 109; *Hairston v. Hairston*, 30 Miss. 276; *Morey v. Sohler*, 63 N. H. 507, 56 Am. Rep. 538, 3 Atl. 636; *In re Melville's Estate*, 245 Pa. 318, 91 Atl. 679.

80. *Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620; *Wallis v. Wallis*, 114 Mass. 510.

81. *Hitchins v. Basset*, 2 Salk. 592; *Kern v. Kern*, 154 Ind. 29, 55 N. E. 1004; *In re Sternberg's Estate*, 94 Iowa, 305, 62 N. W. 734; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151; *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591.

take cannot be shown by evidence extrinsic to the will,⁸³ and it has been held that even a mistake apparent in the will does not defeat the revocation if it is not based on information received from others, but the matter is within the personal knowledge of testator.⁸⁴ A revocation, moreover, which is stated to be based upon certain advice given testator, has been supported, though the advice was mistaken, since it was the advice on which testator acted, and as to his receipt of the advice there was no mistake.⁸⁵

— **Marriage and birth of issue.** The common law rule was that the will of a man is not revoked by his marriage alone,⁸⁶ and this rule still controls in some states. In others the statutes changing the common-law rights of a married woman as regards her interest in her husband's estate on his death without issue have been regarded as changing the rule, so as to give to his marriage the effect of revoking his will,⁸⁷⁻⁸⁸ and occasionally there is a statutory provision expressly to that effect.⁸⁹

82. *Campbell v. French*, 3 Ves. 321, where the revocation of a provision in favor of certain persons, "they being all dead," was held to be inoperative, they being alive. See also *Doe d. Evans*, 10 Adol. & El. 228; *Mordecai v. Boylan*, 59 N. C. 365; and a suggestive editorial note in 22 Harv. Law Rev. at p. 374.

83. *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642; *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 634; *Gifford v. Dyer*, 2 R. I. 99; *Skipwith v. Cabell's Ex'r*, 19 Gratt. (Va.) 758.

84. *Mendinhall's Appeal*, 124 Pa. St. 387, 10 Am. St. Rep. 590.

85. *Attorney General v. Lloyd*, 1 Ves. Sr. 32; *Newton v. Newton*, 12 Ir. Ch. 118; *Skipwith v. Ca-*

bell's Ex'r, 19 Gratt. (Va.) 758.

86. 1 Jarman, Wills, 111.

87-88. *Brown v. Scherrer*, 5 Colo. App. 255, 21 Colo. 481; *Morgan v. Ireland*, 1 Idaho, 736; *Tyler v. Tyler*, 19 Ill. 151; *American Board of Com'rs for Foreign Missions v. Nelson*, 72 Ill. 564; *In re Teopfer*, 12 N. Mex. 372, 67 L. R. A. 315. *Contra*, *Goodsell's Appeal*, 55 Conn. 171, 10 Atl. 557; *Hulett v. Carey*, 66 Minn. 327, 34 L. R. A. 384, 61 Am. St. Rep. 419; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604.

89. See *In re Anderson's Estate*, 14 Ariz. 502, 131 Pac. 975; *In re Cutting's Estate*, 172 Cal. 191, Ann. Cas. 1917D, 1171, 155 Pac. 1002; *In re Roton's Will*, 95 S. C. 118, 78 S. E. 711; *Koontz v.*

At common law, the marriage of a woman revokes her will, for the reason, it is said, that, since the marriage destroys her right to make or revoke a will, if marriage did not in itself cause a revocation, the will would stand as a permanent disposition of her property.⁹⁰ This rule is a positive rule of law, and evidence is not admissible to show a contrary intention on the part of testatrix.⁹¹ In several states it has been held that this rule does not apply when the common-law restriction upon the right of a married woman to make a will no longer exists.⁹² An express statutory provision in accordance with the common-law rule has, however, been held not to be impliedly repealed by a statute giving testamentary capacity to married women;⁹³ and the common-law rule has been regarded as confirmed by a provision, in the statute regarding the revocation of wills, that nothing therein contained shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.⁹⁴

By the common-law rule, generally recognized as in force in this country, in the absence of a statutory change, the marriage of a man, if followed by the birth of a child, revokes his will previously made.⁹⁵ This rule

Koontz, 83 Wash. 180, 145 Pac. 201.

90. 1 Jarman, Wills, 110; Hodsden v. Lloyd, 2 Brown Ch. 534; Garrett v. Dabney, 27 Miss. 335. So by statute in a number of states. 1 Stimson's Am. St. Law, § 2676(A).

91. Nutt v. Norton, 142 Mass. 242, 7 N. E. 720; Hoitt v. Hoitt, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604.

92. *In re Tuller's Will*, 79 Ill. 99, 22 Am. Rep. 164; *In re Emery*, 81 Me. 275, 17 Atl. 68; Roane v. Hollingshead, 76 Md. 369, 35 Am. St. Rep. 438, 17 L. R. A. 592; Noyes v. Southworth, 55 Mich.

173, 54 Am. Rep. 329; *Kelly v. Stevenson*, 85 Minn. 247, 56 L. R. A. 754, 89 Am. St. Rep. 545; *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 329; *Webb v. Jones*, 36 N. J. Eq. 163; *Morton v. Onion*, 45 Vt. 145; *In re Lyons*, 96 Wis. 339, 65 Am. St. Rep. 52; *Contra*, *Swan v. Hammond*, 138 Mass. 45.

93. *Brown v. Clark*, 77 N. Y. 369; *In re Kaufman's Will*, 131 N. Y. 620.

94. *Shorten v. Judd*, 60 Kan. 73, 57 Pac. 938; *Swan v. Hammond*, 138 Mass. 45; *In re Booth's Will*, 40 Ore. 154, 61 Pac. 1135, 66 Pac. 710.

95. 1 Jarman, Wills, 110;

is based, it is said, upon a tacit condition, annexed to the will, that, in case of such a total change in testator's circumstances, the will shall be void,⁹⁶ and consequently evidence of a contrary intention on the part of the testator is, by the weightiest decisions, not admissible.⁹⁷ The rule that marriage and birth of issue revokes the will does not, however, apply if the future wife and the issue of the marriage are provided for by the will,⁹⁸ and occasionally, by statute, a provision for the issue alone is sufficient to prevent its application.⁹⁹

The birth of a child does not, apart from statute, affect a man's previous disposition of his property by will.¹

There are in most of the states express statutory provisions as to the effect of marriage or birth of issue in revoking a will. In some states a will is revoked by marriage and birth of issue, unless provision for such issue is made in the will or by settlement, or they are in such way mentioned in the will as to show an intention not to provide for them. In several states the marriage alone of the testator revokes the will, subject, in some

Christopher v. Christopher, 2 Dickens, 445.

In New Hampshire it has been held that the marriage and birth of issue no longer effect a revocation, in view of the statute which gives to a widow and child not provided for in the will the same share as if decedent had died intestate. Hoitt v. Hoitt, 63 N. H. 498.

96. Kenebel v. Scrafton, 2 East, 530; Baldwin v. Spriggs, 65 Md. 373, 5 Atl. 295.

97. Marston v. Roe, 8 Adol. & E. 14; Chicago, B & Q. R. Co. v. Wasserman (C. C.) 22 Fed. 872; Baldwin v. Spriggs, 65 Md. 373, 5 Atl. 295. See Nutt v. Norton, 142 Mass. 242, 7 N. E. 720; Hoitt

v. Hoitt, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 664. *Contra*, Wheeler v. Wheeler, 1 R. I. 364.

98. Kenebel v. Scrafton, 2 East, 530; Marston v. Roe, 8 Adol. & E. 14; Warner v. Beach, 4 Gray (Mass.) 162; Baldwin v. Spriggs, 65 Md. 373, 5 Atl. 295.

99. 1 Stimson's Am. St. Law, § 2676(C).

1. Doe d. White v. Barford, 4 Maule & S. 10; Goodsell's Appeal from Probate, 55 Conn. 171, 10 Atl. 557; Swan v. Hammond, 138 Mass. 45; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 506. *Contra*, McCullum v. McKenzie, 26 Iowa, 510; Negus v. Negus 46 Iowa, 487, 26 Am. Rep. 157.

states, to the condition that he leaves a widow for whom he does not provide by marriage settlement or in the will, or does not so mention her in the will as to show an intention not to provide for her. And in some states a will made before the birth of issue, which makes no mention of possible issue, is in effect revoked if the testator leaves a child.²

— **Alienation of land.** The conveyance by the testator of land, which would otherwise pass under a will previously made, necessarily withdraws such land from the operation of the will.³ When there is merely a contract to convey, the vendor is, as before stated,⁴ a trustee for the purchaser, and the legal title alone passes under his previous devise of the land, the right to the purchase money passing, in the absence of statute, to the personal representative.⁵ In some states, however, the statute provides that, on the death of the vendor of land, the unpaid purchase money shall pass under the devise of the land, in place, as it were, of the land.⁶

So far as the common-law rule that the will operates only on land owned by testator at the time of its execution may still remain in force in any jurisdiction, the reconveyance to testator of land conveyed by him after the making of the will cannot render the will operative as to such land.⁷ And, apart from any change in the law brought about by the modern statutes, a conveyance by the testator after the making of his will, otherwise

2. 1 Stimson's Am. St. Law, § 2676; 1 Woerner, Administration, § 55. See Shackelford v. Washburn, 180 Ala. 168, 60 So. 318, 43 L. R. A. (N. S.) 1195.

3. 1 Jarman, Wills, 129.

4. *Ante*, § 125.

5. 1 Jarman, Wills, 129, Walton v. Walton, 7 Johns. Ch. (N. Y.) 258 11 Am. Dec. 456; Bender v. Luckenbach 162 Pa. St. 18, 29

Atl. 295, 296; Skinner v. Newberry, 51 Ill. 203; Bruck v. Tucker, 32 Cal. 426. See *ante*, § 127.

6. 1 Woerner, Administration, § 53.

7. 1 Jarman, Wills (4th Ed.) 147; Philippe v. Clevenger, 239 Ill. 117, 16 A. & E. Ann. Cas. 207, 87 N. E. 858; Morey v. Sohler, 63 N. H. 507, 56 Am. Rep. 538.

than by way of mortgage,⁸ if it transfers the legal or equitable title in fee simple, is effective as a revocation, even though, by the same instrument, the title is immediately revested in him.⁹ Under the statutory rule which now prevails in England, and in most, if not all, of the states, that the will operates on such land as the testator has at the time of his death, a conveyance by testator after making his will cannot prevent the operation of the will upon the land conveyed, if it is reconveyed or title is in any way revested in the testator before his death; and in many jurisdictions there is an express provision that a conveyance shall not prevent the operation of the will with respect to such an estate as testator has at the time of his death, unless, in some states, the intention to revoke is expressed in the conveyance.¹⁰

A conveyance by a testator was held in England, as the law formerly stood, to effect a revocation of a devise of the land conveyed, although the conveyance was void, either for want of capacity in the grantee, or for want of the proper formalities, on the theory, it seems that such an attempted conveyance shows an intention that the devise shall never be operative.¹¹ This rule is no longer in force in England, for the reason, it is said, that, as a valid conveyance no longer effects a revocation if the title becomes revested in testator, one which is invalid can have no greater effect.¹² In this country there seems to be no explicit decision that an

8. *Jackson v. Parker*, Ambl. 687; *Baxter v. Dyer*, 5 Ves. Jr. 656; *McTaggart v. Thompson*, 14 Pa. St. 149. This is by reason of the fact that a mortgage is in equity merely a security or lien.

9. *Cave v. Holford*, 3 Ves. 650; *Brydges v. Chandos*, 2 Ves. Jr. 417; *Krieg v. McComas*, 126 Md. 377, 95 Atl. 68; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; *Jones v. Hartley*,

2 Whart. (Pa.) 103; See *Ballard v. Carter*, 5 Pick. (Mass.) 112, 16 Am. Dec. 377.

10. Wills Act, 7 Wm. IV. and 1 Vict. c. 26, § 23; 1 *Stimson's Am. St. Law*, § 2810.

11. 1 *Jarman, Wills* (4th Ed.) 165; *Mountague v. Jeoffereys Moore*, 429; *Hick v. Mors*, Amb. 215; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456.

12. 1 *Jarman, Wills*, 133.

invalid conveyance could in any case effect a revocation, but there are *dicta* to such an effect.¹³ And on such theory, or one analogous thereto, a revocation has been regarded as effected by a conveyance delivered on a condition which was never satisfied.¹⁴ A conveyance which is voidable because procured by fraud has in two states been decided not to cause a revocation.¹⁵

§ 476. Children or issue omitted from will. In most states there is a statutory provision that, if a child living at the testator's death, or who has died prior to such death leaving issue, was born after the execution of the will, such child or issue shall take the share to which he or they would have been entitled if testator had died intestate. In a number of the states, such a provision applies only in case the child or issue were not provided for otherwise by testator, or were not intentionally omitted.¹⁶ In a number of states, statutes of this character, entitling an omitted child to the share which he would have had if deceased had died intestate, are not restricted in their application to children born after the execution of the will, but apply in the case of any child, usually whether that child was omitted intentionally or unintentionally.¹⁷

§ 477. Revival of will. In the case of a will which is revoked by an express statement to that effect in a subsequent will, or by inconsistent provisions therein, the question has frequently arisen as to the effect of a

13. *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258; *Graham v. Burch*, 47 Minn. 171, 28 Am. St. Rep. 339, 49 N. W. 697; *Bigelow, Wills*, 134. But see *Bennett v. Gaddis*, 79 Ind. 347.

14. *In re Gensemore's Estate*, 246 Pa. 216, 92 Atl. 134.

15. *Graham v. Burch*, 47 Minn. 171, 28 Am. St. Rep. 339, 49 N.

W. 697; *Smithwick v. Jordan*, 15 Mass. 113. *Contra* in England *Simpson v. Walker*, 5 Sim. 1. See *Redfield, Wills* (4th Ed.) 344.

16. 1 *Stimson's Am. St. Law*, § 2843.

17. 1 *Stimson's Am. St. Law*, § 2842. See *Page, Wills*, § 291; 1 *Woerner, Administration*, § 55.

subsequent revocation of the revoking will. In England it was held by the common-law courts that the effect was to "revive" or put in force again the provisions of the earlier will, if this had not been destroyed, on the theory that, as the second will had no operation until testator's death, if it was revoked it could not operate as a revocation of the earlier will.¹⁸ The ecclesiastical courts, however, held that the question of revival was one of intention purely, to be decided according to the fact and circumstances of the particular case.¹⁹ This question is there set at rest by the Wills Act,²⁰ which provides "that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same," it being held thereunder that the cancellation or destruction of the revoking will cannot revive the previous will.²¹

In this country the view of the English ecclesiastical courts, that the question of revival is one purely of intention, has occasionally been adopted,²² with the burden, it seems, of showing revival upon the party asserting it.²³ In some jurisdictions, on the other hand, the view is taken that the revocation of the subsequent will *ipso facto* revives the earlier one,²⁴ pro-

18. Goodright v. Glazier, 4 Burrows, 2512, 4 Gray's Cas. 434; 1 Jarman, Wills (4th Ed.) 136.

19. Moore v. Moore, 1 Phillim. 357; Usticke v. Bawden, 2 Addams, 116.

20. 7 Wm. IV. and Vict. C. 26, § 22.

21. 1 Jarman, Wills 126; 1 Williams, Executors (9th Ed.) 163.

22. Blackett v. Ziegler, 153 Iowa, 344, 133 N. W. 901; Pickens v. Davis, 134 Mass. 252; Williams v. Miles, 68 Neb. 463, 62 L. R. A. 383, 110 Am. St. Rep.

431, 4 A. & E. Ann. Cas. 306 and note, 96 N. W. 151; Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591; McClure v. McClure, 86 Tenn. 173, 6 S. W. 44; *In re Gould's Will*, 72 Vt. 316, 47 Atl. 1082; See Bohannon v. Walcott, 1 How. (Miss.) 366; Randall v. Beatty, 31 N. J. Eq. 643.

23. Pickens v. Davis, 134 Mass. 252; Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591. See editorial note, 15 Harv. Law Rev. 142.

24. Stetson v. Stetson, 200 Ill. 601, 61 L. R. A. 258, 66 N. E.

vided, accordingly to some courts, there was no express revocation of the first will, but merely an inconsistency between the first and second wills, on the theory that while an express revocation operates immediately, a revocation by an inconsistent provision is ambulatory until death.²⁵ In a few states the rule of the English statute has been adopted in the absence of local legislation on the subject.²⁶

There are, in many states, statutory provisions on this subject, it being sometimes provided, as in England, that a will once revoked can be revived only by a re-execution thereof, or by a codicil duly executed, while in others the canceling, destruction, or revocation of the second will does not revive the first will, unless such intent appears in the terms of the revocation, or the first will is duly republished.^{26a}

§ 478. Republication. A will may be republished so as to give the words of the will the same effect as if the will had been originally executed at the time of such republication, that is, so as to make it "speak" as of that time.²⁷ Under the law as it formerly existed

262; *Moore v. Rowlett*, 269 Ill. 88, 109 N. E. 682; *Flintham v. Bradford*, 10 Pa. St. 82; *Bates v. Hacking*, 29 R. I. 1, 14 L. R. A. (N. S.) 937, 68 Atl. 622; *Taylor v. Taylor*, 2 Nott & McC (S. C.) 482.

25. *James v. Marvin*, 3 Conn. 576; *Colvin v. Warford*, 20 Md. 357; *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799; *Cheever v. North*, 106 Mich. 390, 37 L. R. A. 561, 58 Am. St. Rep. 499, 64 N. W. 455. See *Peck's Appeal from Probate*, 50 Conn. 562; *Fitzpatrick's Appeal*, 87 Conn. 579, 89 Atl. 92; *Hawes v. Nicholas*, 72 Tex. 481, 2 L. R. A. 863, 10 S. W. 558.

26. *Harvell v. Lively*, 30 Ga.

315; *Danley v. Jefferson*, 150 Mich. 590, 121 Am. St. Rep. 640, 13 Ann. Cas. 242, 114 N. W. 470; *In re Noon's Will*, 115 Wis. 299, 95 Am. St. Rep. 944, 91 N. W. 670. See editorial note, 12 Columbia Law Rev. 353.

26a. 1 *Stimson's Am. St. Law*, §§ 2678, 2679.

The destruction of a codicil reviving a former revoked will has been decided not to have the effect of rendering the revival inoperative, if there was no intention that it should have that effect. *James v. Shrimpton*, 1 Prob. Div. 431.

27. 1 *Jarman, Wills*, 159; *Williams, Executors* (9th Ed.) 170.

in England, restricting the operation of a devise of lands to such lands as were owned by the testator at the time of execution of the will, and in those states in this country where the same rule still prevails, the effect of a republication is important, as it brings lands acquired between the date of execution and of republication within the operation of a general devise.²⁸ But since the general change of the law in this respect, the doctrine of republication has lost much of its importance and it calls for consideration now chiefly in connection with the possibility of giving effect to a will originally invalid,²⁹ or which has been revoked,³⁰ but not destroyed.

The republication may consist of a re-execution of the instrument with the same formalities as are necessary in the case of an absolutely new will. Accordingly, while, previous to the Statute of Frauds, it might be by means of an oral declaration even in the case of land,³¹ since that time the same formalities have been required in the republication, as in the making, of a will of land.³² The making and execution of a codicil to a will has likewise the effect, in the absence of any appearance of a contrary intention, of a republication of the will, and it is immaterial whether the codicil

28. *Beckford v. Parnecott* Cro. Eliz. 493; *Barnes v. Crow*, 4 Brown Ch. 2; *Luce v. Dimock*, 1 Root (Conn.) 82; *Jack v. Shoenberger*, 22 Pa. St. 416.

29. *Burge v. Hamilton*, 72 Ga. 568; *Brown v. Riggin*, 94 Ill. 560, *Manship v. Stewart*, 181 Ind. 299, 104 N. E. 505; *Barnes v. Phillips*, 184 Ind. 415, 111 N. E. 419; *Beall v. Cunningham*, 3 B. Mon. (Ky.) 390, 39 Am. Dec. 120; *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566; *Smith v. Runkle*, —(N. J.)—97 Atl. 296; *Stevens v. Myers*, 62 Ore. 372, 121 Pac. 434; *Walton's Estate*, 194 Pa. 528, 45

Atl. 426; *Skinner v. American Bible Soc.*, 92 Wis. 209, 65 N. W. 1037.

30. *In re Cutting's Estate*, 172 Cal. 191, 155 Pac. 1002, Ann. Cas. 1917D, 1171; *Brown v. Clark*, 77 N. Y. 369; *Burge v. Hamilton*, 72 Ga. 568; *Wickoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597.

31. *Beckford v. Parnecott*, Cro. Eliz. 493.

32. *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Love v. Johnston*, 34 N. C. 355, 1 Woerner, Administration § 56.

expressly so provides, or whether it is actually annexed to the will.³³ In the absence of an expression of a contrary intention, the republication of a will, whether by re-execution, or by the making of a codicil, is of the will as changed by any pre-existing codicils, they being in effect a part of the will.³⁴ The mere fact that the will is referred to by its original date does not take the case out of the rule.³⁵

33. 1 Williams, Executors (9th Ed.) 164; Barnes v. Crow, 4 Brown Ch. 2; Freeman v. Hart, 61 Colo. 455, 158 Pac. 305; Pope v. Pope, 95 Ga. 87, 22 S. E. 245; Hobart v. Hobart, 154 Ill. 610, 45 Am. St. Rep. 151; Manship v. Stewart, 181 Ind. 299, 104 N. W. 505; *In re* Murfield's Will, 74 Iowa, 479; Brimmer v. Sohler, 1 Cush. (Mass.) 118; McCurdy v. Neall, 42 N. J. Eq. 333, 7 Atl.

566; Van Alstyne v. Van Alstyne, 28 N. Y. 375; Stevens v. Myers, 62 Ore. 372, 121 Pac. 434; Linard's Appeal, 93 Pa. 313, 39 Am. Rep. 753; Skinner v. American Bible Soc., 92 Wis. 209, 65 N. W. 1037.

34. 1 Williams, Executors (9th Ed.) 171; Crosbie v. MacDoual, 4 Ves. 610.

35. Green v. Tribe, 9 Ch. Div. 231.

CHAPTER XXI.

DEDICATION.

- § 479. Purposes for which dedication may be made.
- 480. No particular beneficiary or beneficiaries.
- 481. Who may effect dedication.
- 482. Intention to dedicate.
- 483. Acceptance.
- 484. Dedication distinguished from estoppel.
- 485. Qualified and conditional dedication.
- 486. Effect of dedication.

§ 479. Purposes for which dedication may be made. Land may be "dedicated" to a public use by means of a declaration by its owner, either by word or act, of his intention that the land shall be devoted to such use.¹ The doctrine of dedication appears in its inception to have been confined to the case of a dedication of land, or of a bridge erected thereon, to highway uses,^{1a} but the scope of the doctrine has been very greatly extended. It has, for instance, been decided that land may be dedicated for use by the public as a park, common or public square,² as a wharf or landing

1. Angell. Highways. § 132 *et seq*; Elliott, Roads & Streets, c. 5.

1a. While *Lade v. Shepherd*, 2 Strange, 1004 (anno 1735) appears to be the first reported case in which the doctrine is specifically referred to, it is reasonable to suppose that it existed, in theory at least, from a much earlier period. In Woolrych, Ways, p. 5, appears the following language: 'It is laid down in the old books, that in a highway the king has nothing except the passage for himself and his people, but that the freehold, and all the profits, as trees, etc., appertain to the lord of the soil (citing *Y. B.*

2 Ed. 4, 9; 8 Ed. 4, 9; 8 Hen. 7, 5; 2 Co. Inst. 705). For it is presumed by the law, that the proprietor of such land adjoining gave up to the public for passage at some former period all the land between his enclosure and the middle of the road" (citing *Doe d. v. Pearsey*, 7 B. & C. 306). See also the discussion and quotations in the opinion of Collin, J., in *Appleton v. New York*, 219 N. Y. 250, 114 N. E. 73.

2. *Baker v. Johnston*, 6 Pet. (U. S.) 431; *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405; *Gordon County v. Calhoun*, 128 Ga. 781, 58 S. E. 360; *Rhodes v.*

place,³ as a cemetery,⁴ for school purposes,⁵ and for the erection of public buildings.⁶

The analogy between the dedication of land for a park or common and its dedication for a highway is reasonably close, since in both cases there results a right of user in each and every member of the public. The

Town of Brightwood, 145 Ind. 21, 43 N. E. 942; *Pella v. Scholte*, 24 Iowa, 283, 95 Am. Dec. 729; *Northport Wesleyan Grove Camp Meeting Ass'n v. Andrews*, 104 Me. 342, 20 L. R. A. (N. S.) 976, 71 Atl. 1027; *Higgenson v. Slatery*, 212 Mass. 583, 99 N. E. 523; *Trustees of M. E. Church, Hoboken v. Council of Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696; *Porter v. International Bridge Co.*, 200 N. Y. 234, 93 N. E. 716; *LeClercq v. Gallipolis*, 9 Ohio, 217, 28 Am. Dec. 641; *Carter v. Portland*, 4 Ore. 339; *Com. v. Rush*, 14 Pa. St. 186; *State v. Travis County*, 85 Tex. 435, 21 S. W. 1029; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554; *Sturmer v. Randolph County Court*, 42 W. Va. 724, 36 L. R. A. 300, 26 S. E. 532; *Thorndike v. Milwaukee Auditorium Co.*, 143 Wis. 1, 126 N. W. 881.

3. *City of Napa v. Howland*, 87 Cal. 84, 25 Pac. 247; *Alton v. Illinois Transportation Co.*, 12 Ill. 38, 52 Am. Dec. 479; *Village of Mankato v. Willard*, 13 Minn. 13, 97 Am. Dec. 208; *Child v. Chappell*, 9 N. Y. 246; *Portland & W. V. R. Co. v. Portland*, 14 Ore. 188, 58 Am. Rep. 299, 12 Pac. 265; *City of Pittsburg v. Epping Carpenter Co.*, 194 Pa. St. 318, 45 Atl. 129; *Gardner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407.

4. *Wormley v. Wormley*, 207 Ill. 411, 3 L. R. A. (N. S.) 481, 69 N. E. 865; *Redwood Cemetery Ass'n v. Bandy*, 93 Ind. 246; *Hagaman v. Dittmar*, 24 Kan. 42; *Tracy v. Bittle*, 213 Mo. 302, 112 S. W. 45; *First Nat. Bank of Pawnee City v. Hazels*, 63 Neb. 844, 56 L. R. A. 765, 89 N. W. 378; *Stockton v. Newark*, 42 N. J. Eq. 531, 9 Atl. 203; *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.) 407; *Pott v. Pottsville*, 42 Pa. 132; *Mowry v. City of Providence*, 10 R. I. 52; *Pierce v. Spafford*, 53 Vt. 394; *Roundtree v. Hutchinson*, 57 Wash. 414, 27 L. R. A. (N. S.) 875, 107 Pac. 345;

5. *Carpenteria School Dist. v. Heath*, 56 Cal. 478; *Chapman v. Floyd*, 68 Ga. 455; *Board of Regents for Normal School Dist. No. 3 v. Painter*, 102 Mo. 464, 10 L. R. A. 493, 14 S. W. 938; *Board of Education of Incorporated Village of Van Wert v. Edson*, 18 Ohio St. 221; *Pott v. Pottsville*, 42 Pa. 132; *School Dist. No. 2 of Johnson County v. Hart*, 3 Wyo. 563, 27 Pac. 919, 29 Pac. 741.

6. *Spires v. Los Angeles*, 150 Cal. 64, 87 Pac. 1026; *Campbell County Court v. Newport*, 12 B. Mon. (Ky.) 538; *State v. Travis County*, 85 Tex. 435, 21 S. W. 1029; *Board Sup'rs Frederick County v. City of Winchester*, 84 Va. 467, 4 S. E. 844.

same may be said of a dedication of land, covered by water, for use by the individual members of the public, for purposes of navigation, passage or recreation,⁷ and of a dedication of land immediately surrounding a well or spring, to enable the public to obtain water therefrom.⁸ Likewise, a decision that land may be dedicated to the use of the public for the purpose of keeping the view of the sea unobstructed appears to involve merely a recognition of the fact that there may, in such a case, be a use of the land by any member of the public who may chose to look at the sea over that land. But the position that land may be dedicated for school purposes, or for use by the public authorities as a cemetery, involves a very considerable departure from the original conception of dedication, since such a use is necessarily restricted to but a small part of the public. A school building into which any and every person shall have the right of entry, or a cemetery in which any and every person shall have the right of burial, is not readily conceivable. And likewise, when land is devoted to the purposes of the particular municipality, as, for instance, to the erection of a municipal building, the beneficiaries of the use are not the public generally, but that class of the public who reside within the municipal limits. As regards the dedication of land for a wharf or landing place, such a use of land appears to be analogous to its use for highway purposes, in so far as the former use

7. See *Shaw v. Crawford*, 10 Johns. 236; *Compton v. Waco Bridge Co.*, 62 Tex. 715; *Gillean v. Frost*, 25 Tex. Civ. App. 371, 61 S. W. 345; *Trenton Water Power Co. v. Donelly*, 77 N. J. L. 659, 73 Atl. 597.

8. *Smith v. Cornelius*, 41 W. Va. 59, 30 L. R. A. 747, 23 S. E. 599; *McConnell v. Lexington*, 12 Wheat, 582; *Raleigh County v. Ellison*, 8 W. Va. 308; *Thompson*

v. McPherson,—Ky.—124 S. W. 272.

9. *Atty Gen. v. Vineyard Grove Co.*, 181 Mass. 507, 64 N. E. 75; See *Atlantic City v. Associated Realities Corp.*, 73 N. J. Eq. 721, 17 Ann. Cas. 743, 70 Atl. 345; *Berrien Springs v. Ferguson*, 154 Mich. 472, 118 N. W. 262; *Poole v. Commissioners of Rehoboth*, 9 Del. Ch. 192, 80 Atl. 683.

involves merely a right, in any member of the public, to pass to or from boats over that land, but in so far as this may involve the temporary storage or piling of goods on the land by any member of the public, to the possible exclusion of any use whatsoever of the land by the owner of the land or by other members of the public, the applicability thereto of the doctrine of dedication appears, on principle, to be open to question, and there are judicial expressions to this effect.¹⁰

The greatest extension which the doctrine of dedication has received is that involved in decisions that land may be dedicated for the use of a particular religious sect or denomination, or a particular church society, as a place for worship,¹¹ as a cemetery,¹² or as a parsonage.¹³ These decisions appear, ordinarily, to have been dictated by a desire to uphold a gift which would otherwise fail for lack of a sufficient conveyance, and they are usually sought to be justified on the theory that such a use is a public use. It is difficult to concede, however, that a use of land by a sect or society for religious or cemetery purposes is a public use. The doctrine of dedication has never, apparently, been applied in the case of land devoted to a merely philanthropic use, such as an almshouse or hospital, not under the control of the public authorities,¹⁴ and yet the public is ordinarily quite as much interested in such a use

10. *Pearsall v. Post*, 20 Wend. (N. Y.) 111; *Post v. Pearsall*, 22 Wend. N. Y.) 425.

11. *Com'rs of Wyandotte Co. v. Presbyterian Church*, 30 Kan. 620, 1 Pac. 109; *Griffey v. Briars*, 7 Bush. (Ky.) 471; *Hannibal v. Draper*, 15 Mo. 634; *Cooper v. Sandy Hill First Presbyterian Church*, 32 Barb. (N. Y.) 222; *Williams v. First Presbyterian Society*, 1 Ohio St. 478; *Atkinson v. Bell*, 18 Tex. 474.

12. *Beatty v. Kurtz*, 2 Pet. (U.

S.) 566, 7 L. Ed. 212; *Boyce v. Kalbaugh*, 47 Md. 334, 28 Am. Rep. 464.

13. *McKinney v. Griggs*, 5 Bush (Ky.) 401, 96 Am. Dec. 360.

14. In *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, it is said that "it was admitted at the bar that dedications for charitable and religious purposes, and for public highways, were valid." The admission appears to have been unjustified as regards dedications for charitable purposes.

as in the use of land for worship under the auspices of some particular church. And it has been explicitly decided that land cannot be dedicated for use for a railway,¹⁵ a use in which all classes of the community are more or less interested. The decisions that land may be dedicated for the use of a particular religious sect or society, appear to be based, directly or indirectly, upon a false analogy suggested in an early case in the federal Supreme Court,¹⁶ between the doctrine of dedication, and a doctrine, applied in that case, that a grant for the establishment of a church will be upheld even though at the time of the grant there is no grantee in existence.¹⁷ The suggestion thus made, that land may be dedicated for religious purposes, was subsequently applied by that court as validating an oral gift of land to an unincorporated religious body for use as a cemetery.¹⁸ And these cases are ordinarily referred to as conclusive of the validity of a dedication for the benefit of a religious society.

§ 480. No particular beneficiary or beneficiaries.

It is well recognized that a dedication of land does not involve any necessity of a particular grantee or beneficiary.¹⁹ The purpose and effect of a common-law dedi-

15. *Elyton Land Co. v. South & North Alabama Co.*, 95 Ala. 631, 10 So. 270; *Pittsburgh, C., C. & St. L. Ry. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356 (*dictum*); *Louisville etc. R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 303, 28 S. W. 14; *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514, 28 L. R. A. 612, 46 Am. St. Rep. 355, 40 N. E. 1014; *Todd v. Pittsburg, Ft. W. & C. R. Co.*, 19 Ohio St. 514; *Watson v. Chicago M & St. P. R. Co.*, 46 Minn. 321, 48 N. W. 1129.

But by force of statute land may be dedicated for railway

purposes. *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. Ed. 743; *Kansas City & N. Connecting R. Co. v. Baker*, 183 Mo. 312, 82 S. W. 85; *Iowa Cent. R. Co. v. Homan*, 151 Iowa, 404, 131 N. W. 878.

16. *Pawlet v. Clark*, 9 Cranch U. S. 292, 3 L. Ed. 735.

17. See editorial note 16 Harv. Law Rev. 128.

18. *Beatty v. Kurtz*, 2 Pet. (U. S.) 566, 7 L. Ed. 521.

19. *Beatty v. Kurtz*, 2 Pet. 566, 7 L. Ed. 521; *Doe v. Jones*, 11 Ala. 63; *Warren v. Jacksonville*, 15 Ill. 236, 58 Am. Dec.

cation is to create a right of user in the public, or at least in some particular class of the public, and not in some particular person or persons, natural or legal. And for this reason, not only is a particular grantee or beneficiary unnecessary, but there is, it seems, no dedication when there is a particular grantee or beneficiary.

As there cannot be a dedication in favor of a particular person, so there cannot be a dedication in favor of a limited number of persons.²⁰ It must be in favor of the public, and not of a part of the public. Consequently an attempted dedication in favor of a municipality, or the inhabitants of a municipality, has no legal validity, unless construed as a dedication in favor of the whole public,²¹ and this although the municipality may represent the public for the purpose of ac-

610; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866; *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405; *State v. Wilson*, 42 Me. 9; *Winona v. Huff*, 11 Minn. 119; *Bryant's Lessee v. McCandless*, 7 Ohio Pt. 2, 135; *Atkinson v. Bell*, 18 Tex. 874; *Meeker v. Puyallup*, 5 Wash. 759, 32 Pac. 727.

20. *Hill v. Wing*, 193 Ala. 312, 69 So. 445; *Illinois Ins. Co. v. Littlefield*, 67 Ill. 368; *City of Chicago v. Borden*, 190 Ill. 430, 60 N. E. 915; *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513; *Witter v. Harvey*, 1 McCord L. 67, 10 Am. Dec. 650; *Brown v. Oregon Short Line R. Co.*, 36 Utah, 257, 24 L. R. A. (N. S.) 86, 102 Pac. 740; *Talbott v. Richmond & D. R. R. Co.*, 31 Gratt. (Va.) 685; *Tupper v. Huson*, 46 Wis. 646, 1 N. W. 332.

21. *Poole v. Huskinson*, 11 M. & W. 827; *Miller v. City of*

Indianapolis, 123 Ind. 196, 24 N. 228; *Atty Gen. v. Tarr*, 148 Mass. 309, 2 L. R. A. 87, 19 N. E. 358; *Trerice v. Barteau*, 54 Wis. 99, 11 N. W. 244.

In connection with the statement that it is immaterial to the validity of a dedication that there is no municipal corporation existent at the time to assume control of the land dedicated on behalf of the public, it is occasionally suggested that the lack in this respect is remedied by the subsequent creation of such a corporation. *Riverside v. MacLain*, 210 Ill. 308, 66 L. R. A. 288, 102 Am. St. Rep. 164, 71 N. E. 498; *Buffalo L. & R. Ry. Co. v. Hoyer*, 214 N. Y. 236, 108 N. E. 455; *Kniss v. Duquesne Borough*, 255 Pa. 417, 100 Atl. 132; *Gillian v. Frost*, 25 Tex. Civ. App. 371, 61 S. W. 345. This is, it is conceived, misleading. The dedication is valid regardless of whether

cepting the dedication,²² and controlling the user of the land dedicated. .

The case of a gift of land to a municipal corporation, effected by a written conveyance to the corporation, for a purpose involving a use of the land by or for the benefit of the inhabitants, is occasionally referred to as a dedication,²³ but it is not properly such. In such a case the municipality is in the position of a grantee, while in the case of a dedication there is, as above stated, no grantee. And conceding that a valid dedication may be made in favor of a religious association by an oral declaration of an intention to that effect,²⁴ a view which, as before suggested, is difficult to harmonize with the requirement that dedication be in favor of the public and not of part of the public, the term dedication is not properly applicable when there is a valid conveyance in writing to such association or in trust therefor. In such case the title passes, not by dedication, but by grant.

§ 481. **Who may effect dedication.** No one other than the owner of land, or one acting under authority from him, can effect a dedication,²⁵ and an attempted

such a corporation is subsequently created.

22. *Post*, § 483.

23. *Gaynor v. Bauer*, 144 Ala. 448, 3 L. R. A. N. S. 1082, 39 So. 749; *Cordano v. Wright*, 159 Cal. 610, A. & E. Ann. Cas. 1912C, 1044, 115 Pac. 227; *H. A. Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481; *In re Wellington*, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; *Rowzee v. Pierce*, 75 Miss. 846, 40 L. R. A. 402, 65 Am. St. Rep. 625, 23 So. 307; *Normal School Dist. No. 30 v. Painter*, 102 Mo. 464, 10 L. R. A. 493, 14 S. W. 938; *Greene v. O'Connor*, 18

R. I. 56, 19 L. R. A. 262, 25 Atl. 692; *Spokane v. Security Savings Soc.*, 82 Wash. 91, 143 Pac. 435.

24. *Ante*, § 479 notes 11-13.

25. *Johnson v. Dadeville*, 127 Ala. 244, 28 So. 700; *California Nav. & Improvement Co. v. Union Transportation Co.*, 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936; *Shedd v. Alexander*, 270 Ill. 117, 110 N. E. 327; *Edenville v. R. R. Co.*, 77 Iowa, 69, 41 N. W. 568; *Allen v. Meuwenberg*, 108 Mich. 629, 66 N. W. 571; *Stillman v. Olean*, 210 N. Y. 168, 104 N. E. 128.

dedication by one not the owner is not validated by his subsequent acquisition of title, unless he thereafter in some way recognizes the dedication.²⁶

One having a partial or limited interest in land cannot be affected by a dedication in which he does not participate. For instance, an existing easement in the land,²⁷ or lien, by way of mortgage,²⁸ or otherwise,²⁹ is not affected by a dedication made by the owner of an estate in fee simple in the land, and a dedication by one cotenant is a nullity as regards the other cotenants.³⁰ Likewise a reversioner or remainderman cannot be affected by a dedication made by the particular tenant alone.³¹

A municipal corporation, it has been held, may dedicate land owned by it to a particular public use,³² and

26. *Boerner v. McKillip*, 52 Kan. 508, 35 Pac. 5; *Kansas City Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. 835; *Camden v. McAndrew & Forbes Co.*, 85 N. J. L. 260, 88 Atl. 1034; *Chase v. Oregon City*, 72 Ore. 527, 143 Pac. 1111; *Bushnell v. Scott*, 21 Wis. 451, 24 Am. Dec. 555.

27. *Delaware & Hudson Co. v. Olyphant Borough*, 224 Pa. 387, 73 Atl. 458; *State v. Steamship Co.*, 111 La. 120, 35 So. 482; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Sarcoxi v. Wild*, 64 Mo. App. 403. See *South Berwick v. York County*, 98 Me. 108, 56 Atl. 623.

28. *Hoole v. Atty. Gen.* 22 Ala. 190; *Jacobs Pharmacy Co. v. Luckie*, 143 Ga. 457, Ann. Cas. 1917A, 1105, 85 S. E. 332; *H. A. Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481; *Granite Bituminous Pav. Co. v. McManus*, 244 Mo. 184, 148 S. W. 621; *Gate City v. Richmond*, 97 Va. 337, 33 S. E. 615.

29. *Hays v. Perkins*, 109 Mo. 102, 18 S. W. 1127; *Morning v. Lincoln*, 93 Neb. 364, 140 N. W. 638.

30. *South Baltimore Harbor & Imp. Co. v. Smith*, 85 Md. 537, 37 Atl. 27; *St. Louis v. Laclede*, 96 Mo. 197, 9 Am. St. Rep. 334, 9 S. W. 581; *Thomason v. Dayton*, 40 Ohio St. 63; *Daniels v. Almy*, 18 R. I. 244, 27 Atl. 330; *Scott v. State*, 1 Sneed (Tenn.) 629.

31. *Wood v. Veal*, 5 Barn. & Ald. 454; *City of Durham v. Southern R. Co.*, 121 Fed. 894; *Rives v. Dudley*, 56 N. C. 126, 67 Am. Dec. 231; *Schenley v. Com.*, 36 Pa. 29, 78 Am. Dec. 359; *McKinney v. Duncan*, 121 Tenn. 265, 118 S. W. 683; See editorial note, 21 Harv. Law Rev. 151.

32. *Boston v. Lecraw*, 17 How. Pr. (N. Y.) 426; *San Francisco v. Calderwood*, 31 Cal. 585; *Holladay v. City and County of San Francisco*, 124 Cal. 352, 57

a dedication by the United States government, by means of an Act of Congress, has been recognized³³ as has a dedication by a state.³⁴

§ 482. **Intention to dedicate.** A dedication need not be by any formal act or declaration, and it is sufficient if in any way the owner of the land indicates an intention to devote the land to the public use.^{34a} The act of dedication is affirmative in character, and the intention to dedicate must be clearly shown.³⁵ If, however, the acts of the owner of the land are such as unequivocally to indicate an intention to dedicate, the fact that he had no such intention is immaterial.³⁶ In case his acts are equivocal in character, he may, ac-

Pac. 146; Attorney General v. Tarr, 148 Mass. 309, 2 L. R. A. 87, 19 N. E. 358; State v. Woodward, 23 Vt. 92.

33. United States v. Illinois Cent. R. Co., 154 U. S. 225, 237, 38 L. Ed. 971; Cook v. Burlington, 30 Iowa, 94, 6 Am. Rep. 649; Wells v. Pennington County, 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305.

34. Snowden v. Loree, 122 Fed. 493; Zinc Co. v. City of La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; Terre Haute & I. R. Co. v. Scott, 74 Ind. 29; Reilly v. City of Racine, 51 Wis. 526, 8 N. W. 417.

34a. Hill v. Houk, 155 Ala. 448, 46 So. 562; Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746; Godfrey v. City of Alton, 12 Ill. 29, 52 Am. Dec. 476; Williams v. Wiley, 16 Ind. 362; Hall v. McLeod, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; Wright v. Tukey, 3 Cush. (Mass.) 290; Buntin v. Danville, 93 Va. 200, 24 S. E. 30.

35. Harper v. State, 109 Ala.

66, 19 So. 901; Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840; Denver v. Jacobson, 17 Colo. 497, 30 Pac. 246; City of Hartford v. New York & N. E. R. Co., 59 Con. 250, 22 Atl. 37; Swift v. Lithonia, 101 Ga. 706, 29 S. E. 12; Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; State v. Green, 41 Iowa, 693; O'Malley v. Dillenbeck Lumber Co., 141 Iowa, 186, 119 N. W. 601; Hayden v. Stone, 112 Mass. 346; State v. Nudd, 23 N. H. 327; Heiple v. East Portland, 13 Ore. 97; Cincinnati & M. V. R. Co., v. Roseville, 76 Ohio St. 108, 81 N. E. 178; Harris v. Commonwealth, 20 Gratt. (Va.) 833; Atlas Lumber Co. v. Quirk, 28 S. Dak. 643, 135 N. W. 172; Provident Trust Co. v. City of Spokane, 63 Wash. 92, 114 Pac. 1030; Lynchburg Traction & Light Co. v. Guill, 107 Va. 86, 57 S. E. 644.

36. Town of Holly Grove v. Smith, 63 Ark. 5, 37 S. W. 956; Frauenthal v. Slaten, 91 Ark. 350, 121 S. W. 395; Denver v. Clements, 3 Colo. 484; Hanson v.

according to some decisions, testify as to his actual intention.³⁷

The existence or non existence of the intent to dedicate in any particular case is a question of fact rather than of law.³⁸

— **Public user as evidence.** There are numerous decisions to the effect that the mere fact that land is used by the public for a greater or less time does not in itself show a dedication thereof by the owner,³⁹

Proffer, 23 Idaho 705, 132 Pac. 573; Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949; Miller v. Indianapolis, 123 Ind. 196, 24 N. E. 228; Tise v. Whitaker Harvey Co., 146 N. C. 374, 59 S. E. 1012; Cole v. Minnesota Loan & Trust Co., 17 N. Dak. 409, 17 Ann. Cas. 304, 117 N. W. 354; Kuck v. Wakefield, 58 Ore. 549, 115 Pac. 428; Lamar County v. Clements, 49 Tex. 347; Champ v. Nicholas County Court, 72 W. Va. 475, 78 S. E. 361.

37. Bidinger v. Bishop, 76 Ind. 244; Goodfellow v. Riggs, 88 Iowa, 540, 55 N. W. 319; City of Chicago v. Chicago, R. I. & P. Ry. Co., 152 Ill. 561, 38 N. E. 768; Helm v. McClure, 107 Cal. 199, 40 Pac. 437. *Contra*, Perkins v. Fielding, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100.

38. City of Hartford v. New York & N. E. R. Co., 59 Conn. 250, 22 Atl. 37; Harmony v. Clark, 250 Ill. 57, 95 N. E. 47; Owensboro v. Muster, 111 Ky. 856, 64 S. W. 840; Cushwa v. Williamsport, 117 Md. 306, 83 Atl. 389; Adams v. Iron Cliffs Co., 78 Mich. 278, 18 Am. St. Rep. 441, 44 N. W. 270; Morse v. Zeize, 34 Minn. 35, 24 N. W. 287; New

Orleans, J. & G. N. R. Co. v. Moye, 39 Miss. 374; Benton v. St. Louis, 217 Mo. 687, 118 S. W. 418; Wood v. Ilurd, 34 N. J. L. 87; Waters v. Philadelphia, 208 Pa. St. 189, 57 Atl. 523; Folsom v. Town of Underhill, 36 Vt. 580. The facts on which a finding of dedication *vel non*, in a large number of cases, was based, are stated and considered in a note to Benton v. St. Louis, 129 Am. St. Rep. 582 *et seq.*

39. Folkstone Corp. v. Brockman (1914) App. Cas. 338; Irwin v. Dixon, 19 How. (U. S.) 10 13 L. Ed. 25; McKey v. Village of Hyde Park, 134 U. S. 84, 33 L. Ed. 860; Steele v. Sullivan, 70 Ala. 589; San Francisco & Grote, 120 Cal. 59, 41 L. R. A. 335, 65 Am. St. Rep. 155, 52 Pac. 127; Healey v. Atlanta, 125 Ga. 736, 54 S. E. 749; Palmer v. Chicago, 248 Ill. 201, 93 N. E. 765; Johnson v. Robertson, 156 Iowa, 64, 135 N. W. 585; Cyr v. Madore, 73 Me. 53; Hayden v. Stone, 112 Mass. 346; Stacey v. Miller, 14 Mo. 478; Nelson v. Reick, 96 Neb. 486, 148 N. W. 331; Lewis v. City of Portland, 25 Ore. 133, 42 Am. St. Rep. 772; Weiss v. Borough of South Bethlehem, 136 Pa. 294, 20

but the owner's acquiescence in such user of the land is a fact to be considered in connection with other facts bearing on the question of dedication,⁴⁰ the weight to be attributed to such acquiescence depending, it would seem, on the length and character of the user, the nature of the place in which it occurs, the ability of the owner to prevent such user by the public without interfering with his own user of the land, as well as other circumstances.⁴¹ The theory is that if the public user has been openly as of right, and for so long a time that

Atl. 801; *Worthington v. Wade*, 82 Tex. 26, 17 S. W. 520; *Bacon v. Boston & M. R. Co.*, 83 Vt. 421, 76 Atl. 128; *Lynchburg Traction & Light Co. v. Guill*, 107 Va. 86, 57 S. E. 644; *Cunningham v. Hendricks*, 89 Wis. 632, 62 N. W. 410. But in Kentucky the continuous public user of a pass-way for fifteen years without let or hindrance from the owner has been regarded as raising a conclusive presumption of dedication. *Bloomfield v. Allen*, 146 Ky. 34, 141 S. W. 400.

40. *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448; *Atlanta Railway & Power Co. v. Atlanta Rapid Transit Co.*, 113 Ga. 481, 39 S. E. 12; *City of Chicago v. Chicago R. I. & P. Ry. Co.*, 152 Ill. 561, 38 N. E. 768; *State v. Birmingham*, 74 Iowa, 407, 38 N. W. 121; *Southern Railway v. Coplinger's Adm'r*, 151 Ky. 749, 152 S. W. 947; *Neal v. Hopkins*, 87 Md. 19, 39 Atl. 322; *Klenk v. Town of Walnut Lake*, 51 Minn. 381, 53 N. W. 703; *New Orleans, J. & G. N. R. Co. v. Moye*, 39 Miss. 374; *Penquite v. Lawrence*, 11 Ohio St. 274; *Weiss v. South Bethlehem Borough*, 136 Pa. St. 294, 20 Atl. 801; *Water-*

town v. Troeh,—S. Dak.—, 125 N. W. 501; *Bennington County v. Manchester*, 87 Vt. 555, 90 Atl. 502; *Christianson v. Caldwell*, 152 Wis. 135, 139 N. W. 751; *Sturmer v. Randolph County Court*, 42 W. Va. 724, 36 L. R. A. 300, 26 S. E. 532. But that acquiescence in public user for less than the prescriptive period is insufficient to evidence dedication, see *Jones v. Peterson*, 178 Iowa, 1389, 161 N. W. 181.

In a considerable number of jurisdictions the public user of one's land under claim of right, if continued for the prescriptive period, is regarded as giving rise to a conclusive presumption of the legal creation of rights of user in public, analogous to the conclusive presumption of a grant on which the doctrine of prescription for private rights has ordinarily been based. This matter we consider in connection with the doctrine of prescription. *Post*, § 533.

41. That the question whether acquiescence in the user is such as to evidence an intention to dedicate is purely one of fact, see *Folkstone Corporation v. Brockman App. Cas.* (1914) 338.

it must have come to the knowledge of the owner of the land, the owner's acquiescence therein may justify the inference that he intended that it be devoted to such use.⁴² If the user is not as of right, but is based upon a license or permission given to individuals or to a class of individuals, the owner's acquiescence therein can obviously not support an inference of dedication.⁴³

When the owner of land leaves it open in whole or in part as a means of access to his own premises, the fact that he allows the public generally to use it for purposes of passage is but slight, if any, evidence of an intention to dedicate, since he could not conveniently leave it open to those persons coming to his own premises and close it as against all others.⁴⁴ And the owner's mere acquiescence in the use of land by the public for purposes of travel or recreation can furnish but slight evidence of dedication when such land is unenclosed land, not in use for purposes of cultivation or otherwise.⁴⁵ That, on the other hand, one whose land is

42. See per Blackburn J. in *Greenwich Board of Works v. Maudslay*, L. R. 5 Q. B. 404.

43. *Barraclough v. Johnson*, 8 Ad. & El. 99; *Wooster v. Fiske*, 115 Me. 161, 98 Atl. 378; *Carpenter v. City of St. Joseph*, 263 Mo. 705, 174 S. W. 53.

44. *Irwin v. Dixon*, 9 How. (U. S.) 10, 13 L. Ed. 25; *Loomis v. Connecticut Ry. & Lighting Co.*, 78 Conn. 156, 61 Atl. 539; *Georgia R. R. & Banking Co. v. Atlanta*, 118 Ga. 486, 45 S. E. 256; *Chicago v. Chicago, R. I. & P. R. Co.*, 152 Ill. 561, 38 N. E. 768; *Pennsylvania Co. v. Plotz*, 125 Ind. 26, 24 N. E. 343; *Bradford v. Fultz*, 167 Iowa, 686, 149 N. W. 925; *Durgin v. Lowell*, 3 Allen (Mass.) 398; *Railroad v. Roseville*, 76 Ohio St. 108, 81 N. E. 178; *Lewis v. Portland*,

25 Ore. 133, 22 L. R. A. 736, 42 Am. St. Rep. 772; *Columbia & P. S. R. Co. v. Seattle*, 33 Wash. 513, 74 Pac. 670.

45. *Tutwiler v. Kendall*, 113 Ala. 664, 21 So. 332; *Latham v. Los Angeles*, 87 Cal. 514, 25 Pac. 673; *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499; *Savannah v. Standard Fuel Supply Co.*, 140 Ga. 353, 78 S. E. 906; *Kyle v. Logan*, 87 Ill. 64; *Hansen v. Green*, 275 Ill. 221, 113 N. E. 982; *State v. Kansas City etc. R. Co.*, 45 Iowa, 139; *Tucker v. Conrad*, 103 Ind. 349, 2 N. E. 803; *Rathman v. Norenberg*, 21 Neb. 467, 32 N. W. 305; *Hutto v. Tindall*, 6 Rich. L. (S. C.) 396; *Gulf C. & S. F. R. Co. v. Montgomery*, 85 Tex. 64, 19 S. W. 1015.

for the most part enclosed, leaves outside his fence a strip suitable for passage, not apparently for his own convenience, and acquiesces in the public use of that strip, may frequently justify the inference of an intention on his part to dedicate such strip to the public use.⁴⁶

In some jurisdictions it has been asserted that if the owner of land acquiesces in the public use thereof for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment, an intention to dedicate may be presumed.⁴⁷ This statement, borrowed, directly or indirectly, from a *dictum* in an early case in the Supreme Court of the United States,⁴⁸ appears to be somewhat opposed to the cases above referred to, in which it is decided that the fact of user alone is not sufficient of itself to show a dedication,⁴⁹ and it is difficult to see how the possibility of detriment to public or private interests by reason of the interruption of the use can have a bearing upon the question whether there has been a dedication, a question of the landowner's intention.⁵⁰

46. See *McCracken v. Joliet*, 271 Ill. 270, 111 N. E. 131; *Carlson v. Allen*, 90 Kan. 457, 135 Pac. 669; *Neal v. Hopkins*, 87 Md. 19, 39 Atl. 322; *Boonville Special Road Dist. v. Fuser*, 184 Mo. App. 634, 171 S. W. 962; *Benton v. St. Louis*, 217 Mo. 687, 118 S. W. 418, 129 Am. St. Rep. 561; *Robison v. Gebauer*, 98 Neb. 196, 152 N. W. 329; *Johnson City v. Wolfe*, 103 Tenn. 277, 52 S. W. 991; *Schettler v. Lynch*, 23 Utah, 305, 64 Pac. 955; *Humphrey v. Krutz*, 77 Wash. 152, 137 Pac. 806.

47. *Macon v. Franklin*, 12 Ga. 239; *Chicago v. Wright*, 69 Ill. 318; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749;

Marion v. Skillman, 127 Ind. 130, 11 L. L. A. 55, 26 N. E. 676; *Cromer v. State*, 21 Ind. App. 502, 52 N. E. 239; *State v. Wilson*, 42 Me. 9; *Case v. Favier*, 12 Minn. 89; *Parrish v. Stephens*, 1 Ore. 59; *Hughes v. Providence etc. R. Co.*, 2 R. I. 493; *Johnson City v. Wolfe*, 103 Tenn. 277, 52 S. W. 991; *Whittaker v. Ferguson*, 16 Utah, 240, 51 Pac. 980; *Richmond v. Stokes*, 31 Gratt. (Va.) 713; *Roundtree v. Hutchinson*, 57 Wash. 414, 27 L. R. A. (N. S.) 875, 107 Pac. 345.

48. *Cincinnati v. White*, 6 Pet. 431

49. *Ante*, this section, note 39.

50. See *Hayden v. Stone*, 112 Mass. 346.

That the public user has been accompanied by expenditures on the part of the municipal authorities, to adapt the land to such user, and that the land owner knew of such expenditures, and acquiesced therein, would appear to be a consideration indicative of an intention on his part to dedicate, or perhaps operative to preclude him from denying such intention.⁵¹

That the owner of land continues to pay taxes thereon,⁵² or that he makes a conveyance of the land,⁵³ may tend to rebut any inference that he has dedicated it to public use. That he has maintained a gate or bars across the land, thus interfering more or less with any public user thereof, is evidence in rebuttal of any rights in the public,⁵⁴ though not conclusive in this regard.⁵⁵

51. See *Eldridge v. Collins*, 75 Neb. 65, 105 N. W. 1085; *Harris v. Commonwealth*, 20 Gratt. (Va.) 833; *McKenzie v. Gilmore*,—(Cal.) —, 33 Pac. 262; *State v. Birmingham*, 74 Iowa, 411, 38 N. W. 121; *Raymond v. Wichita*, 70 Kan. 523, 79 Pac. 323; *Rex v. Thomas*, 7 El. & Bl. 399.

52. *Mansur v. State*, 60 Ind. 357; *City of Topeka v. Cowee*, 48 Kan. 345, 29 Pac. 560; *Case v. Favier*, 12 Minn. 89 (Gil. 48); *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. 207; *Eugene v. Lowell*, 72 Ore. 237, 143 Pac. 903. But payment of taxes is but slight evidence against a dedication. See *Rhodes v. Town of Brightwood*, 145 Ind. 21, 43 N. E. 942; *Getchell v. Benedict*, 57 Iowa, 121, 10 N. W. 321; *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405; *City of Ottawa v. Gentzer*, 160 Ill. 509, 43 N. E. 601.

53. *Hall v. City of Baltimore*, 56 Md. 187; *Case v. Favier*, 12 Minn. 89 (Gil. 48).

54. *Rugby Charity Trustees v. Merryweather*, 11 East 375 note; *Jones v. Phillips*, 59 Ark. 35, 26 S. W. 386; *Cook v. Sudden*, 94 Cal. 443, 29 Pac. 949; *Bidinger v. Bishop*, 76 Ind. 244; *Gray v. Haas*, 98 Iowa, 502, 67 N. W. 394; *State v. Adkins*, 42 Kan. 203, 21 Pac. 1069; *Cyr v. Madore*, 73 Me. 53; *Com. v. Newbury*, 2 Pick. (Mass.) 51; *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004; *Carpenter v. Gwynn*, 35 Barb. (N. Y.) 395; *Lewis v. Portland*, 25 Ore. 133, 42 Am. St. Rep. 772, 22 L. R. A. 736, 35 Pac. 256; *Wickre v. Independence*, 31 S. D. 623, 141 N. W. 973.

55. *Peuple v. Eel River etc. R. Co.*, 98 Cal. 665, 33 Pac. 728; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *Bradford v. Fultz*, 167 Iowa, 686, 149 N. W. 925; *Eldridge v. Collins*, 75 Neb. 65, 105 N. W. 1085. But that the maintenance of gates and bars, in four different places within a distance of half a mile

— **Sales with reference to plat.** As a general rule, if the owner of land lays it off into lots, with streets and alleys intersecting the same, and thereafter sells lots with reference to such streets and alleys, or with reference to a plat on which they appear, he is regarded as having dedicated to the public the land covered by such street and alleys,⁵⁶ and a like result has been held to follow if he sells lots with reference to a plat made by another.⁵⁷ But that the owner of

conclusively excluded an inference of dedication, see *Jones v. Davis*, 35 Wis. 376.

56. *Irwin v. Dixon*, 9 How. (U. S.) 10, 31, 13 L. R. A. 25; *South & N. A. R. Co. v. Davis*, 185 Ala. 193, 64 So. 606; *Balmat v. Argenta*, 123 Ark. 175, 184 S. W. 445; *Porter v. Carpenter*, 39 Fla. 14, 21 So. 788; *Fossion v. Landry*, 123 Ind. 136, 24 N. E. 96; *Schick v. West Davenport Imp. Co.*, 167 Iowa, 294, 145 N. W. 689, 149 N. W. 451; *Bartlett v. City of Bangor*, 67 Me. 460; *Mayor & City Council of Baltimore v. Frick*, 82 Md. 77, 33 Atl. 435; *Briel v. City of Natchez*, 48 Miss. 423; *Harrington v. Manchester*, 76 N. H. 347, 82 Atl. 716; *Ridgefield Park v. New York, S. & W. R. Co.*, 85 N. J. L. 278, 89 Atl. 773; *In re Hunter*, 163 N. Y. 542, 57 N. E. 735; *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344; *Meier v. Portland Cable Ry. Co.*, 16 Ore. 500, 1 L. R. A. 856, 19 Pac. 610; *Quicksall v. City of Philadelphia*, 177 Pa. 301, 35 Atl. 609; *Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co.*, 240 Pa. 519, 87 Atl. 698; *Brown v. Curran*,—(R. I.)—83 Atl. 515; *City of Elkins v. Donohoe*, 74 W. Va. 335, 81 S. E. 1130.

Likewise a part or square shown on a plat with reference to which lots have been sold has been regarded as dedicated. *Frauenthal v. Slaten*, 91 Ark. 350, 121 S. W. 395; *Davidow v. Griswold*, 23 Cal. App. 188, 137 Pac. 619; *East Atlanta Land Co. v. Mower*, 138 Ga. 380, 75 S. E. 418; *New Orleans v. Carrolton Land Co.*, 131 La. 1092, 60 So. 695; *Northport Grove Camp meeting Ass'n v. Andrews*, 104 Me. 342, 20 L. R. A. (N. S.) 976, 71 Atl. 1027; *Cushwa v. Williamsport*, 117 Md. 306, 83 Atl. 389; *Atty. Gen. v. Abbott*, 154 Mass. 323, 13 L. R. A. 251, 28 N. E. 346; *Pondler v. Minneapolis*, 103 Minn. 479, 115 N. W. 274; *Ramstad v. Carr*, 31 N. D. 504, L. R. A. 1916B, 1160, 154 N. W. 195; *Lueders v. Town of Tenino*, 49 Wash. 521, 95 Pac. 1089; as has a wharf, under like circumstances. *City of Pittsburg v. Epping—Carpenter Co.*, 194 Pa. 318, 45 Atl. 129. But see *Palen v. Ocean City*, 64 N. J. L. 669, 46 Atl. 774.

57. *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883; *Thomas v. Metz*, 236 Ill. 86, 86 N. E. 184; *Longworth v. Sedevic*, 165 Mo. 221, 65 S. W. 260; *Clark v. Eliza-*

land makes a plat thereof, without making any sales in accordance therewith, has been usually regarded as not involving a dedication,⁵⁸ in the absence of a statutory provision for dedication by the filing of a plat.⁵⁹ That a dedication may result from sales with reference to a plat it is unnecessary, it has been decided, that the spaces asserted to be dedicated be marked on the plat as streets alleys or squares, it appearing from a consideration of the plat as a whole, with reference to the surrounding circumstances, that the spaces were intended to be devoted to a public use.^{59a}

In a considerable number of the cases in which this doctrine of dedication by sales with reference to a plat has been asserted, the rights of individual purchasers of lots only were in question, but their rights, as against their vendor, to have the streets and other public places kept open, in accordance with the plat on the strength of which they made their purchases, is to

beth, 40 N. J. L. 172; Wyman v. Mayor of New York, 11 Wend. (N. Y.) 486; Oregon City v. Oregon & C. R. Co., 44 Ore. 165, 74 Pac. 924; City of Pittsburg v. Epping Carpenter Co., 194 Pa. 318, 45 Atl. 129; Deadwood v. Whittaker, 12 S. Dak. 515, 81 N. W. 908; Corsicana v. Zorn, 97 Tex. 317, 78 S. W. 924.

58. United States v. Chicago, 7 How. (U. S.) 185, 12 L. R. A. 660; Webb v. Demopolis, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289; Town of Holly Grove v. Smith, 63 Ark. 5, 37 S. W. 956; People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; Baltimore & Ohio S. W. Ry. Co. v. Seymour, 154 Ind. 17, 55 N. E. 953 (*semble*); Bennett v. Seibert, 10 Ind. App. 369, 35 N. E. 35; Rowan v. Portland, 8 B. Mon. (Ky.) 232; Quirk v. Miller, 129 La. 1071, 57

So. 521; Whitworth v. Berry, 69 Miss. 882, 12 So. 146; New York & L. B. R. Co. v. Borough of South Amboy, 57 N. J. L. 252, 30 Atl. 628; Nodine v. Union, 42 Ore. 613, 72 Pac. 582; Patterson v. Peoples Natural Gas. Co., 172 Pa. St. 554, 33 Atl. 575.

59. *Post*, notes 63a-66.

59a. East Birmingham Realty Co. v. Birmingham Machine & Foundry Co., 160 Ala. 461, 49 So. 448; Los Angeles v. McCollum, 156 Cal. 148, 23 L. R. A. (N. S.) 387, 103 Pac. 914; Kimball v. Chicago, 253 Ill. 105, 97 N. E. 257; Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Hanson v. Eastman, 21 Minn. 509; Buschmann v. City of St. Louis, 121 Mo. 523, 26 S. W. 687; Weger v. Delran, 61 N. J. L. 224, 39 Atl. 730.

be sustained upon a different theory,⁶⁰ and it is unnecessary, in such a case, to introduce any reference to the doctrine of dedication. Many of the cases, however, which assert this doctrine of dedication by sales with reference to a plat, involve the rights of the public generally, or of the municipality as representative of the public, and that such sales do usually involve a dedication in accordance with the plat may be regarded as settled in most, if not all, of the states. It is to be regretted that, of the great number of cases in which a dedication by sales in accordance with a plat is asserted, none, so far as the writer has observed, undertake to explain why such sales should operate as effecting a dedication, why, for instance, the fact that the owner of land has sold two or three lots with reference to a plat, and has thereby subjected himself to obligations in favor of the purchasers as regards the streets depicted on the plat, is to be regarded as showing an intention to create rights in such streets in favor of the public generally. The doctrine had its origin, it may be suspected, in a failure to distinguish between the rights of the individual purchasers and of the public, as when the courts said, as they have not infrequently said, that the sale of lots with reference to a plat involves a dedication of the lots in favor of the purchasers, thus ignoring the well settled principle that land cannot be dedicated for the benefit of particular members of the public.⁶¹ The expression "dedication" having thus been introduced to express the result of such sales in favor of individuals, it was to be expected that, as time went on, such sales should come to be regarded as effecting a dedication for all purposes.⁶²

60. *Ante*, § 366(b).

61. See the remarks in *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; *Prescott v. Edwards*, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178.

62. That such sales effect a dedication appears to be negatived in *Washington*. See *Smith v. King County*, 80 Wash. 273, 141 Pac. 695.

—**Description with reference to street.** That in selling or conveying land, it is described by reference to a suppositious street, or extension of a street, which has not actually been opened, does not, it seems, necessarily involve a dedication of land for such street,^{62a} though it would no doubt ordinarily give the purchaser a right of way in the land so referred to as a street, if the vendor is the owner thereof.⁶³

—**Statutory dedication.** In the statutes authorizing the record of a plat of a subdivision of land made by the owner thereof,^{63a} there is usually a provision that the strips or pieces of land which the owner, as indicated on the plat, intends shall be used by the public for streets, parks, and the like, shall be regarded as dedicated to the public. These statutes usually contain minute requirements in regard to the form and authentication of the plat, and, if these requirements are not complied with, the plat does not constitute a statutory dedication, though it may, in connection with sales of land with reference thereto, or other acts, constitute evidence of a common-law dedication.⁶⁴

A statutory dedication by the recording of a plat differs from a common-law dedication in that it involves a direct conveyance of the legal title, the ownership of the land, to that extent, to the municipality, while in the case of a common-law dedication the legal ownership is not affected, there being vested in the

62a. *Hoole v. Atty. Gen.*, 22 Ala. 190; *Mobile v. Fowler*, 147 Ala. 403, 41 So. 468 (*semble*); *Cerf v. Pfleging*, 94 Cal. 131, 29 Pac. 417; *Owensboro v. Muster*, 111 Ky. 856, 64 S. W. 840; *City of Omaha v. Hawver*, 49 Neb. 1, 67 N. W. 891; *Atlantic City v. Groff*, 68 N. J. L. 670, 54 Atl. 800; *In re Eleventh Avenue*, 81 N. Y. 436; *Jones v. Teller*, 65 Ore. 328, 133 Pac. 354; *Tesson v. Porter Co.*,

238 Pa. 504, 86 Atl. 278; *Felin v. Philadelphia*, 241 Pa. 164, 88 Atl. 421; *Rathmun v. Halfman*, 58 Tex. 551. *Contra*, *Flersheim v. Baltimore*, 85 Md. 489, 36 Atl. 1098; *Philadelphia, B. & W. R. Co. v. Baltimore*, 124 Md. 635, 93 Atl. 146; *Whyte v. City of St. Louis*, 153 Mo. 80, 54 S. W. 478.

63. *Ante*, § 366(a).

63a. *Ante*, § 443.

public merely a privilege of user.⁶⁵ In case there is no municipality in existence at the time of a statutory dedication, the fee, it has been said, is in abeyance until a municipality is created.⁶⁶

§ 483. **Acceptance.** In order that a dedication, or rather, an offer of dedication, may be effective for the purpose of imposing burdens and liabilities upon the public authorities as regards the condition and repair of the property, it is ordinarily necessary that it be accepted by the public,⁶⁷ and, by numerous decisions, an acceptance is also necessary in order to render the offer of dedication irrevocable by the dedicator,⁶⁸ and in order to give to the municipality rights of control as regards the property.⁶⁹ In one state it has been de-

64. See *Marsh v. Village of Fairbury*, 163 Ill. 401, 45 N. E. 236; *Ruddiman v. Taylor*, 95 Mich. 547, 55 N. W. 376; *Hatton v. St. Louis*, 264 Mo. 634, 175 S. W. 888; *Kaufman v. Butte*, 48 Mont. 400, 138 Pac. 770; *Pillsbury v. Alexander*, 40 Neb. 242, 58 N. W. 859; *Incorporated Village of Fulton's Lessee v. Mehrenfeld*, 8 Ohio St. 440; *Kee v. Satterfield*, 46 Okla. 208, 149 Pac. 243; *McCoy v. Thompson*, 84 Ore. 141, 164 Pac. 589; *Thorndike v. Milwaukee Auditorium Co.*, 143 Wis. 1, 126 N. W. 881.

65. *Post*, § 486.

66. *Winthrop Harbor v. Gurdies*, 257 Ill. 596, 101 N. E. 199.

67. *City & County of San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 545; *City of Denver v. Denver & S. F. Ry. Co.*, 17 Colo. 583, 31 Pac. 338; *Rhodes v. Town of Brightwood*, 145 Ind. 21, 43 N. E. 942; *Maine v. Bradbury*, 40 Me. 154; *Ogle v. City of Cumberland*, 90 Md. 59, 44 Atl. 1015; *Downend v. Kansas City*,

156 Mo. 60, 56 S. W. 902; *State v. Atherton*, 16 N. H. 203; *Atlantic & S. R. Co. v. State Board of Assessors of New Jersey*, 80 N. J. L. 83, 77 Atl. 609.

68. *City of Los Angeles v. McCollum*, 156 Cal. 148, 23 L. R. A. (N. S.) 378, 103 Pac. 914; *Riley v. Hammel*, 38 Conn. 574; *H. A. Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481; *Town of Kenwood Park v. Leonard*, 177 Iowa, 337, 158 N. W. 655; *Whittington v. Comm'rs of Crisfield*, 121 Md. 387, 88 Atl. 232; *Hayden v. Stone*, 112 Mass. 346; *Mighill v. Town of Rowley*, 224 Mass. 586, 113 N. E. 569; *Price v. Town of Breckenridge*, 92 Mo. 378, 5 S. W. 20; *Buffalo v. Delaware, L. & W. R. Co.*, 190 N. Y. 84, 82 N. E. 513; *Simmons v. Cornell*, 1 R. I. 519; *Spokane v. Security Sav. Soc.*, 82 Wash. 91, 143 Pac. 435; *University of Our Lady of the Sacred Heart v. City of Watertown*, 150 Wis. 505, 137 N. W. 754.

69. *Schmidt v. Spaeth*, 82 N. J. L. 83 Atl. 242; *Pope v. Clarke*,

cided that the death of the dedicator before acceptance nullifies the dedication.⁷⁰

Some of the statutes providing for a dedication by the record of a plat have been construed as not involving any necessity of an acceptance.⁷¹ And according to some decisions there is a presumption of acceptance of a dedication which is beneficial in character,⁷² a view which in effect dispenses with the necessity of an acceptance in such a case. Furthermore, by the weight of authority, a dedication effected by sales with reference to a plat⁷³ cannot be revoked even though there has been no indication of acceptance,⁷⁴ a

122 Md. 1, 89 Atl. 387; *Moore v. Fowler*, 58 Ore. 292, 114 Pac. 472; *Baltimore v. Broumel*, 86 Md. 153, 37 Atl. 648; *Phillips v. Stamford*, 81 Conn. 408, 71 Atl. 361; *Gilder v. City of Brenham*, 67 Tex. 345, 3 S. W. 309.

70. *People v. Johnson*, 237 Ill. 237, 86 N. E. 676; *Chicago M. & St. P. Ry. Co. v. Chicago*, 264 Ill. 24, 105 N. E. 702.

71. *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269; *Osage City v. Larkin*, 40 Kan. 206, 2 L. R. A. 56, 10 Am. St. Rep. 186, 19 Pac. 658; *Keyes v. Excelsior*, 126 Minn. 456, 148 N. W. 501; *Town of Otterville v. Bente*, 240 Mo. 291, 144 S. W. 822; *Weeping Water v. Reed*, 21 Neb. 261, 31 N. W. 797; *Carter v. City of Portland*, 4 Ore. 339; *Sowadzki v. Salt Lake County*, 36 Utah, 127, 104 Pac. 111; *Meachem v. City of Seattle*, 45 Wash. 380, 88 Pac. 628.

72. *Archer v. Salinas City*, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839; *Guthrie v. Town of New Haven*, 31 Conn. 308; *Poole v. Commissioners of Rehoboth*, 9

Del. Ch. 192, 80 Atl. 683; *Abbott v. Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325; *Harrington v. Manchester*, 76 N. H. 347, 82 Atl. 716. See *Phillips v. Stamford*, 81 Conn. 408, 71 Atl. 361.

Such a presumption cannot, it has been suggested exist in the case of a highway, there being liabilities to repair in connection therewith. *Abbott v. Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325; *Wayne County v. Miller*, 31 Mich. 447. But it might, it would seem, even then exist for purposes other than of imposing a liability upon the public. See *Henderson v. Yeaman*, 169 Ky. 503, 184 S. W. 878; *Harrington v. Manchester*, 76 N. H. 347, 82 Atl. 716.

73. *Ante*, § 482, note 56.

74. *Rulolph v. Birmingham*, 188 Ala. 620, 65 So. 1006; *Brookfield v. Block*, 123 Ark. 153, 184 S. W. 419; *Davidow v. Griswold*, 23 Cal. App. 188, 137 Pac. 619; *Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167; *Russell v. Lincoln*, 200 Ill. 511, 65 N. E. 1088; *Louis-*

view which is ordinarily asserted without any attempt to state a reason for such an exception to the ordinary requirement of acceptance, but which is occasionally based on the somewhat unsatisfactory theory that the individual purchasers, by making the purchases, accept in behalf of the public the dedication made by the sales to them.⁷⁵ It would rather seem that it is because of the creation of rights in the individual purchasers, which rights are not subject to subsequent control by the vendor, and of the association which apparently exists between the creation of such individual rights and the asserted dedication in favor of the public,^{75a} that the vendor has been regarded as unable to revoke the dedication thus made.

The acceptance of the dedication may be by formal action on the part of the state or municipality, as representing the public,⁷⁶ but this is not usually necessary.

ville v. Mut. Life Ins. Co., 147 Ky. 141, 738, 143 S. W. 782, 145 S. W. 389; Bartlett v. Bangor, 67 Me. 460; Baltimore v. Frick, 82 Md. 77, 33 Atl. 435; Harrison County Supervisors v. Seal, 66 Miss. 129, 3 L. R. A. 659, 14 Am. St. Rep. 545, 5 So. 622; Shearer v. City of Reno, 36 Nev. 443, 136 Pac. 705; Darling v. Jersey City, 73 N. J. Eq. 318, 67 Atl. 709; Revard v. Hunt, 29 Okla. 835, 119 Pac. 589; Baker City Mut. Irr. Co. v. Baker City, 58 Ore. 306, 110 Pac. 392, 113 Pac. 9; City of Pittsburgh v. Epping Carpenter Co., 194 Pa. 318, 45 Atl. 129; Martinez v. City of Dallas, 102 Tex. 54, 109 S. W. 287, 113 S. W. 1167. *Contra*, Gathright v. State, 129 Ark. 339, 195 S. W. 1069; Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178; Eltinge v. Santos, 171 Cal. 278, 152 Pac. 915; Kimball v. Chicago, 253 Ill. 105,

97 N. E. 257; Rose v. Elizabethtown, 275 Ill. 167, 114 N. E. 14; Steinauer v. Tell City, 146 Ind. 490, 45 N. E. 1056; Clendenin v. Maryland Construction Co. 86 Md. 80, 37 Atl. 709; Canton Co. v. Baltimore, 106 Md. 69, 11 L. R. A. (N. S.) 129, 66 Atl. 681; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600; State v. Hamilton, 109 Tenn. 276, 70 S. W. 619.

75. Sanford v. Meridian, 52 Miss. 383; Christian v. Eugene, 49 Ore. 170, 89 Pac. 419; Highland Realty Co. v. Avondale Land Co., 174 Ala. 326, 56 So. 716.

75a. *Ante*, § 482 notes 61, 62.

76. Little Rock v. Wright, 58 Ark. 142, 23 S. W. 876; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085; White v. Smith, 37 Mich. 291; State v. Atherton, 16 N. H. 203; State v. City of Elizabeth, 35 N. J. L. 359;

Any action on the part of the municipality showing that it has assumed control of the land dedicated is sufficient evidence of acceptance.⁷⁷ Repairs or improvements made by, or under the authority of, officers who have general charge of highways, and power to lay them out, may show an acceptance of the dedication of a highway,⁷⁸ though repairs made by a merely subordinate officer would not have such an effect.⁷⁹ A mere user by the public is sufficient, according to the weight of authority, to justify a finding that there was an acceptance for most purposes,⁸⁰ though not, according to some cases, for the purpose of imposing any burden or

Bellenot v. Richmond, 108 Va. 314, 61 S. E. 785. In Virginia there must, it appears, be an acceptance of record. *Terry v. McClung*, 104 Va. 599, 52 S. E. 355.

77. *Brewer v. City of Pine Bluff*, 80 Ark. 489, 97 S. W. 1034; *Penick v. Morgan County*, 131 Ga. 385, 62 S. E. 300; *People v. Johnson*, 237 Ill. 237, 86 N. E. 676; *Burroughs v. City of Cherokee*, 134 Iowa, 429, 109 N. W. 876; *Mulligan v. McGregor*, 165 Ky. 222, 176 S. W. 1129; *Lyons v. Mullen*, 78 Neb. 151, 110 N. W. 743; *In re Hunter*, 163 N. Y. 542, 57 N. E. 735; *Palmer v. East River Gas Co.*, 115 N. Y. App. Div. 677, 101 N. Y. Supp. 347; *Jeffress v. Town of Greenville*, 154 N. C. 490, 70 S. E. 919; *Cincinnati & L. Ry. Co. v. Carthage*, 36 Ohio St. 631; *Herrington v. Booth & Flinn*, 252 Pa. 70, 97 Atl. 178; *Doyle v. City of Chattanooga*, 128 Tenn. 433, 4 N. C. C. A. 167, 161 S. W. 997; *Spencer v. Arlington*, 49 Wash. 121, 94 Pac. 904.

78. *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269; *Town of Fowler v. Linqvist*, 138

Ind. 566, 37 N. E. 133; *Wright v. Tukey*, 3 Cush. (Mass.) 290; *Kaime v. Harty*, 73 Mo. 316; *Du Bois Cemetery Co. v. Griffin*, 165 Pa. St. 81, 30 Atl. 840; *Folsom v. Town of Underhill*, 36 Vt. 580.

79. *State v. Bradbury*, 40 Me. 154; *White v. Bradley*, 66 Me. 254.

80. *Stewart v. Conley*, 122 Ala. 179, 27 So. 303; *Tranmell v. Bradford*—(Ala.)—73 So. 894; *Hall v. Kauffman*, 106 Cal. 451, 39 Pac. 756; *City of Denver v. Denver & S. F. Ry. Co.*, 17 Colo. 583, 31 Pac. 338; *Phillips v. City of Stamford*, 81 Conn. 408, 22 L. R. A. (N. S.) 1114, 71 Atl. 361; *Parsons v. Trustees of Atlanta University*, 44 Ga. 529; *Consumers' Co. v. Chicago*, 268 Ill. 113, 108 N. E. 1017; *Pittsburg, C. C. & St. Ry. Co. v. Warrum*, 42 Ind. App. 217, 82 N. E. 934, 84 N. E. 356; *Raymond v. Wichita*, 70 Kan. 523, 79 Pac. 323; *Riley v. Buchanan*, 116 Ky. 625, 63 L. R. A. 642, 3 Ann. Cas. 788, 76 S. W. 527; *Cushwa v. Williamsport*, 117 Md. 306, 83 Atl. 389; *Atty. Gen. v. Abbott*, 154 Mass. 323, 13 L. R. A. 251, 28 N.

liability on the municipality.⁸¹ Occasionally the view has been asserted that, in order that acceptance may be inferred from user, for any purpose whatsoever, the user must have continued for the prescriptive period.⁸² And in some cases the question of the sufficiency of user for this purpose has been said to be to a great extent dependent on whether the public convenience would suffer by a cessation of the user.⁸³

E. 346; *Minium v. Solel*,—(Mo.)—183 S. W. 1037; *Cassidy v. Sullivan*, 75 Neb. 847, 106 N. W. 1027; *Schmidt v. Spaeth*, 82 N. J. L. 575, 83 Atl. 242; *Montgomery v. Somers*, 50 Ore. 259, 90 Pac. 674; *Com. v. Moorehead*, 118 Pa. 344, 4 Am. St. Rep. 599, 12 Atl. 424; *Watertown v. Troeh*, 25 S. D. 21, 125 N. W. 501; *Morris v. Blunt*, 49 Utah, 243, 161 Pac. 1127; *Seattle v. Hinckley*, 67 Wash. 273, 121 Pac. 444.

In some states, however, public user is not regarded as sufficient evidence of acceptance, for any purpose. *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966; *Smith v. Smythe*, 197 N. Y. 457, 35 L. R. A. (N. S.) 524, 90 N. E. 1121; *Cincinnati & M. V. R. Co. v. Roseville*, 76 Ohio St. 108, 81 N. E. 178; *Lynchburg Traction & Light Co. v. Guill*, 107 Va. 86, 57 S. E. 644 (*semble*); *Chapman v. Sault Ste. Marie*, 146 Mich. 23, 109 N. W. 53.

81. *Pennick v. Morgan County*, 131 Ga. 385, 62 S. E. 300; *People v. Commissioners*, 52 Ill. 498; *Cochran v. Town of Shepherds-ville*,—(Ky.)—43 S. W. 250; *Mayberry v. Standish*, 56 Me. 342; *Kennedy v. Mayor and City Council of Cumberland*, 65 Md. 514, 57 Am. Rep. 346, 9 Atl. 234;

Ogle v. City of Cumberland, 90 Md. 59, 62, 44 Atl. 1015; *Downend v. Kansas City*, 156 Mo. 60, 51 L. R. A. 170, 56 S. W. 902; *Gilder v. City of Brenham*, 67 Tex. 345, 3 S. W. 309; *Tower v. Rutland*, 56 Vt. 28; *Clarendon v. Rutland R. Co.*, 75 Vt. 6, 52 Atl. 1057; *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 44 S. E. 155; See *Stevens v. Nashua*, 46 N. H. 192. *Contra*, *Ivey v. City of Birmingham*, 190 Ala. 196, 67 So. 506; *Guthrie v. New Haven*, 31 Conn. 308; *Phillips v. Stamford*, 81 Conn. 408, 71 Atl. 361 (*dictum*); *Benton v. St. Louis*, 217 Mo. 687, 129 Am. St. Rep. 560, 118 S. W. 418; *Ackerman v. Williamsport*, 227 Pa. 591, 76 Atl. 421; *Kniss v. Duquesne Borough*, 255 Pa. 417, 100 Atl. 132; *Caston v. City of Rock Hill*, 107 S. C. 124, 92 S. E. 191; *Doyle v. Chattanooga*, 128 Tenn. 433, 161 S. W. 997 (*dictum*).

82. *People v. Johnson*, 237 Ill. 237, 86 N. E. 676; *Whittington v. Comm'rs of Crisfield*, 121 Md. 387, 88 Atl. 232.

83. *Ivey v. City of Birmingham*, 190 Ala. 196, 67 So. 506; *San Francisco v. Carnavan*, 42 Cal. 541; *Benton v. St. Louis*, 217 Mo. 687, 129 Am. St. Rep. 561, 118 S. W. 418; *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275.

The question whether there has been an acceptance is, like that of the offer of dedication, ordinarily one of fact.⁸⁴

It is not infrequently said that the acceptance of a dedication must take place within a reasonable time, or that the public has a reasonable time for acceptance.⁸⁵ What is a reasonable time appears to be a question of fact in each particular case⁸⁶ and is to be determined, to some extent at least, by the necessity or desirability of the public use of the land dedicated, the public being under no obligation to accept the dedication before conditions are ripe for its utilization of the land.⁸⁷ The delay of acceptance, to render it nugatory, must, it has been said, be for such a length of time and under such

84. *City of Hartford v. New York & N. E. R. Co.*, 59 Conn. 250, 22 Atl. 37; *Grube v. Nichols*, 36 Ill. 92; *Flack v. Village of Green Island*, 122 N. Y. 107, 25 N. 267; *Downend v. Kansas City*, 71 Mo. App. 529; *Folsom v. Town of Underhill*, 36 Vt. 580.

85. *People v. Reed*, 81 Cal. 70, 91 Am. Dec. 542, 22 Pac. 474; *Rose v. Elizabethtown*, 275 Ill. 167, 114 N. E. 14; *Town of Kenwood Park v. Leonard*, 177 Iowa, 337, 158 N. W. 655; *Field v. Manchester*, 32 Mich. 279; *Briel v. City of Natchez*, 48 Miss. 433; *Ramstad v. Carr*, 31 N. D. 504, L. R. A. 1916B, 1160, 154 N. W. 195.

86. *H. A. Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481; *Kenwood Park v. Leonard*, 177 Iowa, 377, 158 N. W. 655; *Chafee v. City of Aiken*, 57 S. C. 507, 35 S. E. 800. So it is said that the acceptance of the dedication need not be within any particular time. *Henderson v. Yeaman*, 169 Ky. 603, 184 S. W. 878; *Beale v.*

Takoma Park, 130 Md. 297, 100 Atl. 379.

In *Christopherson v. Incorporated Town of Forest City*, 178 Iowa, 893, 160 N. W. 691, it was held that an acceptance thirty years after the dedication and twenty years after the fencing in of the property was too late. And in *People v. Reed*, 81 Cal. 70, 91 Am. Dec. 542, 22 Pac. 474, a like view was taken of an acceptance twenty-one years after the dedication. And in *Kelley v. Jones*, 110 Me. 360, 86 Atl. 252, of an acceptance eighty years after the dedication.

87. *Lee v. Harris*, 206 Ill. 428, 97 Am. St. Rep. 176, 69 N. E. 230; *McClenehan v. Town of Jesup*, 144 Iowa, 352, 120 N. W. 74; *City of Meridian v. Poole*, 88 Miss. 108, 40 So. 548; *Meier v. Portland Cable Ry. Co.*, 16 Ore. 500, 1 L. R. A. 856, 19 Pac. 610; *City of Ashland v. Chicago & N. W. Ry. Co.*, 105 Wis. 398, 80 N. W. 1101.

circumstances as clearly to indicate an abandonment of any intention to accept the offer of dedication.⁸⁸

Since a municipality has authority, in the ordinary case, to accept a dedication in behalf of the public, the question whether, when the dedication is made by the municipality, an acceptance, by public user or otherwise, is necessary to complete the dedication, is one of some difficulty.^{88a} And the same question may arise in connection with a dedication by the United States or a state.⁸⁹ No clear and harmonious rule appears to exist in this regard.

The question whether the dedication of a highway has been accepted as regards its entire breadth or length by reason of repairs on part only of its breadth or length, or of public user of such part only, would seem to be a question of fact, to be determined with reference to the circumstances of the case, with a presumption perhaps, by the weight of authority, in favor of the acceptance of the whole way as dedicated.⁹⁰

88. *Ramstad v. Carr*, 31 N. D. 504, L. R. A. 1916B, 1160, 154 N. W. 195. And see 129 Am. St. Rep. at p. 619, note to *Benton v. City of St. Louis*.

88a. That acceptance is necessary in such a case, see *San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542; *Curtis v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149; *Board of Trustees of Philadelphia Museums v. Trustees of the University of Pennsylvania*, 251 Pa. 125, 96 Atl. 126. *Contra*, *Attorney Gen. v. Tarr*, 148 Mass. 309, 2 L. R. A. 87, 19 N. E. 358. In *Knox v. Roehl*, 153 Wis. 239, 140 N. W. 1121, it is said that only slight proof of acceptance is necessary in such case.

89. That acceptance is necessary in the case of a dedication

by the United States appears to be assumed in *Wells v. Pennington County*, 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305; *Hatch Bros. Co. v. Black*, 25 Wyo. 109, 165 Pac. 518. So in the case of a dedication by the state. *Reilly v. City of Racine*, 51 Wis. 526, 8 N. W. 417.

90. *People v. Langenoir*,—Cal. App.,—142 Pac. 888; *Ellis v. City of Hazlehurst*, 138 Ga. 181, 75 S. E. 99; *McDonald v. Stark*, 176 Ill. 456, 52 N. E. 37; *Sullivan v. Tichenor*, 179 Ill. 97, 53 N. E. 561; *Village of Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 378; *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883; *Kuehl v. Town of Bettendorf*, 179 Iowa, 1, 161 N. W. 28; *Crosby v. City of Greenville*, 183 Mich. 452, 150 N. W.

In the case of a dedication for streets by the record of a plat, or the sale of lots with reference to a plat, the acceptance of one or more of the streets has occasionally been regarded as involving an acceptance of all, in the absence of a showing of a contrary intention.⁹¹ It has in one state been stated that the acceptance of one street does not show acceptance of all,⁹² and that the acceptance of those streets in one part of the land platted does not show acceptance of those in another part,⁹³ but that the acceptance of the most important streets,⁹⁴ or of most of the streets,⁹⁵ justifies an inference that all have been accepted.

246; *Kennedy v. Le Van*, 23 Minn. 513; *Triplett Twp. v. McPhearson*, 172 Mo. App. 369, 157 S. W. 857; *City of Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318, 45 Atl. 129; *Chaffee v. Aiken*, 57 S. C. 507, 35 S. E. 800. In *Borough of South Amboy v. New York & L. B. R. Co.*, 66 N. J. L. 623, 50 Atl. 368, it is said that the dedication must be accepted in whole, if accepted at all.

On the other hand it has been quite occasionally decided that, in the particular case, an acceptance as to the whole did not result from repairs on, or user of, a part of the land dedicated. *Mobile v. Fowler*, 147 Ala. 403, 41 So. 468; *Hall v. Meriden*, 48 Conn. 416; *Kelsoe v. Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138, 48 S. E. 366; *Theissen v. City of Lewiston*, 26 Idaho, 505, 144 Pac. 548; *Bell v. City of Burlington*, 68 Iowa, 296, 27 N. W. 245; *Wayne County v. Miller*, 31 Mich. 447; *Commonwealth v. Royce*, 152 Pa. St. 88, 25 Atl. 162; *Ashland v. Chicago & N. W.*

Ry. Co., 105 Wis. 398, 80 N. W. 1101.

91. *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230; *Parriott v. Hampton*, 134 Iowa, 157, 111 N. W. 440; *Heitz v. City of St. Louis*, 110 Mo. 618, 19 S. W. 735; *Derby v. Alling*, 40 Conn. 410; *City of Jackson v. Laird*, 99 Miss. 476, 55 So. 41. But see *Kelsoe v. Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138, 48 S. E. 366; *Wolfskill v. Los Angeles County*, 86 Cal. 405, 24 Pac. 1094; *Kennedy v. Mayor and City Council of Cumberland*, 65 Md. 514, 57 Am. Rep. 346, 9 Atl. 234.

92. *Rose v. Elizabethtown*, 275 Ill. 167, 114 N. E. 14; *Casey v. Chicago*, 263 Ill. 147, 104 N. E. 1025.

93. *Chicago, M. & St. P. Ry. Co.*, 264 Ill. 24, 105 N. E. 702.

94. *Kimball v. Chicago*, 253 Ill. 105, 97 N. E. 257; *Dewey v. Chicago*, 274 Ill. 268, 113 N. E. 599.

95. *Consumers' Co. v. Chicago*, 268 Ill. 113, 108 N. E. 1017.

§ 484. **Dedication distinguished from estoppel.** It is frequently asserted that the doctrine of dedication is based upon the theory of estoppel *in pais*, but this would seem to be incorrect.⁹⁶ The doctrine of dedication was recognized earlier than the doctrine of estoppel *in pais*,⁹⁷ and the former doctrine is perfectly comprehensible without reference to the latter. One who indicates, by his course of conduct, an intention to devote his property to public use, thereby effects a dedication, just as one who, by executing an instrument of conveyance in favor of an individual, indicates an intention to transfer to him an estate in land, effects such transfer. In neither case can it properly be said that, because the expression of intention in accordance with legal requirements results in effecting the intention, an estoppel *in pais* is involved. So when it is said, as it occasionally is said, that one whose acts are such as to show an intention to dedicate, is estopped to deny such intention, the introduction of the theory of estoppel appears entirely unnecessary. Such a case involves merely an application of a general rule that, for legal purposes, one's intention is such as his acts would lead a reasonable man to believe to be his intention.⁹⁸ The only case, it is submitted, in which it is at all appropriate to refer to the theory of estoppel in this connection is that, above referred to,⁹⁹ of a dedication by sales with reference to a plat, in which case the dedication appears to be, in some way not explained, a

96. As is well stated in Angell, Highways, § 156.

97. The doctrine of dedication was recognized in express terms in *Lade v. Shepherd*, 2 Strange 1004, an action of trespass, decided *anno* 1735. Estoppel *in pais*, or equitable estoppel, received its first explicit recognition in courts of law in the nineteenth century. See Bigelow, Estoppel, ch. 18, §

2; Ewart, Estoppel, p. 7. As before remarked (*ante*, § 479, note 1a), the doctrine of dedication presumably was recognized in principle, if not by name, early in the history of English law.

98. See 4 Wigmore, Evidence, § 2413.

99. *Ante*, § 482, note 56.

result of the vendor's asserted estoppel, as against the purchasers, to deny the existence of ways and spaces as indicated on the plat.

Although, as just stated, the doctrine of dedication is properly independent of that of estoppel, the fact that the public have been allowed to utilize the land as if it has been dedicated to public use may, under particular circumstances, operate to prevent or estop the owner from interrupting such use. In such a case the court is quite as likely to state that the user of the land by the public for the particular purpose shows a dedication for that purpose, as to say that the landowner is estopped to prevent the continuance of such user. For instance, in the case of land which has been used, without dissent by the owner, for the purpose of a cemetery, a finding of dedication is no doubt usually based, to a considerable extent at least, upon considerations which appertain properly to the doctrine of estoppel rather than to that of dedication. A dedication is found to have been made by reason of circumstances which would properly estop the owner to deny that it was made. For the purpose of the particular case the confusion of the two doctrines is immaterial, but for the purpose of scientific discussion it is much to be deprecated.¹

§ 485. **Qualified and conditional dedication.** A dedication may be made subject to reservations in favor of the dedicator or to restrictions upon the freedom of use of the land by the public. Thus it has been held that a highway may be dedicated, to be used only at certain seasons,² or subject to a right in the dedicator or in others to use the land for certain purposes, or at certain times.³ And the dedication of a highway may be

1. See the admirable discussion in the editorial note in 16 Y. 347, 17 L. R. A. 454, 32 N. E. 78.

Harv. Law Rev. at p. 128.

2. Hughes v. Bingham, 135 N. 5 Q. B. 26; Arnold v. Blaker, L.

3. Mercer v. Woodgate, L. R.

made, not for general highway purposes, but for use by pedestrians only, or for a certain class of vehicles.⁴ But there may be a restriction imposed by the dedicator upon the control or user of the land by the public so far reaching in its nature as to be inconsistent with the very nature and purpose of a dedication.

In cases in which land was dedicated for a highway, a reservation, in favor of the dedicator, of a right to locate and maintain, or to enable others to locate and maintain, railway tracks in the highway, has ordinarily been regarded as valid,⁵ while on the other hand a general reservation of the control of public utilities in connection with the highway has not been upheld.⁶ A stipulation that the public user of the highway shall be subject to certain specific restrictions on the power to remove trees or grass from parts of the land has been supported.⁷ A provision, in connection with the dedication, that the municipality shall make certain improvements has been given effect as a condition

R. 6 Q. B. 433; *City of Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1, 29 N. E. 484; *City of Dubuque v. Benson*, 23 Iowa, 248; *Atlantic City v. Associated Realities Corp.* 73 N. J. Eq. 721, 17 Ann. Cas. 743, 70 Atl. 345; *City of Cohoes v. President, etc., Delaware & H. Canal Co.*, 134 N. Y. 397, 31 N. E. 887.

4. *Stafford v. Coyney*, 7 Barn. & C. 257; *Home Laundry Co. v. Louisville*, 168 Ky. 479, 182 S. W. 645; *Hemphill v. Boston*, 8 Cush. (Mass.) 195; *Tyler v. Sturdy*, 108 Mass. 196; *Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696.

5. *Noblesville v. Lake Erie & W. Ry. Co.*, 130 Ind. 1, 29 N. E. 484; *Arn v. Chesapeake & O. Ry.*, 171 Ky. 157, 188 S. W. 340;

Ayres v. Pennsylvania R. Co., 48 N. J. L. 44, 57 Am. Rep. 538, 3 Atl. 885; 52 N. J. L. 405, 20 Atl. 54; *Tallon v. Hoboken*, 59 N. J. L. 383, 60 N. J. L. 212, 37 Atl. 895; *Oklahoma City & T. R. Co. v. Dunham*, 39 Tex. Civ. 575, 88 S. W. 849. And so, apparently, a reservation of a right to place a canal in the highway may be valid. *City of Cohoes v. President, etc. Delaware & H. Canal Co.*, 134 N. Y. 397, 31 N. E. 887.

6. *Jones v. Carter*, 45 Tex. Civ. App. 450, 101 S. W. 514; *Bradley v. Spokane & I. E. R. Co.*, 79 Wash. 455, 140 Pac. 688.

7. *Avis v. Borough of Vine-land*, 56 N. J. L. 474, 23 L. R. A. 685, 28 Atl. 1039; *Young v. Landis*, 73 N. J. L. 266, 62 Atl. 1133.

precedent to the vesting of rights in the public,⁸ as has a provision that other owners of land shall dedicate for the same public purpose.⁹ A stipulation relieving the dedicator from liability for any part of the cost of adapting the land to the public use has been upheld.¹⁰

That a stipulation in favor of the dedicator, made at the time of dedication, is invalid, does not ordinarily invalidate the dedication.¹¹ But a stipulation for a right to revoke the dedication has been regarded as showing an intention not to dedicate.¹² And there is evidently no dedication when the owner of the land retains the power to determine in the future what part of the land shall be devoted to the public use.¹³

Although, by a statutory dedication, the ownership of the land dedicated would otherwise be vested in the municipality,¹⁴ the dedicator may, it has been decided, by an express provision on the plat, retain the ownership, a right of user merely being vested in the public,¹⁵ and he may, likewise, it seems, expressly retain the minerals in the land dedicated,¹⁶ the ownership of which would otherwise be vested in the municipality.¹⁷

8. *People v. Williams*, 64 Cal. 498, 2 Pac. 393; *Jenkins County v. Dickey*, 139 Ga. 91, 76 S. E. 856.

9. *Peoples' Gas Light & Coke Co. v. Chicago*, 255 Ill. 612, 99 N. E. 703; *St. Louis v. Meier*, 77 Mo. 13; *Jacobs Pharmacy Co. v. Luckie*, 143 Ga. 457, 85 S. E. 332.

10. *Perth Amboy Trust Co. v. Perth Amboy*, 75 N. J. L. 291, 68 Atl. 84. See the comments on this case in 21 Harv. Law Rev. at p. 357. Compare *Richards v. Cincinnati*, 31 Ohio St. 506.

11. *City of Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1, 29 N. E. 484; *Des Moines v. Hall*, 24 Iowa, 234; *Richards v. Cincinnati*, 31 Ohio St. 506; *Riddle v. Town*

of Charlestown, 43 W. Va. 796, 28 S. E. 831; *State v. Spokane St. Ry. Co.*, 19 Wash. 518, 41 L. R. A. 515, 67 Am. St. Rep. 739, 53 Pac. 719.

12. *San Francisco v. Canavan*, 42 Cal. 541.

13. *Niagara Falls Suspension Bridge v. Bachman*, 66 N. Y. 261.

14. *Ante*, § 482, note 64.

15. *Dubuque v. Benson*, 23 Iowa, 248.

16. *Brown v. City of Carthage*, 128 Mo. 10, 30 S. W. 312; *Dubuque v. Benson*, 23 Iowa, 248.

17. *Des Moines v. Hall*, 24 Iowa, 234; *Zinc Co. v. City of La Salle*, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; *Hawesville v. Hawes' Heirs*, 6 Bush. (Ky.)

§ 486. **Effect of dedication.** A common law dedication for highway purposes,¹⁸ or even for a park, common, or square,¹⁹ does not affect the ownership of the land, but merely gives to the public a right of user therein. When, however, land is dedicated for a purpose which excludes the idea of its use by any and every individual, as in the case of a dedication for a school, church, or cemetery, the corporation or association which carries out the purpose of the dedication must have an exclusive control of the land which is practically equivalent to possession thereof.²⁰ In some states the view has been taken that in the case of land dedicated for a park,²¹ or even for a highway,²² the municipal corporation which controls the land so dedicated in behalf of the public has a right of possession therein which entitles it to maintain ejectment against an intruder thereon, a view which is not entirely satis-

232. But see *Leadville v. Bohn Mining Co.*, 37 Colo. 248, 8 L. R. A. (N. S.) 422, 11 Ann. Cas. 443, 86 Pac. 1038.

18. *Lade v. Shepherd*, 2 Strange 1004; *City of San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542; *Robbins v. White*, 52 Fla. 613, 42 So. 841; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Farwell v. Chicago*, 247 Ill. 235, 93 N. E. 168; *Wilder v. City of St. Paul*, 12 Minn. 192; *Charleston Rice Milling Co. v. Bennett*, 18 S. C. 254.

19. *Cincinnati v. White*, 6 Pet. (U. S.) 431, 8 L. R. A. 452; *Attorney General v. Abbott*, 154 Mass. 323, 13 L. R. A. 251, 28 N. E. 346; *Porter v. International Bridge Co.*, 200 N. Y. 234, 93 N. E. 716; *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 207; *Raleigh County Sup'rs v. Ellison*, 8 W. Va. 303.

20. It has accordingly been

decided that one who has dedicated land for a cemetery has thereafter no such right to possession of the land as to be entitled to maintain ejectment. *Campbell v. City of Kansas*, 102 Mo. 326, 10 L. R. A. 593, 13 S. W. 897; *Hunter v. Trustees of Sandy Hill*, 6 Hill. (N. Y.) 407.

21. *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696; *Price v. Plainfield*, 40 N. J. L. 608.

22. *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; *City and County of San Francisco v. Grote*, 120 Cal. 59, 41 L. R. A. 335, 65 Am. St. Rep. 155, 52 Pac. 127; *Lee v. Harris*, 203 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230; *Winona v. Huff*, 11 Minn. 119; *Hoboken Land & Improvement Co. v. Hoboken*, 36 N. J. L. 540; *Ocean Grove*

factory from the standpoint of principle.²³ It is somewhat difficult to see how a mere right of user in the public can confer on the municipality a right of possession, sufficient to sustain ejection, it being conceded that a private individual having a mere right of user, that is, an easement, can have no such right of possession. Even though the public right of user is of such character and extent as entirely to preclude any user of the land by the dedicator, or by his successor in interest, it seems desirable, for the purpose of legal theory, to deny the element of possession to a mere right of using the land.

The statutes in regard to dedication by the recording of a plat frequently provide that the ownership of the land, and not a mere right of user, shall be vested in the municipality in trust for the public.²⁴ Under such a statute the title to the land is properly to be regarded as passing by way of grant or conveyance, rather than by way of dedication, as the term was understood at common law. The statute makes the plat in effect a conveyance of the land which purports to be devoted to public use.

Whether the ownership or merely a right of user is vested in the public, the land cannot be aliened by

Camp Meeting Ass'n v. Berthall, 481, 50 Am. Rep. 149, 21 N. W. 63 N. J. L. 312, 43 Atl. 887. 520.

23. For contrary decisions, see *Savannah v. Steamboat Co.*, R. M. Charl. (Ga.) 342; *Covington v. Freking*, 8 Bush. (Ky.) 121; *Bay County v. Bradley*, 39 Mich. 133, 33 Am. Rep. 367; *Canton Co. v. City of Baltimore*, 106 Md. 69, 66 Atl. 679, 11 L. R. A. (N. S.) 129, 67 Atl. 274; *Southampton v. Betts*, 163 N. Y. 454, 57 N. E. 762; *Street Comm'rs v. Taylor*, 1 Brev. (S. C.) 129; *Racine v. Crotsenberg*, 61 Wis.

24. See *Leadville v. Bohn Min. Co.*, 37 Colo. 248, 86 Pac. 1038; *Gebhardt v. Reeves*, 75 Ill. 301; *City of Pella v. Scholte*, 21 Iowa, 463; *Hutchinson v. Danley*, 88 Kan. 437, 129 Pac. 163; *Village of Grandville v. Jenson*, 84 Mich. 54, 47 N. W. 600; *City of Winona v. Huff*, 11 Minn. 119; *Carroll v. Elmwood*, 88 Neb. 352, 129 N. W. 537; *Incorporated Village of Fulton's Lessee v. Mehrenfeld*, 8 Ohio St. 140.

the public authorities to individuals,²⁵ nor used for purposes other than those for which it was dedicated.²⁶

A use of the land by the public authorities for purposes other than those contemplated in the dedication will be restrained upon the application of owners of other land injured by such change of use,²⁷ and a suit for this purpose may be maintained by the dedicator, it seems, in case the ownership of the land is still in him,²⁸ but not if, under the statute, the owner-

25. *Douglass v. City Council of Montgomery*, 118 Ala. 599, 43 L. R. A. 376, 24 So. 745; *Rudolph Herman Co. v. City and County of San Francisco*, 154 Cal. 688, 99 Pac. 169; *City of Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479; *Trustees of August v. Perkins*, 3 B. Mon. (Ky.) 437; *Cummings v. City of St. Louis*, 90 Mo. 259, 2 S. W. 130; *Haberly v. Treadgold*, 67 Ore. 425, 136 Pac. 334; *Corporation of Seguin v. Ireland*, 58 Tex. 183.

26. *Western Railway of Ala. v. Alabama G. T. R. Co.*, 96 Ala. 272, 17 L. R. A. 474, 11 So. 483; *Arkansas River Packet Co. v. Sorrels*, 50 Ark. 466, 8 S. W. 683; *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 36 L. R. A. (N. S.) 185, 117 Pac. 906; *Lutterloh v. Town of Cedar Keys*, 15 Fla. 306; *Ward v. Field Museum*, 241 Ill. 496, 89 N. E. 731; *East Chicago Co. v. East Chicago*, 171 Ind. 654, 87 N. E. 17; *Hopkinsville v. Jarrett*, 156 Ky. 777, 162 S. W. 85; *Codman v. Crocker*, 203 Mass. 146, 89 N. E. 177; *Board of Regents for Normal School-Dist. No 3 v. Painter*, 102 Mo. 464, 10 L. R. A. 493, 14 S. W. 938; *Trustees of*

Methodist Episcopal Church of Hoboken v. City of Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; *Louisville & N. R. Co. v. Cincinnati*, 76 Ohio St. 481, 81 N. E. 983; *Church v. Portland*, 18 Ore. 73, 6 L. R. A. 259.

27. *Douglass v. City Council of Montgomery*, 118 Ala. 599, 43 L. R. A. 376, 24 So. 745; *Lutterloh v. City of Cedar Keys*, 15 Fla. 306; *Strange v. Hill & West Dubuque St. Ry. Co.*, 54 Iowa, 669, 7 N. W. 115; *Price v. Thompson*, 48 Mo. 363; *Dodge v. North End Improvement Ass'n*, 189 Mich. 16, Ann Cas. 1918E, 485, 155 N. W. 438; *Rowzee v. Pierce*, 75 Miss. 846, 40 L. R. A. 402, 65 Am. St. Rep. 625, 23 So. 307; *Huber v. Gazley*, 18 Ohio, 18, 3 Ohio St. 399; *Church v. City of Portland*, 18 Ore. 73; *Morrow v. Highland Grove Traction Co.*, 219 Pa. 619, 123 Am. St. Rep. 677, 69 Atl. 41; *Clement v. City of Paris*, 107 Tex. 200, 175 S. W. 672.

28. *Hardy v. City of Memphis*, 10 Heisk. (Tenn.) 127; *Rowzee v. Pierce*, 75 Miss. 846, 40 L. R. A. 402, 65 Am. St. Rep. 625, 23 So. 307. But see *Thorndike v. Milwaukee Auditorium Co.*, 143 Wis. 1, 126 N. W. 881.

ship of the land is in the public.²⁹

In case a right of user only is vested in the public, an abandonment of the right has the effect of leaving the land free from the burden thereof, in the original dedicator or those claiming under him.³⁰ And even when, under the statute, the ownership is vested in the public, if the authorities entirely relinquish the use of the land, or the use for which the land was dedicated becomes impossible, the land has been held to revert to the original dedicator, or to persons claiming under him.³¹

A mere failure on the part of the public to exercise the right of user, or the cessation of such exercise, does not show an abandonment,³² nor is an improper

29. United States v. Illinois C. R. Co., 154 U. S. 225, 38 L. Ed. 971; Thorndike v. Milwaukee Auditorium Co., 143 Wis. 1, 126 N. W. 881. *Contra*, Warren v. City of Lyons City, 22 Iowa, 351.

30. Mahoning County Comr's v. Young, 8 C. C. A. 27, 59 Fed. 96; Matthews v. Bloodworth, 111 Ark. 545, 165 S. W. 263; Olin v. Denver & R. G. R. Co., 25 Colo. 177, 53 Pac. 454; Benham v. Potter, 52 Conn. 248; Robbins v. White, 52 Fla. 613, 42 So. 841; Bayard v. Hargrove, 45 Ga. 342; Thomsen v. McCormick, 136 Ill. 135, 26 N. E. 373; Town of Freedom v. Norris, 128 Ind. 377, 27 N. E. 869; Kitzman v. Greenhalgh, 164 Iowa, 166, 145 N. W. 505; Baltimore & O. R. Co. v. Gould, 67 Md. 60, 8 Atl. 754; Briel v. City of Natchez, 48 Miss. 423; Tracy v. Bittle, 213 Mo. 202, 112 S. W. 45; Porter v. International Bridge Co., 200 N. Y. 234, 93 N. E. 716; Rowe v. James, 71 Wash. 267, 128 Pac. 539.

31. Hill v. Kimball, 269 Ill. 398, 110 N. E. 18; Board of Sup'rs of Kent County v. City of Grand Rapids, 61 Mich. 144, 27 N. W. 888; Gaskins v. Williams, 235 Mo. 563, 139 S. W. 117; City of Newark v. Watson, 56 N. J. L. 667, 24 L. R. A. 843, 29 Atl. 487; Heard v. City of Brooklyn, 60 N. Y. 242; Board of Education of the Incorporated Village of Van Wert v. Inhabitants of Van Wert, 18 Ohio St. 221, 98 Am. Dec. 114; Haberly v. Treadgold, 67 Ore. 425, 136 Pac. 334; State v. Travis County, 85 Tex. 435, 21 So. 1029; Sowadzki v. Salt Lake County, 36 Utah, 127, 104 Pac. 111.

32. Santa Ana v. Santa Ana Valley Irr. Co., 163 Cal. 211, 124 Pac. 847; Chicago R. I. & P. Ry. v. Council Bluffs, 109 Iowa, 425, 80 N. W. 564; Gardarl v. Humboldt, 87 Kan. 41, 123 Pac. 764; Rowan v. Portland, 8 B. Mon. (Ky.) 232; Briel v. Natchez, 48 Miss. 423; Smith v. State, 23 N. J. L. 712; Spencer

use of the land by the public authorities sufficient in itself to terminate the rights of the public therein.³³

v. Peterson, 41 Ore. 257, 68 Pac. 519; Pittsburg v. Epping-Carpenter Co., 194 Pa. St. 318, 45 Atl. 129; Hogan v. Jamestown, 32 R. I. 528, 80 Atl. 271; Basic City v. Bell, 114 Va. 157, Ann. Cas. 1914A, 1031, 76 S. E. 336; Olson Land Co. v. City of Seattle, 76 Wash. 142, 136 Pac. 118; Lins v. Seefield, 126 Wis. 610, 105 N. W. 917.

33. Barclay v. Howell, 6 Pet. (U. S.) 498, 8 L. R. A. 478; McAlpine v. Chicago Great West-

ern R. Co., 68 Kan. 207, 64 L. R. A. 85, 1 A. & E. Ann. Cas. 452, 75 Pac. 73; Parker v. City of St. Paul, 47 Minn. 317, 50 N. W. 347; Goode v. City of St. Louis, 113 Mo. 257, 20 S. W. 1048; Williams v. First Presbyterian Soc. in Cincinnati, 1 Ohio St. 478; Hardy v. City of Memphis, 10 Heisk. (Tenn.) 127; Thorndike v. Milwaukee Auditorium Co., 143 Wis. 1, 126 N. W. 881.

CHAPTER XXII.

INTESTATE SUCCESSION.

- § 487. General considerations.
- 488. Descent to issue.
- 489. Surviving consort as heir.
- 490. Parent as heir.
- 491. Descent to collateral kindred.
- 492. Kindred of the half blood.
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- 499. Disinheritance.

§ 487. **General considerations.** At common law, the real property belonging to decedents passed, in the absence of a valid will,¹ to persons standing in a position of blood relationship to them, according to certain established rules or “canons” of descent.² Personal property, on the other hand, including chattels real, passed to the administrator, appointed by the ecclesiastical court from among the intestate’s next of kin, who usually, whether rightly or wrongly, appropriated to his own use all the surplus after payment of debts,³ until by statute it was provided that such surplus should be distributed, in a certain manner, to the widow and children, or, in default of children, to the next of kin.⁴

In this country, the common-law distinction between real and personal property in this regard is still re-

1. But a will was valid, except by particular custom, only after the Statute of Wills. See *ante*, § 466.

208 *et seq.*

3. Blackst. Comm. 515; Holdsworth & Vickers Law of Succession, 132.

2. Litt. §§ 2-8; 2 Bl. Comm. 4. 22 & 23 Car. II. c. 10.

tained in perhaps a majority of states, though in some the executor is empowered, upon receiving authority from the court, to sell real property for the payment of debts.⁵ In some states the statute provides that real property shall pass to the personal representative, to be administered by him in the same manner as personal property,⁶ and there is a growing tendency to obliterate the distinctions between the two classes of property as regards the powers of the executor or administrator in redarg thereto. Generally, moreover, in this country, the persons to whom the real property passes upon the death of the owner intestate are approximately the same as those entitled to the personal property when distributed by the personal representative.

The original rule at common law was that the right of succession was determined by relationship to the "first purchaser," as he was termed, meaning thereby the person who in theory, at least, brought the land into the family, but who might as well have been termed the last purchaser, as being the person who last acquired the land otherwise than by descent. In course of time, when land had been in the same family for several generations, it frequently became difficult satisfactorily to identify such purchaser, and the courts came to regard relationship to the person last seised in deed of the land as sufficient for this purpose, on a presumption apparently to the effect that a person related to the person last seised was ordinarily likewise related, in the same line of descent, to the first purchaser.⁷ And so it is usually said that, at common law,

5. *Post*, § 552.

6. Woerner, Administration, §§ 276, 337; 1 Dembitz, Land Titles, § 28; 11 Am. & Eng. Enc. Law, 1037 *et seq.*

7. Watkins, Descents (4th ed.) 11, 2 Blackst. Comm. 228, and Chitty's note to same on p. 209; Leake, Prop. in Land, 60.

The common-law rule that seisin in deed makes the root of descent, in connection with the rule that persons of the half blood could not inherit, received what was regarded as its typical exemplification in the following case: If, on the death of a father seised in fee simple, leav-

the person claiming land by descent must have shown that he was heir to the person who was last actually seised of the land. Nevertheless, if one acquired land by purchase, although he did not acquire the actual seisin, as for instance a devisee who failed to enter, his heir could take by descent to the exclusion of the heir of the person last actually seised.⁸

The present English statute provides that descent shall always be traced from the last purchaser^{8a} while in this country, in most, if not all, the states, descent is traced from the person last entitled to the land, regardless of whether he was seised, or whether he acquired the land by purchase or by descent.⁹

At common law, as in England at the present day, the male issue inherits before the female, and, when there are two or more males of equal degree, the elder alone inherits, while females inherit all together. These rules, in so far as they give priority to the male issue, and to the eldest of such issue, have been changed in all the states of this country, and all those in the same degree of relationship, whether male or female, share equally in the inheritance, the legislation in this country having followed in this respect, as it has frequently done in other respects, the provisions of the English statute as to the distribution of personal property.¹⁰

ing a son and a daughter by a first marriage, and a son by a second marriage, the elder son, the heir, entered and obtained seisin, and then died without issue, his half brother could not inherit, but the land passed to the sister, while, if he did not enter, the land would pass to the half brother. Hence the maxim, "*Possessio fratris de feodo simplici facit sororem esse haeredem*," and the rule that seisin in deed is necessary to make the root of descent was frequently

referred to as the doctrine of "*possessio fratris*." See Litt. § 8; Williams, Seisin, 55; Challis, Real Prop. 241.

8. Watkins, Descents (4th ed.) 29, 32; Hubback, Succession, 114.

8a. 3 & 4 Wm. IV. c. 106, "The Inheritance Act."

9. 4 Kent's Comm. 388; Greenleaf's Cruise's Dig. tit. 29, ch. 3; Dembitz, Land Titles, § 30.

10. 4 Kent's Comm. 379; 1 Stimson's Am. St. Law, § 3101. Occasionally a naked legal title

— **Reversions and remainders.** Since at common law descent was traced either from the person last actually seised, or from the last purchaser, it followed that if a reversion or remainder subject to a particular estate of freehold was cast upon an heir, such heir did not, unless he did acts changing the course of descent, constitute a root of descent, in case of his death while the particular estate was still outstanding, but the person claiming as heir upon his death was required to trace his descent from the original reversioner or remainderman, as being the last purchaser, and it was the person who was the heir of the latter at the time of the termination of the particular estate who was then entitled to possession.¹¹ A like rule applied in the case of an executory devise, that person being entitled who could show himself the heir of the original devisee at the time of the vesting.¹²

The common-law rule in this regard was recognized and applied in a number of states,¹³ but even in those states, as in others, it has, for the most part, been superseded, owing to the statutory changes in the law of descent, with the result that a reversion or remainder, which passes to one by descent, subsequently passes, on

still descends as at common law. As to estates tail, see *ante*, § 30.

11. Watkins, Law of Descents (14th Ed.) 130; Cruise, Digest. tit. 29, ch. 4, § 1 *et seq.*

12. Goodright v. Searle, 2 Wils. 29; Doe v. Hutton, 3 Bos. & Pull. 643; Watkins, Law of Descents, 132; Fearn, Cont. Rem. 561.

13. Buck v. Lantz, 49 Md. 439; Conner v. Waring, 52 Md. 724; Jenkins v. Bonsal, 116 Md. 629, 82 Atl. 229; Payne v. Rosser, 53 Ga. 662; Jackson v. Hilton, 16 Johns. (N. Y.) 96; Lawrence v. Pitt, 46 N. Car. 344; King v.

Scoggin, 92 N. Car. 99, 53 Am. Rep. 410.

In Barnitz v. Casey, 7 Cranch 456, and Garrison v. Hill, 79 Md. 75, 47 Am. St. Rep. 363, 28 Atl. 1062, it is said that he is entitled who makes himself heir at the time when the contingency happens. That is so in the case of an executory interest, as in the first of the above cited cases, because it is then that the interest falls into possession, but it would not seem to be so in the case of a contingent remainder, unless the vesting and the termination of the particular estate occur at the same time,

his death intestate, to his heirs, without regard to the ancestor from whom he inherited.¹⁴

— **Devise to heir.** In case one undertakes to devise to his heir exactly the same interest in particular land as the latter would take by descent, he is regarded as taking by descent and not by the devise, descent being regarded as the worthier title.¹⁵ So if one having an estate in fee simple undertakes to devise an estate for life to one person with remainder in fee simple thereon to his, the testator's, heir at law, the latter, instead of taking an estate in remainder under the devise, takes an estate in reversion by descent.¹⁶ That the devise is subject to a charge of some sort does not affect the application of the rule.^{16a} But if the devise undertakes to give to the heir an estate in a larger or smaller share of the land than would have passed to him by descent, he takes under the devise.^{16b}

In case the property would, apart from the devise, pass by descent to two or more persons to hold jointly,

as in the second of the above cited cases. At common law the general doctrine applied to a vested as well as to a contingently remainder.

14. *Kean v. Hoffecker*, 2 Harr. (Del.) 103, 29 Am. Dec. 336; *Oliver v. Powell*, 114 Ga. 592, 40 S. E. 826; *North v. Graham*, 235 Ill. 178, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189, 85 N. E. 267; *Miller v. Miller*, 10 Metc. (Mass.) 393; *Cook v. Hammond*, 4 Mason, 467; *Moore v. Rake*, 26 N. J. L. 574; *Barber v. Brundage*, 169 N. Y. 368, 62 N. E. 417; *Early v. Early*, 134 N. C. 258, 46 S. E. 503; *Hicks v. Pegues*, 4 Rich. Eq. (S. C.) 413.

15. *Watkins*, Law of Descents (4th Ed.) 229; *Co. Litt.* 12b, *Hargrave's note*; *Jost v. Jost*, 1 Mackey (Dist. Col.) 487; *David-*

son v. Koehler, 76 Ind. 398; *Tyler v. Fidelity & Columbia Trust Co.* 158 Ky. 280, 164 S. W. 939; *Medley v. Williams*, 7 G. & J. (Md.) 70; *Ellis v. Page*, 7 Cush. (Mass.) 161; *Felton v. Billups*, 2 Dev. & B. (19 N. Car.) 308; *Seabrook's Exors. v. Seabrook*, 1 McMul. Eq. (S. C.) 201; *Hoover's Lessee v. Gregory*, 10 Yerg. 444.

16. *Watkins*, Law of Descents (4th Ed.) 221; *Barr v. Gardner*, 259 Ill. 256, 102 N. E. 287; *Stellwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240; *Donnelly v. Turner*, 60 Md. 81; *Whitney v. Whitney*, 14 Mass. 88.

16a. *Clark v. Smith*, 1 Salk. 241; *Ellis v. Page*, 7 Cush. (Mass.) 161; *Kinney v. Glasgow*, 53 Pa. 141.

the question whether a devise of the property to those persons would be operative depends primarily on whether, in that particular jurisdiction, joint heirs take as coparceners or as tenants in common.^{16c} If joint heirs take as coparceners, such persons named as joint devisees take under the devise and not by descent, since the devise creates a tenancy in common or joint tenancy, and cannot create a holding in coparcenery,^{16d} while if joint heirs take as tenants in common, a devise to them jointly, if not in such form as to create a joint tenancy, is nugatory as creating the same interest in each of them as he would acquire by descent.¹⁷

§ 488. **Descent to issue.** In all the states, realty descends to all the legitimate children of deceased living at his death, and to the descendants of deceased children, these latter taking *per stirpes*, and not *per capita*, that is, the descendants of each child taking what their ancestor would have taken had he been alive, without reference to their number.¹⁸ In case all the children of the intestate are dead, the grandchildren and issue of deceased grandchildren inherit in their place. Such descendants take *per stirpes* if they are not all in the same degree of relationship to the intestate, as when some are grandchildren and some are great-grandchildren, while, if they are all in the same degree of relationship, they take in some states *per capita*, though in other states *per stirpes*.¹⁹

16b. *Landie v. Simmons*, 1 300, 12 S. E. 753; *McAfee v. App. D. C.* 507; *McDaniel v. Allen*, 64 Miss. 417, 1 So. 356; *McKay v. Hendon*, 7 N. C. 209.

16c. *Ante*, § 193.

16d. *Watkins, Law of Descent* (4th Ed.) 233; *Anon. Cro. Eliz.* 431, pl. 6; *Gilpin v. Hollingsworth*, 13 Md. 190, 56 Am. Dec. 737; *Biedler v. Biedler*, 87 Va.

300, 12 S. E. 753; *McAfee v. Gilmore*, 4 N. H. 391.

17. See *Trustees of University v. Holstead*, 4 N. Car. 289.

18. 1 *Stimson's Am. St. Law*, § 3101.

19. 1 *Stimson's Am. St. Law*, §§ 3103, 3137; 1 *Dembitz, Land Titles*, § 33.

§ 489. **Surviving consort as heir.** At common law, the surviving husband was entitled to an estate by curtesy in his wife's real property,²⁰ while he took an absolute interest in her personal property, including chattels real.²¹ Apart from his estate by curtesy, her real property did not pass to him, even though otherwise it escheated for failure of heirs. In this country, at the present day, the surviving husband is frequently given a fee-simple interest in his wife's real property. In some, he is, if the wife leaves no issue, given a fee-simple interest in all her realty, while in some he is given one-half or two-thirds of her realty in such case. In a number of states, although there are children, he takes a share by descent, which is greater or less, according to the number of children who are to share in the intestate's property. In some states, moreover, he takes all the realty, if the wife leaves no issue, parent, or brother or sister, and in most, if not in all, the states, he takes it if she leaves no kindred.²²

The surviving wife had, at common law, her right of dower only out of his realty, while, by the English statute of distribution, she was given one-third of his personalty, unless he left no issue, in which case she had one-half.²³ In this country the widow is frequently, by statute, given a fee-simple interest in a portion of her husband's realty in certain contingencies, as when he leaves no issue, or no issue, parent, or brother or sister, or when he leaves no kindred, her rights corresponding, in a general way, to those of a surviving husband.²⁴ In a number of states, moreover, she is given a third or a half in fee simple, even though her husband leaves

20. Ante, §§ 237-245.

Dembitz, Land Titles, § 32.

21. Co. Litt. 351; 2 Blackst. Comm. 434.

23. 2 Blackst. Comm. 515,

22. 1 Stimson's Am. St. Law, §§ 3105, 3109, 3115, 3119, 3123; 1 Woerner, Administration, § 66; 1

24. 1 Stimson's Am. St. Law, §§ 3109, 3115, 3119, 3123; 1 Woerner, Administration, § 67; 1 Dembitz, Land Titles, § 32.

issue,²⁵ and this she is frequently allowed to take in lieu of any provisions made for her in his will.²⁶

§ 490. **Parent as heir.** At common law, land could never lineally ascend, that is, it could not pass to the father or grandfather of the decedent upon the latter's death, though it could pass to his uncle, the brother of his father, and might from him pass to the father.²⁷ This rule has been entirely changed in this country, and the statute frequently provides that the decedent's property shall pass to his father or mother in certain cases. Thus, in some states it is provided that, if the intestate leave no descendants, his property shall pass to his father, or to the father or mother, or to the mother, together with brothers and sisters, though in some states the brothers and sisters of deceased are preferred to either of his parents.²⁸

§ 491. **Descent to collateral kindred.** In case the intestate leaves no issue surviving, and the realty does not pass entirely to the surviving consort, or to one or both of the parents, under the statutes referred to above, it descends among the collateral kindred of the intestate, that is, to persons not lineally related to him, but related by reason of the fact that they are descended from the same ancestor. Among such collateral kindred the brothers and sisters and their descendants hold the first place, and are sometimes, by the terms of the statute, preferred to the parents of deceased.²⁹

Generally, as between collateral kindred not particularly specified in the statute of descent, those standing

25. 1 Stimson's Am. St. Law, § 3105.

26. 1 Stimson's Am. St. Law, § 3262; see *ante*, § 236.

27. Litt. § 3. Different explanations of the origin of this rule have been given. See 2 Blackst. Comm. 211 *et seq.*; 2 Pollock & Maitland, Hist. Eng.

Law, 287 *et seq.*; Holdsworth & Vickers, Law of Succession, 152.

28. 1 Stimson's Am. St. Law, §§ 3107, 3111, 3117; 1 Woerner, Administration, § 68.

29. 1 Stimson's Am. St. Law, §§ 3107, 3111, 3113, 3121.

in an equal degree of relationship to the intestate share the inheritance to the exclusion of those in a more distant degree. In the majority of the states, the statute provides that the degrees of kinship shall be computed according to the rule of the civil law, though a few have adopted that of the canon law, sometimes referred to as that of the common law.³⁰ The preference shown for the civil law is in accord with the general tendency to follow the English statute of distributions, which was construed with reference to the civil law rule.³¹ The difference between the two rules is as follows. The canon law regarded the intestate and a particular claimant as in the degree of relationship to one another which corresponded to the number of degrees between their common ancestor and the one of his two descendants who was most distant from him, so that if the claimant and intestate were both grandchildren of the common ancestor, they were related to one another in the second degree, while, if one was a grandchild and the other a great-grandchild, they were related in the third degree. By the civil-law method of computing relationship, on the other hand, the degrees between the common ancestor and the intestate were added to those between the former and the claimant, in order to ascertain the degree of relationship; and so two grandchildren of a common ancestor were related in the fourth degree, and a grandchild and a great-grandchild in the fifth degree.³² The canon law rule was utilized by the ecclesiastical courts for the purpose of determining the validity of marriage between blood relatives, but does not appear ever to have been recognized in England by the common law courts.³³ It has never in that country been applied for the purpose of determining rights of inheritance,

30. 1 Stimson's Am. St. Law, §§ 3121, 3139; 1 Woerner, Administration, § 72.

31. Lloyd v. Tench, 2 Ves. Sr. 212; 1 Williams, Executors (9th

Ed.) 355.

32. 2 Blackst. Comm. 206 *et seq.*

33. See Christian's note to 2 Blackst. Comm. 207.

for the reason that these have always been ascertained, as between collateral kindred, upon the principle of representation, according to which the lineal descendants of any person deceased stand in the place in which such person would have stood if he had been living.³⁴

§ 492. Kindred of the half blood. At common law, in order that one might inherit as a collateral kinsman of the intestate, it was necessary that they both be descended not only from the same person, but from the same marriage of that person, that is, the claimant must have been a kinsman of the whole, and not of the half, blood. So, one could not inherit from his half brother, even though the land had descended from their common parent to such half brother, and though otherwise the land would escheat for want of heirs.³⁵ This rule has been changed by statute in most, if not all, the states, but the statutory provisions on the subject are very divergent. In a few states, kindred of the half blood are given the same rights of succession as those of the whole blood; and in some they inherit half shares only as against the whole shares passing to those of the whole blood. In a number of states, while the distinction between the whole and half blood no longer exists in connection with land purchased by the intestate, it does exist as to ancestral land, so as to exclude from any share therein collateral kin not of the blood of the ancestor from whom the land was derived.^{35a} In a few states kindred of the half blood do not take except in default of kindred of the whole blood in the same degree of relationship.³⁶ In the absence of any reference to the matter of whole or half blood, the statute has al-

34. *Post*, § 493.

35. Litt. §§ 6-8; 2 Blackst. Comm. 227.

35a. *Post*, § 494.

36. 1 Stimson's Am. St. Law, § 3133; 1 Woerner, Administra-

tion, § 70; 1 Dembitz, Land Titles, § 37. The cases on the subject are collected in editorial notes 29 L. R. A. 552, 26 L. R. A. N. S. 603, L. R. A. 1916C, 923.

most invariably been construed to apply without reference to such a distinction.³⁷

§ 493. **Representation.** The common law doctrine was that the lineal descendants of a person deceased represent the latter, that is, stand in the place, for purposes of inheritance from another, in which the deceased person would have stood had he survived.³⁸ In this country, since the statutes expressly give the right of inheritance to the direct descendants of the intestate, and declare whether they are to take *per stirpes* or *per capita*, the application of the doctrine of representation is not usually called for in their favor. As regards collateral kindred, there is in some states a general provision that the descendants of any person deceased shall inherit the estate which such person would have inherited had he survived the intestate, but more usually the right of representation is in terms restricted to descendants of a deceased brother or sister. Thus, if the intestate left surviving a brother and the children of a deceased sister, though such children could not otherwise assert any right to share the intestate's property with the surviving brother, since he stands in a closer degree of relationship to the intestate, they can do so by reason of their right of representation of the intestate.³⁹ In either case, descendants of a deceased brother or sister of the intestate stand in the place of such brother or sister as

37. *In re Lynch's Estate*, 132 Cal. 214, 64 Pac. 284; *Ector v. Grant*, 112 Ga. 557, 53 L. R. A. 723, 37 S. E. 984; *Aldridge v. Montgomery*, 9 Ind. 302; *Anderson v. Bell*, 140 Ind. 375, 29 L. R. A. 541, 39 N. E. 735; *Neely v. Wise*, 44 Iowa, 544; *Clay v. Cousins*, 1 T. B. Mon. (Ky.) 75; *Sheffield v. Lovering*, 12 Mass. 489; *Rowley v. Stray*, 32 Mich. 70; *Prescott v. Carr*, 29 N. H.

453, 61 Am. Dec. 632; *Beebee v. Griffing*, 14 N. Y. 235; *Stockton v. Frazier*, 81 Ohio St. 227, 90 N. E. 168; *Edwards v. Barksdale*, 2 Hill Eq. 416; *Baker v. Chalfant*, 5 Whart. 477; *Lynch's Appeal*, 132 Pa. St. 422, 19 Atl. 281; *Marlow v. King*, 17 Tex. 177. 38. 2 Blackst. Comm. 217. 39. 1 Stimson's Am. St. Law, § 3138.

regards the right to share with any surviving brothers and sisters of the intestate or descendants of other deceased brothers and sisters. In some states the right of representation is not conceded to all descendants of a deceased brother or sister, but is restricted to the children of such brother or sister, the result of which would be, in the case stated above, that the surviving brother would take all the intestate's property, to the exclusion of the grandchildren of the deceased sister, though the children of the deceased sister would have been entitled had they survived.^{39a} A statute providing that no representation shall be allowed beyond the degree of brothers' and sisters' children precludes all persons not so closely related from taking by representation. Under such a statute, for instance, uncles and aunts take to the exclusion of the children of deceased uncles and aunts.⁴⁰ But a statute thus limiting representation within certain degrees of kindred does not limit inheritance within those degrees, that is, persons beyond those degrees, if all in the same degree of kindred to the intestate, may take as heirs without reference to the doctrine of representation.⁴¹

Ordinarily, if the statute expressly provides that certain classes of relatives shall take by representation, that doctrine cannot apply in favor of others.⁴² And a provision that the property shall, in a certain con-

39a. 1 Woerner, Administration, § 71; 1 Dembitz, Land Titles, § 35.

40. Porter v. Askew, 11 Gill. & J. 346; Clary v. Watkins, 64 Neb. 386, 89 N. W. 1042; Johnston v. Chesson, 6 Jones Eq. (59 N. C.) 146. And first cousins to the exclusion of children of first cousins. Adee v. Campbell, 79 N. Y. 52; *In re Clendaniel's Estate*, 12 Phila. 54.

41. Hoffman v. Watson, 109 Md. 532, 72 Atl. 479.

42. Curry's Estate, 39 Cal. 529; Quinby v. Higgins, 14 Me. 309; Bigelow v. Morong, 103 Mass. 287; *In re Chapoton's Estate*, 104 Mich. 11, 53 Am. St. Rep. 454, 61 N. W. 892; Douglas v. Cameron, 47 Neb. 358, 66 N. W. 430; Clayton v. Drake, 17 Ohio St. 367; Brennenman's Appeal, 40 Pa. St. 115; North v. Valk, Dud. Eq. (S. C.) 212; *In re Robert's Estate*, 84 Wash. 163, 146 Pac. 398.

tingency, descend to the next of kin "in equal degree," has ordinarily been construed as excluding any right, in those who are not next of kin, to share, by way of representation, with those who are next of kin.⁴³

The doctrine of representation, as applied when there are claimants in different degrees of relationship to the intestate serves, so far as it may be available under the statute, to prevent the exclusion of the claimants of the more remote degree from all share in the intestate's property. When all the claimants are in the same degree, they are all equally the intestate's next of kin, and consequently they may all share in the intestate's property without reference to the doctrine of representation. Whether, in such case, they take by way of representation or purely in their own right may however be important for the purpose of determining whether they take *per stirpes* or *per capita*.⁴⁴ If, for instance, the nephews and nieces of the intestate are to be regarded as taking by way of representation, the children of each brother or sister take together their parents share, that is, they take *per stirpes*, while if they do not take as representing their parent, they take *per capita*. The statutes fixing the course of descent have more usually been construed as calling for the application of the doctrine of representation only when the claimants are of unequal degree, and not when they are all of the same degree, the result of such construction being that, in the latter case, they take *per capita*.

43. *In re Nigro's Estate*, 172 Cal. 474, 156 Pac. 1019; *Van Cleve v. Van Fossen*, 73 Mich. 342, 41 N. W. 258; *Conant v. Kent*, 130 Mass. 178; *Douglas v. Cameron*, 47 Neb. 358, 66 N. W. 430; *Schenck v. Vail*, 24 N. J. Eq. 538; *In re Sullivan's Estate*, 48 Wash. 631, 94 Pac. 483, 95 Pac. 71.

44. See *Garrett v. Bean*, 51 2 R. P.—45

Ark. 52, 9 S. W. 435; *Houston v. Davidson*, 45 Ga. 574; *Cox v. Cox*, 44 Ind. 368; *Doane v. Freeman*, 45 Me. 113; *McComas v. Amos*, 29 Md. 132; *Balch v. Stone*, 149 Mass. 39, 20 N. E. 322; *Ernst v. Freeman's Estate*, 129 Mich. 271, 88 N. W. 636; *Jones v. Barnett*, 30 Tex. 637; 2 Blackst. Comm. 417.

and not *per stirpes*.⁴⁵ A different construction has, however, occasionally been placed on a particular statute.⁴⁶ In some states there is a specific provision that when all those entitled are of the same degree of kindred to the intestate, they shall take *per capita*.⁴⁷

§ 494. **Ancestral lands.** At common law, in case of failure of lineal descendants of the person last seised, the land passed to his collateral relations only when they were of the blood of the first purchaser, by whom the land was brought into the family.⁴⁸ This rule of the common law survives to some extent in the statutory provisions, found in a number of states, to the effect that, if the land came to the intestate either by descent, or by gift or devise from an ancestor, or sometimes, "on the part of" or "from" his father or mother, it shall pass to such kindred as are of the blood of the ancestor from whom it was derived by him.⁴⁹ The statutes of this

45. *Byrd v. Lipscomb*, 20 Ark. 19; *Houston v. Davidson*, 45 Ga. 574; *In re Nigro's Estate*, 172 Cal. 474, 156 Pac. 1019; *Baker v. Bourne*, 127 Ind. 466, 26 N. E. 1078; *Snow v. Snow*, 111 Mass. 389; *Nichols v. Shepard*, 63 N. H. 391; *Staubitz v. Lambert*, 71 Minn. 11, 73 N. W. 511; *Eshleman's Appeal*, 74 Pa. St. 42; *Fisk v. Fisk*, 60 N. J. Eq. 195, 46 Atl. 538; *Wagner v. Sharp*, 33 N. J. Eq. 520; *Miller's Appeal*, 40 Pa. St. 387; *Stent v. McLeod*, 2 McCord Eq. (S. C.) 354; *Davis v. Rowe*, 6 Rand. (Va.) 355; *Ball v. Ball*, 27 Gratt. (Va.) 325.

46. *McComas v. Amos*, 29 Md. 132; *Odam v. Caruthers*, 6 Ga. 39; *Crump v. Faucett*, 70 N. C. 345; *Jackson v. Thurman*, 6 Johns. (N. Y.) 322.

The English statute of Distri-

bution has been construed as giving the property to the direct descendants of the intestate, when in equal degree, *per stirpes*, and to the collateral relatives, when in equal degree, *per capita*. *Lloyd v. Tench*, 2 Ves. Sen. 213; *Re Ross's Trusts*, L. R. 13 Eq. 286; *In re Natt*, 37 Ch. Div. 517.

47. 1 Stimson's Am. St. Law, § 3137. See *Ellis v. Harrison*, 140 N. C. 444, 53 S. E. 299; *Witherspoon v. Jernigan*, 97 Tex. 98, 76 S. W. 445; *Moore v. Conner*—(Va.)—, 20 S. E. 936.

48. Litt. § 4; 2 Blackst. Comm. 220. See *ante*. § 487. Thus, if A purchased land and it descended to his son B, who was seised, and B died without issue, the land descended to such collateral relatives of B only as were of the blood of A.

49. 1 Stimson's Am. St. Law,

general character differ to so great an extent in their phraseology that any general statements with reference thereto are difficult, if not impossible, to make.^{49a} In some the exclusion of collateral kindred not of the blood of the ancestor from whom the property was derived applies only as between kindred in equal degree, and in some only in case there is a relative of the blood of that ancestor within a certain degree named, and in some it excludes the kindred not of the ancestor's blood in favor of any existing kindred of his blood, though not ordinarily, by the terms of the statute, to the extent of allowing the property to escheat for failure of heirs.⁵⁰

The statutes have ordinarily been construed as restricting the right of inheritance to the blood of the ancestor from whom the land passed directly to the intestate, and not to the blood of the ancestor who first brought the property into the family, as at common law.⁵¹

When the statute speaks of a gift or devise from an ancestor, the expression "ancestor" might reasonably, it would seem, be construed as referring to a person from whom the donee or devisee did actually inherit, or would have inherited had the gift or devise not been made, rather than as referring to one from whom he

§ 3101; 1 Dembitz, Land Titles, § 36.

49a. The cases construing the statutes in this regard are most conveniently collected in note to L. R. A. 1916C, 902 *et seq.* See also editorial note 15 Columbia Law Rev. 526.

50. That the property does not escheat, see *State University v. Brown*, 1 Ired. L., 23 N. Car. 387; *Dowell v. Thomas*, 13 Pa. St. 41; *Parr v. Bankhart*, 22 Pa. St. 291.

51. *Gardner v. Collins*, 2 Pet. (U. S.) 58, 7 L. Ed. 347; *Clark*

v. Shailer, 46 Conn. 119; *Smith v. Croom*, 7 Fla. 81; *Murphy v. Henry*, 35 Ind. 442; *Cutter v. Waddingham*, 22 Mo. 206; *Den v. Jones*, 8 N. J. L. 340; *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Hyatt v. Pugsley*, 33 Barb. (N. Y.) 373; *Clayton v. Drake*, 17 Ohio St. 367; *Whlte v. White*, 19 Ohio St. 531; *Morris v. Potter*, 10 R. I. 58; *Arnold v. O'Connor*, 397 R. I. 557, L. R. A. 1916C, 898, 94 Atl. 145. *Contra*, *Lewis v. Gorman*, 5 Pa. St. 164; *Wilkinson v. Bracken*, 2 Ired. L. (24 N. C.) 315.

might have inherited had some other heir not intervened.⁵² For instance, the fact that the person who devised the land to the intestate was his uncle or his cousin, so that, had the latter not left a brother surviving, the property would have come to the intestate by descent, would not seem to make such testator the ancestor of the intestate within the meaning of the statute. A brother or sister may be an ancestor within such a provision.⁵³ That the statute provides for the descent of property, in a certain contingency, from husband to wife, or from wife to husband, has in at least one state been regarded as not making the one consort the ancestor of the other, for the purpose of the statutes referred to.⁵⁴

In case the legal and equitable titles to the land in question came to the intestate from different sources, it is the source of the legal title, rather than of the equitable, which determines whether it is to be regarded as coming from a particular ancestor.⁵⁵ But the fact that the ancestor paid for the land, or that it was paid for from his estate, has been regarded as making it a gift to the intestate from the ancestor, though it was conveyed by the vendor directly to the intestate.⁵⁶

52. Such construction was adopted in *Burgwyn v. Devereux*, 1 Ired. Law (23 N. C.) 583; *Osborne v. Widenhouse*, 3 Jones Eq. (56 N. C.) 238. But in *Greenlee v. Davis*, 19 Ind. 60, the word "ancestor" was construed as equivalent to "kindred." And to that effect is *Hostetler v. Peters*, 94 Ohio 17, 113 N. E. 656.

53. *Benedict v. Brewster*, 14 Ohio, 368; *Cutter v. Waddingham*, 22 Mo. 206.

54. *Brower v. Hunt*, 18 Ohio St. 311; *Stembel v. Martin*, 50 Ohio St. 495. *Contra*, *Cornett v. Hough*, 136 Ind. 387, 35 N. E.

699.

55. *Goodright v. Wells*, Dougl. 771; *Selby v. Alston*, 3 Ves. Jr. 339; *Hill v. Heard*, 104 Ark. 23, 42 L. R. A. (N. S.) 446, Ann. Cas. 1914C, 403, 148 S. W. 254; *Wells v. Head*, 12 B. Mon. (Ky.) 166; *Nicholson v. Halsey*, 1 Johns. Ch. (N. Y.) 417; *Higgins v. Higgins*, 57 Ohio St. 239, 48 N. E. 943; *Russell v. Bruer*, 64 Ohio St. 1; *Shepard v. Taylor*, 15 R. I. 204, 3 Atl. 382, 16 R. I. 166, 13 Atl. 105.

56. *Galloway v. Robinson*, 19 Ark. 396; *Cotton v. Citizens' Bank*, 97 Ark. 568, 135 S. W. 346; *Frick Coke Co. v. Longhead*,

Generally speaking, land acquired by means of ancestral land, as by purchase with the proceeds of the sale of the latter,⁵⁷ or by exchange,⁵⁸ is not ancestral. But ancestral land would not ordinarily lose its character as such because a partition thereof between the heirs is effected.⁵⁹ If one who owns land which came to him from an ancestor conveys it to another and takes a reconveyance back, the land will ordinarily lose its ancestral character and pass, on his death intestate, as having been newly acquired by him.⁶⁰

Of somewhat the same nature as the statutory provisions above referred to, as making the course of descent dependent upon the source of the intestate's title, are the provisions found in a number of states to the effect that, upon the death of a minor unmarried, leaving property which came from either parent, by descent or, in some states, by gift or devise, it shall descend to the other children of the same parent, or to the issue of such children.⁶¹ The effect of a statute of this character has in several cases been said to be to make the property pass to the surviving children as by descent, not from the deceased child, but from the parent,

203 Pa. 168, 52 Atl. 172. *Contra*, ante, § 203.

Patterson v. Lamson, 45 Ohio St. 77. Compare Carter v. Day, 59 Ohio St. 96, 69 Am. St. Rep. 757, 51 N. E. 967.

57. Watson v. Thompson, 12 R. I. 466; Martin v. Martin, 98 Ark. 93, 135 S. W. 348. See Adams v. Anderson, 23 Miss. 705; Cornett v. Hough, 136 Ind. 387.

58. Armington v. Armington, 28 Ind. 74; Brower v. Hunt, 18 Ohio St. 311.

59. Martin v. Martin, 98 Ark. 93, 135 S. W. 348; Conkling v. Brown, 8 Abb. Pr. N. S. (N. Y.) 345; Lawson v. Townley, 90 Ohio, 67, 106 N. E. 780. See

60. Co. Litt. 12b; Watkins, Law of Descents (4th Ed.) 241 *et seq*; Holme v. Shinn, 62 N. J. Eq. 1, 49 Atl. 151; Kihlken v. Kihlken, 59 Ohio St. 106, 69 Am. St. Rep. 757, 51 N. E. 967; Nesbitt v. Trindle, 64 Ind. 183. But see Dudrow v. King, 117 Md. 182, 83 Atl. 34, and the editorial note thereon, 12 Columbia Law Rev. 625.

61. 1 Stimson's Am. St. Law, § 3101; 1 Dembitz, Land Titles, § 36. See *In re Van Orsdol's Estate*, 94 Neb. 98, 142 N. W. 686; and editorial note, L. R. A. 1916C, at p. 926.

as if such child had died in the parent's lifetime.⁶² But nevertheless it has been occasionally decided that property which came, by force of the statute, to the deceased minor child—upon the death of another deceased minor child, did not come from the deceased parent, so as to be within the operation of the statute.⁶³ The statute does not apply when the property came from a grand parent and not from a parent,⁶⁴ and when it in terms applies only to property acquired by descent, it does not apply to property acquired by devise.⁶⁵

§ 495. **Illegitimate children.** At common law, a child born out of wedlock was regarded as *filius nullius*, and as consequently bearing no relationship to any persons other than his own offspring. Consequently he could be the heir neither of his own father or mother, nor of any other person, and no persons could inherit from him except the heirs of his body.⁶⁶ This rule has been changed generally in this country by various statutory provisions. In the first place, the state statute frequently provides that the intermarriage of the parents after the birth of the child, or such intermarriage when accompanied by the father's acknowledgment of the child, shall render the child legitimate, and in some states the acknowledgment by the father without intermarriage has this effect, subject to the proviso, usually, that an acknowledgment of the child shall not enable the child to inherit from the kindred of the father.⁶⁷

62. *In re North's Estate*, 48 Conn. 583; *Nash v. Cutler*, 16 Pick. (Mass.) 491; *Crowell v. Clough*, 23 N. H. 207; *Perkins v. Simons*, 28 Wis. 90; *In re Fort's Estate*, 14 Wash. 10, 44 Pac. 104.

63. *Driskell v. Hanks*, 18 B. Mon. (Ky.) 855; *Goodrich v. Adams*, 138 Mass. 552; *Walkers v. Boaz*, 2 Rob. (Va.) 485. *Contra*, *Perkins v. Simons*, 28 Wis. 90.

64. *Walden v. Phillips*, 86 Ky. 302, 5 S. W. 757; *Sedgwick v. Minot*, 6 Allen (Mass.) 171; *Whitten v. Davis*, 18 N. H. 88.

65. *Donahue's Estate*, 36 Cal. 329; *Nash v. Cutler*, 16 Pick. (Mass.) 491; *Burke v. Burke*, 34 Mich. 451.

66. 1 Blackst. Comm. 459; 2 Kent's Comm. 212.

67. 1 Stimson's Am. St. Law, §§ 6631, 6632. There is an ex-

In most states, by statute, the illegitimate children inherit from the mother equally with the legitimate children, and in some states they inherit also from her kindred, though in a majority of the states, while inheriting from the mother, they do not inherit from her kindred. In a few states they inherit from the mother only in case of default of lawful issue.⁶⁸ The property of an illegitimate child will descend to the surviving husband or wife, or to the children, as in the case of any other person dying intestate. In default of such others entitled to inherit, the decedent's property goes usually, under the statute, to the mother and the latter's kindred.⁶⁹

§ 496. **Unborn children.** At common law, a child *en ventre sa mere* at the time of the death of the intestate, if subsequently born alive, is regarded as living at the time of such death, for the purpose of taking from him by descent,⁷⁰ this according with a general rule that such a child is to be regarded as living when it is to its interest so to regard it.⁷¹ The common law rule has been applied in a number of decisions in this country,⁷² occasionally subject to the qualification that not only must the child be born alive, but the period of its

cellent summary of the statutes, with references to some of the decisions thereon, in 1 Dembitz. Land Titles, §§ 39, 40. See also 27 Am. & Eng. Encyc. Law (2nd Ed.) 327.

68. 1 Stimson's Am. Law, § 3151; 1 Woerner, Administration, § 75.

69. 1 Stimson's Am. St. Law, § 3154; 1 Woerner, Administration, § 75.

70. Watkins, Law of Descents, ch. 4; Challis, Real Prop. (3rd Ed.) 139.

71. See Doe d. Clarke v. Clarke, 2 H. Pl. 399; Gray Perpetuities, § 220; Williams, Real Prop. (21st Ed.) 363. See for a general discussion of the status of such a child, editorial note 26 Harv. Law Rev. 638.

72. Morrow v. Scott, 7 Ga. 535; Barr v. Gardner, 259 Ill. 256, 102 N. E. 287; Massie v. Hiatt's Adm'r, 82 Ky. 314; Aubuchon v. Bender, 44 Mo. 560; Giles v. Solomon, 10 Abb. Prac. (N. S.) 97; Hill v. Moore, 1 Murph. (5 N. C.) 233; Pearson v. Carlton, 18 S. C. 47.

foetal existence must have been such that its continuance in life may be reasonably anticipated,⁷³ and in a number of states the common law rule has been confirmed by statute.⁷⁴ In many states, however, the statute in terms provides for inheritance by posthumous children only who are the children of the intestate, or, in some, who are descended from him.⁷⁵ A statute thus excluding posthumous children other than children of the intestate has been construed to exclude only those born after the death of the intestate, and not to exclude a relative previously born merely because he happened to have been born after the death of his own father.⁷⁶

A child which was *en ventre sa mere* at the time of the intestate's death, and entitled to take by descent from him, cannot be divested of his interest, it has been held, by a proceeding to which he was not a party, even though the decree therein was rendered before his birth.⁷⁷

The case of descent to a child *en ventre sa mere* at the time of the intestate's death presents one case of what has been referred to as the doctrine of shifting inheritances, by which, as it was recognized at common law, the estate of the person who was next in the line of descent at the time of the intestate's death was liable to be divested in favor of one subsequently born who was nearer in the line of descent.⁷⁸ In so far as descent to a child *en ventre sa mere* at the time of the intestate's death is recognized, the inheritance necessarily shifts,

73. *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442;; *Harper v. Archer*, 4 Sm. & M. (Miss.) 99, 43 Am. Dec. 472; *Marsellis v. Thalhimier*, 2 Paige 35, 21 Am. Dec. 66.

74. 1 *Stimson's Am. St. Law* § 3136.

75. 1 *Stimson's Am. St. Law*, §§ 2844, 3135, 3136; 1 *Woerner, Administration*, § 74.

76. *Shriver v. State*, 65 Md.

278, 4 Atl. 679.

77. *Botsford v. O'Conner*, 57 Ill. 72; *Massie v. Hiatt*, 82 Ky. 314; *Giles v. Solomon*, 10 Abb. Pr. N. S. 97; *Deal v. Sexton*, 144 N. C. 157, 119 Am. St. Rep. 943, 56 S. E. 691.

78. 2 *Blackst. Comm.* 208; 3 *Cruise's Dig.* tit. 29 ch. 3, § 11; *Watkins, Law of Descents*, 169, 185.

either partially or wholly, upon his subsequent birth. But in several cases in this country the doctrine of shifting inheritances has been repudiated, in so far as it was asserted in favor of a person born after the intestate's death who was not at the time of such death *en ventre sa mere*.⁷⁹ Occasionally the statute provides that no child born after the intestate's death shall take by descent unless born within ten months thereafter.⁸⁰

§ 497. **Adopted children.** The statutes authorizing the adoption of children quite frequently contain express provisions as to inheritance both by and from an adopted child.⁸¹ Apart from any such express provision, the effect of the adoption is ordinarily to entitle the child to inherit from the adoptive parent as if he were the latter's own child,⁸² and to entitle the child of the adopted child to inherit from the adoptive parent.⁸³ But the statutes do not ordinarily operate to give to the adopted child a right to inherit from the kindred of the adoptive parent,⁸⁴ they frequently containing an ex-

79. *Bates v. Brown*, 5 Wall. (U. S.) 710, 18 L. Ed. 535; *Cox v. Matthews*, 17 Ind. 367; *Drake v. Rogers*, 13 Ohio St. 21; *Melton v. Davidson*, 86 Tenn. 129, 5 S. W. 530. The doctrine was formerly recognized in North Carolina. *Cutlar v. Cutlar*, 2 Hawkes (9 N. C.) 324, but was superseded by the act of 1823. *Rutherford v. Green*, 2 Ired. Eq. (37 N. C.) 121.

80. 1 Stimson's Am. St. Law, § 3136.

81. 1 Stimson's Am. St. Law, § 6647.

82. *Re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *Barnes v. Allen*, 25 Ind. 222; *Merritt v. Morton*, 143 Ky. 133, 33 L. R. A. (N. S.) 139, 136 S. W. 133; *Virgin v. Marwick*, 97

Me. 578, 55 Atl. 520; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Morrison v. Estate of Session's*, 70 Mich. 297, 14 Am. St. Rep. 500, 38 N. W. 249; *Rowan's Estate*, 132 Pa. 299, 19 Atl. 82. See editorial note 5 Virginia Law Rev. 349.

83. *In re Darling's Estate*, 173 Cal. 221, 159 Pac. 606; *Pace v. Klink*, 51 Ga. 220; *Gray v. Holmes*, 57 Kan. 217, 33 L. R. A. 207, 45 Pac. 596; *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683; *Herrick's Estate*, 124 Minn. 85, 144 N. W. 455; *Bernero v. Goodwin*, 267 Mo. 427, 184 S. W. 14; *Batchelder v. Walworth*,—(Vt.)—82 Atl. 7; See *In re Webb's Estate*, 250 Pa. 179, 95 Atl. 419.

84. *Van Matre v. Sankey*, 148 Ill. 536, 23 L. R. A. 665, 39 Am.

PLICIT provision to this effect. The adopted child may, it has been held, inherit from his natural parent as he would have done had he never been adopted.⁸⁵ But there are decisions to the effect that one cannot inherit from the adoptive parent both as an adopted child and as a blood relative of such parent.⁸⁶

St. Rep. 196, 36 N. E. 628; Wallace v. Noland, 246 Ill. 535, 138 Am. St. Rep. 247, 92 N. E. 535; Barnhizel v. Ferrell, 47 Ind. 335; Sunderland's Estate, 60 Iowa, 732, 13 N. W. 655; Merritt v. Morton, 143 Ky. 133, 33 L. R. A. (N. S.) 139, 136 S. W. 133; Van Derlyn v. Mack, 137 Mich. 146, 66 L. R. A. 437, 109 Am. St. Rep. 669, 100 N. W. 278, 4 Ann. Cas. 879; Hockaday v. Lynn, 200 Mo. 456, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775, 98 S. W. 585; Meader v. Archer, 65 N. H. 214; Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753; Burnett's Estate, 210 Pa. 599, 69 Atl. 74; Batcheller-Durkee v. Batcheller, 39 R. I. 45, 97 Atl. 378; Helms v. Elliott, 89 Tenn. 446, 10 L. R. A. 535, 14 S. W. 930; Moore v. Moore, 35 Vt. 98. "The ancestors of the adopter are presumed to know their relatives by blood, and to have them in mind in the distribution of their estates, either by will or descent, but they cannot be expected to keep informed as to adoption proceedings in the probate court of the counties of this state; and to allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of unheard-of adopted children, contrary to the wishes

and expectations of such ancestors." Burket, J., in Phillips v. McConica, 59 Ohio St. 1, 69 Am. St. Rep. 753.

85. Barnhizel v. Farrell, 47 Ind. 335; Wagner v. Warner, 50 Iowa, 532; Clarkson v. Hatton, 143 Mo. 47, 39 L. R. A. 748, 65 Am. St. Rep. 635, 44 S. W. 761; Upson v. Noble, 35 Ohio St. 655; Compare *dicta* in *Re Jobson's Estate*, 164 Cal. 312, 43 L. R. A. (N. S.) 1062, 128 Pac. 938; *Re Havsgord's Estate*, 34 S. D. 131, 147 N. W. 378. That the adopted son may inherit from his natural grandfather, see *In re Darling's Estate*, 173 Cal. 221, 159 Pac. 606.

In Indiana it has been decided that a child adopted by a husband during his former marriage was a child "by a previous wife" within a statute giving a share in his estate to such a child. Markover v. Krauss, 132 Ind. 294, 17 L. R. A. 806, 31 N. E. 1047; Patterson v. Browning, 146 Ind. 160, 44 N. E. 993.

An adopted child of a deceased devisee has been regarded as "an heir in a descending line" of such devisee within a statutory provision substituting such heir in place of the deceased devisee, so as to prevent a lapse. Clark v. Clark, 76 N. H. 551, 85 Atl. 758; Warren v. Prescott, 84 Me. 483, 17 L. R. A. 435, 30 Am. St.

As regards inheritance from the adopted child, it is occasionally provided by the statute that property acquired by him by gift, devise or descent from the adoptive parent shall pass, upon his death intestate and without issue, to such parent, and in some states that property otherwise acquired by him shall so pass.⁸⁷ There is at least one decision to the effect that, even in the absence of any statutory provision in this regard, all property of the child, in such case, passes to the adoptive parent, to the exclusion of his blood relatives.⁸⁸ There are, on the other hand, decisions that all his property passes to his own kindred to the exclusion of the adoptive parent,⁸⁹ such a view being occasionally based on the fact that the statute, providing in terms that the adopted child should be heir of the adoptive parent, and being silent as to any right of inheritance by the latter, impliedly excluded any such rights.⁹⁰ In some states

Rep. 370, 24 Atl. 948. And in *Riley v. Day*, 88 Kan. 503, 129 Pac. 524 it was held that the adopted child of a deceased child of decedent was "living issue" of such deceased child within a statute providing for descent to living issue of a deceased child.

86. *Morgan v. Reel*, 213 Pa. 81, 62 Atl. 253; *Billings v. Head*, 184 Ind. 361, 111 N. E. 177; *Delano v. Bruerton*, 148 Mass. 619, 2 L. R. A. 698, 20 N. E. 308; *Contra*, *Wagner v. Varner*, 50 Iowa, 532. As regards the effect of a second adoption by another person upon the child's right to inherit from him who first adopted him, see editorial notes, 31 Harv. Law Rev. 488; 16 Mich. Law Rev. 119; 5 Virginia Law Rev. 349, commenting on *In re Klapp's Estate*, 197 Mich. 615, 164 N. W. 381, in which it was decided that the right to inherit

under the first adoption was destroyed. *Contra*, *Patterson v. Browning*, 146 Ind. 160, 44 N. E. 993.

87. 1 Stimson's Am. St. Law, § 6649.

88. *In re Jobson's Estate*, 164 Cal. 312, 43 L. R. A. (N. S.) 1062, 128 Pac. 938.

89. *White v. Dotter*, 73 Ark. 130, 83 S. W. 1052; *Russell v. Jordan*, 58 Colo. 445, 147 Pac. 693; *In re Namaun*, 3 Hawaii, 484; *Baker v. Clowser*, 158 Iowa, 156, 43 L. R. A. (N. S.) 1056, 138 N. W. 837; *Fisher v. Browning*, 107 Miss. 729, Ann. Cas. 1917C, 466, 66 So. 132; *Reinders v. Koppelman*, 68 Mo. 482, 494; *Edwards v. Yearby*, 168 N. C. 663, L. R. A. 1915E, 462, 85 S. E. 19; *Upson v. Noble*, 35 Ohio St. 655; *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617.

90. *Corn v. Powell*, 16 W. N.

it is the law that an adoptive parent or his kindred shall take such property as passed to the child from the adoptive parent, while the blood relatives take property which he acquired otherwise.⁹¹

The right of inheritance, acquired by a child's adoption in one state will, it has been held, be recognized in another state, in so far as this right is not inconsistent with the laws and policy of the latter state.⁹²

§ 498. Advancements. An advancement is a giving, by anticipation, to a child or other relative, of a part or the whole of what the donee would receive on the death of the donor intestate, with the result, generally speaking, that the amount thereof is deducted in determining the share of such donee after the donee's death. A substantially similar doctrine was recognized at common law, in the case of land given to one of several co-heiresses to hold in frank marriage, she being excluded from any share in the ancestor's land unless she brought the land given her into a common fund for equal distribution, this being known as "hotchpot."⁹³

C. (Pa.) 297; *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617.

91. See *Swick v. Coleman*, 218 Ill. 33, 75 N. E. 807; *Lanferman v. Van Zile*, 150 Ky. 751, 150 S. W. 1008; *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617; *Humphries v. Davis*, 100 Ind. 274.

In *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788, *Paul v. Davis*, 100 Ind. 422, overruling *Barnhizel v. Ferrell*, 47 Ind. 335, it was decided that property which descended to the adopted child from the adoptive parent descended to the latter's kindred, the question of the descent of property otherwise acquired being expressly left undecided.

92. *Woodward's Appeal*, 81 Conn 152, 70 Atl. 453; *Van*

Matre v. Sankey, 148 Ill. 536, 23 L. R. A. 665, 39 Am. St. Rep. 196. 36 N. E. 628; *Schick v. Howe*, 137 Iowa, 249, 14 L. R. A. (N. S.) 980, 114 N. W. 916; *Gray v. Holmes*, 57 Kan. 217, 33 L. R. A. 207, 45 Pac. 596; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Fisher v. Browning*, 107 Miss. 729, Ann. Cas. 1917C, 466, 66 So. 132; *Anderson v. French*, 77 N. H. 509, 93 Atl. 1042, L. R. A. 1916 A, 660; *Finley v. Brown*, 122 Tenn. 316, 25 L. R. A. (N. S.) 1285, 123 S. W. 359. See *Calhoun v. Bryant*, 28 S. Dak. 266, 133 N. W. 266. *Contra*, *Brown v. Finley*, 157 Ala. 424, 21 L. R. A. N. S. 679, 131 Am. St. Rep. 68, 47 So. 577.

93. 2 Blackst. Comm. 190. As

Frank-marriage was, however, practically obsolete even in Blackstone's time,⁹⁴ and the modern law of advancements is based exclusively on statutes, which differ somewhat in different states.⁹⁵

In most states the statute applies in terms to a gift to any descendant of the intestate, but a statute applying in terms to a gift to a child only has been construed as extending to a gift to another descendant.⁹⁶

The statutes of many states provide that if the person to whom the advancement was made dies before the intestate, his representatives shall stand in his place as regards the advancement, that is, will take subject to the deduction thereof as the ancestor would have done.⁹⁷ But even apart from an express provision to that effect, it seems, persons taking by right of representation the share of him to whom the advancement was made, take subject to such deduction.⁹⁸ Persons, on the other hand, who take in their own right and not by right of representation, take free from any claim on account of advancements made to their parent.⁹⁹

to local customs of charging advancements in connection with the distribution of personalty, see 2 Blackst. Comm. 517; Holt v. Frederick, 2 P. Wms. 356.

94. 2 Blackst. Comm. 115.

95. 1 Stimson's Am. St. Law, §§ 3160-3168; 2 Woerner, Administration, § 559.

96. *In re Williams*, 62 Mo. App. 339; *Johnson v. Antriken*, 205 Mo. 244, 103 S. W. 936; *Storey's Appeal*, 83 Pa. St. 89; A gift to a grandchild made while the grandchild's parent was alive has been regarded as not constituting an advancement to the parent. *Stevenson v. Martin*, 11 Bush (Ky.) 485.

97. 1 Stimson's Am. St. Law, § 3164. See *Simpson v. Simpson*,

114 Ill. 603, 2 N. E. 603, 4 N. E. 137, 7 N. E. 287; *Bramford v. Crawford*, 51 Ga. 20; *Coffman v. Coffman*, 41 W. Va. 8, 23 S. E. 523.

98. *Simpson v. Simpson*, 114 Ill. 603, 2 N. E. 603; *Barber v. Taylor*, 9 Dana (Ky.) 84; *Smith v. Smith*, 59 Me. 214; *Williams' Estate*, 62 Mo. App. 339; *Headen v. Headen*, 42 N. C. 159; *Quarles v. Quarles*, 4 Mass. 680; *Parsons v. Parsons*, 52 Ohio St. 470; *Person's Appeal*, 74 Pa. St. 121; *McLure v. Steel*, 14 Rich. Eq. 105.

99. *Brown v. Taylor*, 62 Ind. 295; *Skinner v. Wynne*, 2 Jones Eq. 41; *Calhoun v. Cosgrove*, 33 La. Ann. 1001; *Person's Appeal*, 74 Pa. St. 121.

The question whether a gift to a possible heir or distributee is to be regarded as an advancement is a question as to the intention of the donor, and, apart from statute, a gift to an adult child, if of substantial value, is usually presumed to be an advancement.¹ In a number of states there are statutory provisions to the effect that the gift, in order to constitute an advancement, must be acknowledged in writing as an advancement by the donee, or must be expressed in the gift or grant to be made as such, or must be so charged by the donor in writing.² In some states it is provided that maintaining, educating, or giving money to a minor child, without any view to a portion or settlement for life, is not an advancement.³

The statute in most states declares that, if the amount of the advancement exceeds the share to which the donee would be entitled on the death of the donor intestate, though he need refund no part of what he has received, he can receive nothing further from the intestate's estate. In case the advancement is not equal to the share to which he is entitled, the donee, in a number of states, is given so much of the intestate's property as will make all the shares equal; and in some states it is provided that the advancement is to be charged against the share to which the donee is entitled in either the real or the personal property, according as the advancement may have been the one or the other, and that, if the advancement should exceed the amount to which he may be entitled out of either class of property, his share in the other class shall be proportionally reduced. In some states it is provided in terms that the donee must, in order to obtain his proper share in the

1. 2 Woerner, Administration, § 555; Boyer v. Boyer, 62 Ind. App. 73, 111 N. E. 952; Calhoun v. Taylor, 178 Iowa, 56, 159 N. W. 600; Lynch v. Culver, 260 Mo. 495, 168 S. W. 1138.

2. 1 Stimson Am. St. Law, § 3162.

3. 1 Stimson, Am. St. Law, § 3161. This appears to be so apart from such an express provision. 2 Woerner, Administration, § 555.

intestate's property, bring the amount of the advancement into "hotch pot," that is, he must contribute to the common fund the amount of his advancement, and shall then receive therefrom the same amount as if the advancement had not been made.⁴

The statutes in regard to advancements have no application, as a general rule, in the case of a partial intestacy, since it is presumed that the will would have mentioned any gifts which it was intended should be regarded as advancements.⁵

§ 499. Disinheritance. It is generally recognized that one who would otherwise take, as heir or distributee, the whole or a part of decedent's property, cannot be deprived of his right in this regard by a mere expression of an intention to that effect in decedent's will, without a testamentary disposition of the property in favor of another or others. For instance, a statement in testator's will that his eldest son is not to share in his estate will not preclude the son from so sharing, unless all the estate is effectually disposed of by the will.⁶

Even though all of decedent's property is otherwise disposed of by the will, this is not necessarily effective, in many states, to deprive a child of decedent, or the issue of a deceased child, of a right to share therein, it

4. 1 Stimson's Am. St. Law, § 3163.

5. 2 Woerner, Administration, § 553; 1 Dembitz, Land Titles, § 248.

6. *Denn v. Gaskin*, Cowp. 657; *Pickering v. Stamford*, 3 Ves. Jr. 492; *Campbell-Kannanako v. Campbell*, 152 Cal. 201, 92 Pac. 184; *Lane v. Patterson*, 138 Ga. 710, 76 S. E. 47 (*semble*); *Tea v. Millen*, 257 Ill. 624, 101 N. E. 209; *Doe v. Lanius*, 3 Ind. 441, 56 Am. Dec. 518 & note; *Wells v.*

Anderson, 69 N. H. 561, 44 Atl. 103; *Nagle v. Conard*, 79 N. J. Eq. 124, 81 Atl. 841, 80 N. J. Eq. 253, 86 Atl. 1103; *Gallagher v. Crooks*, 132 N. Y. 338, 30 N. E. 746; *In re Trimble's Will*, 199 N. Y. 454, 92 N. E. 1073; *Atkins v. Kron*, 2 Ired. Eq. (N. C.) 58; *Vaughn v. Lanford*, 81 S. C. 282, 62 S. E. 316; *Boisseau v. Aldridges*, 5 Leigh (Tenn.) 222; *Coffman v. Coffman*, 85 Va. 459, 8 S. E. 672.

being frequently provided by statute that a child, or the issue of a deceased child, not provided for in the will, shall, subject to varying limitations, take the share which he would have received in case decedent had died intestate, and in many states there is such a provision, confined in its operation, however, to the case of a child who was born after the execution of the will.⁷

7. See 1 Stimson's Am. St. Administration, § 55.
Law, §§ 2842, 2843, 1 Woerner,

CHAPTER XXIII

ADVERSE POSSESSION OF LAND.

- § 500. General considerations.
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 - (j) Mortgagor and foreclosure purchaser.
 - (k) Surviving spouse and heirs.
 - (l) Parent and child.
 - (m) Husband and wife.

§ 500. General considerations. There were, even in early times, numerous statutes adopted in England limiting the time within which an action could be brought on account of a disseisin of land, but these differed from the statutes of the present day in that, instead of naming a certain number of years before the institution of the action beyond which no disseisin could be alleged, they named a certain year back of which the pleader could

not go.¹ The last statute which adopted this method of fixing the period of limitation was St. Westminster I. c. 39,² which forbade the seisin of an ancestor to be alleged in a writ of right prior to the beginning of the reign of Richard I. (A. D. 1189), and for other writs fixed the year 1217. Thus, under this statute, at the time of its passage, the period of limitation for some writs was fifty-eight years, and this period was lengthened, as time went on without any change in the law, so that it exceeded three hundred years when, by 32 Hen. VIII. c. 2,³ a change was made, and the modern method was adopted of fixing a certain number of years within which the action must be brought. This last statute, however, applied only to the old real actions, and, the action of ejectment having to a great extent taken their place, St. 21 Jac. I. c. 16,⁴ was passed, which provided that no person should thereafter make any entry into any lands, tenements, or hereditaments but within twenty years next after his or their right or title shall have accrued. This statute, while not in terms applying to the action of ejectment, did so in effect by barring the right of entry on which the action depended.

In this country the statutes of the different states, as regards the limitation of actions to recover land, exhibit very considerable diversity, but the courts, in applying them, have recognized certain general principles as governing the subject, with but little regard, for the most part, to the language of the particular statute.

The period of twenty years, named in the statute of James, has been adopted in the legislation of a number

1. Thus the earliest date at which the seisin of an ancestor could be alleged in a writ of right was the beginning of the reign of Henry I. (A. D. 1100) until this was changed by the Statute of Merton to the beginning of the reign of Henry II. (A. D. 1154). Other dates were fixed for other writs. See 2

Pollock & Maitland, *Hist. Eng. Law*, 51, 81, 141.

2. 3 Edw. I. (A. D. 1275).

3. A. D. 1540. The disadvantages of the long period of limitation was, however, to a great extent avoided by the system of levying fines. See Lightwood, *Possession of Land*, 156.

4. A. D. 1623.

of the states, while in a few the lapse of a greater period is required to bar the right of action, and in some a much less period. In a number of the states there are statutory provisions for what are known as "short limitations," in effect considerably reducing the ordinary period in cases when the adverse possession is by one claiming under "color of title," that is, by one who has, in taking possession, acted on the strength of a conveyance or judicial decree purporting to vest the title in him, but which, for some reason, fails to do so. In some states, such a provision exists in favor of one occupying under a particular class of conveyance or decree, as when it is provided that a junior patent from the state under which one occupies cannot be attacked after a certain number of years, and such a provision is frequently found in favor of a purchaser at certain classes of judicial sales, or at tax sales. The possession under such a "short limitation" act is usually required to be accompanied by the payment of taxes on the land by the person in possession.⁵

The doctrine of adverse possession, as now established, may be expected to diminish in importance with the further extension and utilization of the system of registration of titles ordinarily referred to as the Torrens System,^{5a} by reason of the fact that the legislation establishing this system quite frequently provides that title shall not be acquired by adverse possession as against the registered owner of the land.^{5b}

5. The short limitation acts of the several states are well summarized in 2 Dembitz, *Land Titles*, § 186.

5a. *Post*, § 580.

5b. But the English Commissioners on Land Transfer recommend a change in this regard in the English act, to the effect that "the statutes of limitation shall operate in the same manner with regard to registered as to un-

registered land." It has been said, in this connection that "if the policy of the limitation acts is (as has always been held) sound, what adequate reason can there be for restricting them to unregistered land?" Article by Arthur Underhill, Esq. in 17 *Law Quart. Rev.*, at p. 178. See article by James Edward Hogg, Esq. 28 *Yale Law Journ.* at pp. 54, 55, wherein is favored the

— **Theory of the legislation.** The desirability of fixing, by law, a definite period within which claims to land must be asserted has been generally recognized, among the practical considerations in favor of such a policy being the prevention of the making of illegal claims after the evidence necessary to defeat them has been lost, and the interest which the community as a whole has in the security of title. The moral justification of the policy lies in the consideration that one who has reason to know that land belonging to him is in the possession of another, and neglects, for a considerable period of time, to assert his right thereto, may properly be penalized by his preclusion from thereafter asserting such right. It is, apparently, by reason of the demerit of the true owner, rather than any supposed merit in the person who has acquired wrongful possession of the land, that this possession, if continued for the statutory period, operates to debar the former owner of all right to recover the land.⁶

— **Presumption of conveyance distinguished.** The doctrine, occasionally asserted, that the long continued possession of land by one claiming as owner gives rise to the presumption of a valid conveyance to him or to the person under whom he claims, though ordinarily similar in its practical results to the statutes of limitation, is entirely independent thereof. It involves a presumption of the rightfulness of one's possession, while the stat-

application of the limitation statutes to land registered under the system, the limitation period to begin to run, however, only after registration.

6. See Ames, *Disseisin of Chattels*, 3 Harv. Law Rev. 318, *Lectures on Legal History* 197; Editorial note, 10 Columbia L. Rev. 761; Pollock & Wright, *Possession*, 96; Gibson, C. J., in *Sailor v. Hertzogg*, 2 Pa. St. 182;

Haralson, J., in *Lecroix v. Malone*, 157 Ala. 434, 47 So. 725; Depue, J., in *Foulke v. Bond*, 41 N. J. L. 527. A different view is indicated in *McIver v. Ragan*, 2 Wheat, 25, approved in *Craven v. Craven*, 181 Ind. 553, 103 N. E. 333, 105 N. E. 41. See the discussion of the policy of the statutes by Professor Henry W. Ballantine, 32 Harv. Law Rev. 135.

utes of limitation are by their terms applicable only when the possession is, apart from such statutes, wrongful.

As regards the doctrine referred to, of the presumption of a conveyance based on long continued possession, it has been said, by the United States Supreme Court, that in order to presume a conveyance it is not necessary for the jury to believe that a conveyance was in fact executed, but it is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its non execution.⁷ Such a view has also been indicated by some of the state courts,⁸ while others merely recognize that long continued possession is a fact, to be considered along with other facts, tending to show that a conveyance was executed, without being in any way conclusive in that regard.⁹

The cases do not ordinarily specify the length of the period of possession which will be sufficient to justify the presumption of a grant. It would appear, however, that in so far as the presumption is regarded as a rule of law, calling for the finding of a grant without

7. Field, J., in *Fletcher v. Fuller*, 120 U. S. 534, 30 L. Ed. 759.

8. *Kidd v. Browne*,—Ala.—, 76 So. 65; *Reed v. Money*, 115 Ark. 1, 170 S. W. 478; *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 503, 39 Am. Dec. 658; *Melvin v. Waddell*, 75 N. C. 357; *Davis v. McArthur*, 78 N. C. 357; *Williams v. Donnell*, 2 Head (Tenn.) 695; *Dunn v. Eaton*, 92 Tenn. 743, 23 S. W. 163; *Matthews v. Burton*, 17 Gratt. (Va.) 312.

9. *Nelson v. Weekly*, 195 Ala. 1, 70 So. 661; *Carter v. Goodson*, 114 Ark. 359, 169 S. W. 806; *Sumner v. Child*, 2 Conn. 607;

Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; *Jenkins v. McMichael*, 21 Pa. Super. Ct. 161; *Taylor v. Watkins*, 26 Tex. 688; *Hendon v. Vick*, 89 Tex. 469, 35 S. W. 141; *Townsend v. Downer's Adm'r*, 32 Vt. 183.

Regarded as a mere matter of inference, a grant may be inferred or presumed from other facts, even though the person asserting the grant had never been in possession. *Le Blanc v. Jackson*,—Tex Civ. App.—, 161 S. W. 60.

regard to the actual belief of the jury therein,¹⁰ it must be supported by a possession of at least the period of the statute of limitations, and ordinarily its application has been based on a possession for a longer period.¹¹ When the presumption, so called, involves merely an inference of the making of a conveyance from the fact of possession, taken in connection with other circumstances, it seems that a period of possession less than the limitation period might properly be considered in aid of the inference.¹²

A conveyance from the state may be presumed,¹³ although the statute of limitations will not ordinarily run against the state.¹⁴ A conveyance will not be presumed, it seems, on the part of one who was incapacitated to make a conveyance.¹⁵

— **Character of possession.** Ordinarily at least, the statutes of limitation with reference to land in terms impose no requirement upon the person in wrongful possession as to the character of his possession neces-

10. *Ante*, this section, notes 7, 8.

11. *Waggener v. Waggener*, 3 T. B. Mon. (Ky.) 542; *Hunt v. Hunt*, 3 Metc. (Mass.) 175, 57 Am. Dec. 130; *Kellum v. Corr*, 209 N. Y. 486, 103 N. E. 701; *Stockdale v. Young*, 3 Strob. L. S. C.) 501; *Coleman v. Coleman*, 71 S. C. 521, 51 S. E. 250; *Scales v. Cockrill*, 3 Head (Tenn.) 432; *Cannon v. Phillips*, 2 Sneed (Tenn.) 211.

12. *Barclay v. Howell*, 6 Pet. (U. S.) 498, 8 L. Ed. 477; *Ricard v. Williams*, 7 Wheat, 59, 5 L. Ed. 398; *Courcier v. Graham*, 1 Ohio, 330 *Stockdale v. Young*, 3 Strob. L. (S. C.) 501.

13. *United States v. Chaves*, 159 U. S. 452, 40 L. Ed. 215; *Carter v. Walker*, 186 Ala. 140,

65 So. 170; *Tracy v. Norwich etc. R. Co.*, 39 Conn. 382; *Jarboe v. McAtee*, 7 B. Mon. (Ky.) 279; *State v. Dickinson*, 129 Mich. 221, 88 N. W. 621; *Caruth v. Gillispie*, 109 Miss. 679, 68 So. 927; *Jackson v. McCall*, 10 Johns. (N. Y.) 377; *Reed v. Earnhart*, 10 Ired. (N. C.) 516; *Davis v. McArthur*, 78 N. C. 357. See Editorial note, 29 Harv. Law Rev. 88.

14. Post, § 510.

15. *Hunt v. Hunt*, 3 Metc. (Mass.) 175, 37 Am. Dec. 130; *Spears v. Oakes*, 4 Rich. L. (S. C.) 347; *Habersham v. Hopkins*, 4 Strob. L. (S. C.) 238, 53 Am. Dec. 676 (deed in breach of trust); *Garrett v. Weinberg*, 48 S. C. 28; *Martin v. State*, 10 Humph. (Tenn.) 157; *Drewery v. Nelms*, 132 Tenn. 254, 177 S. W.

sary to make the bar effective, and it is merely by reason of the endeavor of the courts adequately to protect the interests of the rightful owner that certain requirements in this regard have become established. The most important of these requirements is that to the effect that the possession must be hostile or "adverse" to the true owner, and so generally has this requirement been recognized, and so important has it been regarded, that the expression "adverse possession" has come to be generally applied to describe that branch of the law which has to do with the construction and application of the statutes of limitation in reference to land. The emphasis thus laid upon the character of the wrongful possession has the unfortunate effect of obscuring the theory on which, as above stated, these statutes appear properly to operate, that is, that, like other statutes of limitation, they bar the remedy of the person rightfully entitled not by reason of any merit in the wrongdoer, but by reason of the demerit of the person who, having a remedy, fails to exercise it within the time named in the statute.

It is occasionally said that the adverse possession which is sufficient to cause the statute of limitations to run is synonymous with disseisin, as recognized at common law, but this is not entirely correct. Disseisin is, properly, "where a man enters into any lands or tenements where his entry is not congeable (i. e. permissible), and ousted him which has the freehold."¹⁶ Disseisin then, as the expression was used in the old books, means a wrongful dispossession of one who has a freehold estate in the land. And it was carefully distinguished from a mere trespass, which did not involve any dispossession of the freeholder.¹⁷ Since then disseisin, generally speaking, meant the wrongful dispossession of one person by another, and the statute of limitations

946; *Ferguson v. Prince*, 136 Tenn. 543, 190 S. W. 548.

17. *Co. Litt.* 181a, 2 *Preston Abstracts*, 287.

16. *Litt.* § 279.

runs by reason of such wrongful dispossession, it would ordinarily be correct to say that the statute runs in favor of a disseisor as against the disseisee. But it also runs under circumstances which did not involve a disseisin at common law, as for instance, when a tenant *pur auter vie* holds over after the death of *cestui que vie*,¹⁸ or a tenant for years disclaims the title of his landlord.¹⁹ On the other hand the statute may not run under circumstances which at common law involved a disseisin. "If a man entereth into land of his own wrong, and take the profits, his words to hold it at the will of the owner cannot qualify his wrong, but he is a disseisor."²⁰ But the statute of limitations would not run in favor of one so entering and claiming to be tenant at will of the rightful owner, for the reason that his possession lacks the element of adverseness or hostility, which is necessary to the running of the statute. Furthermore the expression "disseisin," like "dispossession," has reference to a change of occupancy, while the expression "adverse possession" involves the idea of a continuous occupancy without change.

§ 501. **Actual and visible possession.** In order that the statute of limitations shall run against the right to recover land, it is necessary, not only that the person rightfully entitled be out of the actual possession, but also that there be an entry upon the land by another. The statute does not run as against the true owner in favor of one who, while having what purports to be a conveyance of the land, or other paper title, has never entered on the land.²¹ Nor is an entry upon the land sufficient in itself, but it must be followed by such acts

18. *Post*, § 513(g).
 19. *Post*, § 513(a).
 20. Co. Litt. 271a.
 21. *White v. Burnley*, 20 How. (U. S.) 235, 15 L. Ed. 886; *Ward v. Cochran*, 150 U. S. 597, 37 L. Ed. 1195; *Lipscomb v. McClellan*,

72 Ala. 151; *Christy v. Spring Valley Water Works*, 97 Cal. 21, 31 Pac. 1110; *Walker v. Hughes*, 90 Ga. 52, 15 S. E. 912; *Thayer v. McClellan*, 23 Me. 417; *Word v. Box*, 66 Tex. 596, 3 S. W. 93.

of dominion over the land as will constitute what the law regards as actual possession of the land.²² This requirement of actual possession by another appears to find sufficient justification in the consideration that unless some other person is in possession there is no one against whom the rightful owner can enforce his right of action or entry, and so no one in favor of whom the statute can operate, and also in the consideration that if no person is in possession there is nothing to suggest to the rightful owner the desirability or propriety of asserting his rights in the land.

What is sufficient to constitute actual possession of the land depends upon the character of the land and all the circumstances of the case.²³ It involves, as a general rule, the doing of acts of dominion on the land, sufficiently pronounced and continuous in character to charge the owner with notice that an adverse claim to the land is asserted. Continued residence on the land is no doubt sufficient to show actual possession;²⁴ and cultivation or otherwise improving the land has been regarded as sufficient in particular cases,²⁵ and the erection and maintenance of a fence around the land may, in connection

22. The payment of taxes is not a substitute for possession. *Franklin v. Snow*, 195 Ala. 569, 71 So. 93; *Mitchell v. Chicago B. & Q. R. Co.*, 265 Ill. 300, 106 N. E. 833; *Frazier v. Ison*, 161 Ky. 379, 170 S. W. 977; *Millett v. Mullen*, 95 Me. 400, 49 Atl. 871, *Whitman v. Shaw*, 166 Mas. 451, 44 N. E. 333; *Young v. Grieb*, 95 Minn. 396, 104 N. W. 131; *Leavenworth v. Reeves*, 106 Miss. 722, 64 So. 660; *Hays v. Pumphrey*, 226 Mo. 119, 125 S. W. 1109.

23. The matter is well discussed in 2 *Dembitz Land Titles*, § 181.

24. *Susquehanna & W. V. Rail-*

road & Coal Co. v. Quick, 68 Pa. St. 189; *Alabama State Land Co. v. Kyle*, 99 Ala. 474, 13 So. 43. Under some of the "short limitation" statutes, actual residence is necessary. *Stumpf v. Osterhage*, 94 Ill. 115; *Chiles v. Jones*, 4 Dana (Ky.) 479.

25. *Butler v. Drake*, 62 Minn. 229, 64 N. W. 559; *Susquehanna & W. V. Railroad & Coal Co. v. Quick*, 68 Pa. 189; *Congdon v. Morgan*, 14 S. C. 587; *Crapo v. Cameron*, 61 Iowa, 477, 16 N. W. 523; *Finn v. Wisconsin River Land Co.*, 72 Wis. 546, 40 N. W. 209; *Johns v. McKibben*, 156 Ill. 71, 40 N. E. 449.

with other circumstances, be sufficient.²⁶ On the other hand, a merely occasional and sporadic use of the land, an occasional entry to cut timber or grass, or to appropriate other products or profits of the land, does not usually constitute actual possession.²⁷ The question whether, in any particular case, there was an actual possession of the land, is ordinarily one of fact for the jury under the instructions of the court.²⁸

In a number of states there are statutory provisions as to what shall constitute possession for this purpose,

26. *Perry v. Lawson*, 112 Ala. 480, 20 So. 611; *Carpenter v. Smith*, 76 Ark. 447, 88 S. W. 976; *Brumagim v. Bradshaw*, 39 Cal. 24, 50; *Ritzman v. Aspelmeier*, 89 Iowa, 179, 56 N. W. 421; *Lamereaux v. Creveling*, 103 Mich. 501, 61 N. W. 783; *Barker v. Publisher's Paper Co.*,—N. H. —, 97 Atl. 749; *Moore v. Curtis*, 169 N. C. 74, 85 S. E. 132; *Ambrose v. Huntington*, 34 Ore. 484, 56 Pac. 513; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

27. *Chastang v. Chastang*, 141 Ala. 451, 109 Am. St. Rep. 45, 37 So. 799; *Denham v. Holeman*, 26 Ga. 182, 71 Am. Dec. 198; *White v. Harris*, 206 Ill. 584, 69 N. E. 519; *Smith v. Chapman*, 160 Ky. 400, 169 S. W. 834; *Lacroix v. Crane*, 133 La. 227, 62 So. 657; *Malone v. Long*, 128 Md. 377, 97 Atl. 643; *Parker v. Parker*, 1 Allen (Mass.) 245; *Leavenworth v. Reeves*, 106 Miss. 722, 64 So. 666; *Herbst v. Merrifield*, 133 Mo. 267, 34 S. W. 571; *Cornelius v. Giberson*, 25 N. J. L. 1; *Wheeler v. Spinola*, 54 N. Y. 377; *Campbell v. Miller*, 165 N. C. 51, 80 S.

E. 974; *Wheeler v. Taylor*, 32 Ore. 421, 67 Am. St. Rep. 540, 52 Pac. 183; *Wheeler v. Winn*, 53 Pa. 122, 91 Am. Dec. 186; *Stevens v. Pendregon*, 106 Tex. 576, 173 S. W. 210; *Wilson v. Blake*, 53 Vt. 305. Compare *McLellan v. McFadden*, 114 Me. 242, 95 Atl. 1025; *D. W. Alderman & Sons Co. v. McKnight*, 95 S. C. 245, 78 S. E. 982; *Chase v. Eddy*, 88 Vt. 235, 92 Atl. 99.

So it has been decided that the mere pasturing of cattle on land did not, in view of the character of the land and the custom of the community, involve an actual possession; *Bergere v. United States*, 168 U. S. 66, 42 L. Ed. 383; *McCloskey v. Hayden*, 169 Ill. 297, 48 N. E. 432; *Fuentes v. McDonald*, 85 Tex. 132, 20 S. W. 43; *Chilton v. White*, 72 W. Va. 545, 78 S. E. 1048.

28. *Anderson v. Bock*, 15 How. (U. S.) 323, 14 L. Ed. 714; *Truesdale v. Ford*, 37 Ill. 210; *Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115; *Pendill v. Marquette County Agricultural Soc.*, 95 Ill. 210; *Martin v. Rector*, 30 Hun (N. Y.) 138; *O'Hara v. Richardson*, 46 Pa. St. 385.

a usual one being that land shall be regarded as possessed by one when it has been protected by him by means of a substantial enclosure, or when it has been "usually cultivated and improved,"²⁹ this latter phrase being construed as equivalent to cultivated and improved as land of a similar character is usually cultivated and improved.³⁰

The possession need not be by the adverse claimant himself, he being regarded as in actual possession for this purpose if one holding under him as his tenant or agent is in possession.³¹

The possession must, it is said, be "visible" and "notorious," so that the owner may have an opportunity to learn of the adverse claim, and to protect his rights.³² Actual knowledge of the possession on the part of the true owner is not, however, necessary, it being sufficient that he could have learned thereof by the exercise

29. Wood, Limitations (4th Ed.) § 255.

30. See *Mattes v. Hall*,—(Cal.)—132 Pac. 295; *Trask v. Success Mining Co.*, 28 Idaho, 483, 155 Pac. 288; *Ramapo Mfg. Co. v. Mapes*, 216 N. Y. 362, 110 N. E. 772.

31. *Holtzman v. Douglas*, 168 U. S. 278; *Elliott v. Dycke*, 78 Ala. 1; *Beckett v. Petaluma*, 171 Cal. 309, 153 Pac. 20; *Kepley v. Scully*, 185 Ill. 52, 57 N. E. 187; *Atty. Gen. v. Ellis*, 198 Mass. 91, 15 L. R. A. (N. S.) 1120, 84 N. E. 430; *Ramsey v. Glenney*, 45 Minn. 401, 22 Am. St. Rep. 736, 48 N. W. 322; *Lindenmayer v. Gunst*, 70 Miss. 693, 35 Am. St. Rep. 685, 13 So. 252; *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757, 24 S. E. 748; *Strom v. Hancock Land Co.*, 70 Ore. 101, 140 Pac. 458; *Whitehead v. Foley*, 28 Tex. 1; *Chamberlain v.*

Pybas, 81 Tex. 511, 17 S. W. 50.

Such possession by one person by the hands of another has been conveniently designated as "mediate possession" as distinct from the "immediate possession" of the person who is actually in the possession of the land. *Salmond's Jurisprudence*, § 101.

32. *Lawrence v. Doe*, 144 Ala. 524, 41 So. 612; *De Frieze v. Quint*, 94 Cal. 653, 28 Am. St. Rep. 151, 30 Pac. 1; *Grimes v. Ragland*, 28 Ga. 123; *McClellan v. Kellogg*, 17 Ill. 498; *Haas v. Wilson*, 97 Kan. 176, 154 Pac. 1018; *Frazier v. Ison*, 161 Ky. 379, 170 S. W. 977; *Beatty v. Mascen*, 30 Md. 409; *Fugate v. Pierce*, 49 Mo. 441; *Little v. Downing*, 37 N. H. 355; *King v. Wells*, 94 N. C. 344; *Wade v. Crouch*, 14 Okla. 593; *Bowman v. Bowman*, 35 Ore. 279; *Daniel v. Dayton Coal & Iron Co.*, 132 Tenn.,

of proper diligence.³³ And since the requisites of "actual" possession are usually defined with reference to the sufficiency of such acts to affect the owner with notice of the adverse claim, it would seem somewhat questionable whether there can be any "actual" possession which is not at the same time "visible" and "notorious." There are, however, statements to be found that notoriety of possession is not necessary in case the possession is actually known to the rightful owner,³⁴ statements which suggest, by implication, that there might be a possession sufficient to satisfy the requirement of actual possession, but not sufficient to satisfy that of visible and notorious possession.

§ 502. Exclusiveness of possession. In order that one may acquire rights in land by possession for the statutory period, the possession must, it is frequently

501, 178 S. W. 1187; *Mhoon v. Cain*, 77 Tex. 416; *Dignan v. Nelson*, 26 Utah, 186, 72 Pac. 936.

33. *Bynum v. Hewlett*, 137 Ala. 333, 34 So. 391; *School Dist. No. 8 of Thompson v. Lynch*, 33 Conn. 336; *St. Louis A. & T. H. R. Co. v. Nugent*, 152 Ill. 119, 39 N. E. 263; *Alden v. Gilmore*, 13 Me. 178; *Saumels v. Borrow-scale*, 104 Mass. 207; *Merritt v. Westerman*, 180 Mich. 449, 147 N. W. 483; *Village of Glencoe v. Wadsworth*, 48 Minn. 402, 51 N. W. 377; *Spicer v. Spicer*, 249 Mo. 522, Ann. Cas. 1914D, 238, 155 S. W. 832. See Editorial note, 11 Columbia Law Rev. 673; *Carney v. Hennessey*, 74 Conn. 107, 53 L. R. A. 699, 92 Am. St. Rep. 199, 49 Atl. 910; *St. Louis etc. R. Co. v. Nugent*, 152 Ill. 119, 39 N. E. 263; *Denham v. Holeman*, 26 Ga. 182.

34. *Brown v. Cockrell*, 33 Ala. 47; *Trotter v. Neal*, 50 Ark. 340, 7 S. W. 384; *Clarke v. Gilbert*, 39 Conn. 94; *Cook v. Babcock*, 11 Cush. (Mass.) 206; *McCaughn v. Young*, 85 Miss. 277, 37 So. 839; *Norton v. Kowazek*,—(Mo.)—193 S. W. 556; *Dausch v. Crane*, 109 Mo. 323, 19 S. W. 61; *Pease v. Whitney*,—N. H.—, 98 Atl. 62; *Sheaffer v. Eakman*, 56 Pa. St. 144; *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744.

35. *Ward v. Cochran*, 150 U. S. 597, 37 L. Ed. 1195; *Goodson v. Brothers*, 111 Ala. 589, 20 So. 443; *Towle v. Quante*, 246 Ill. 568, 92 N. E. 967; *Stump v. Henry*, 6 Md. 201, 61 Am. Dec. 301; *Bailey v. Carlton*, 12 N. H. 9, 37 Am. Dec. 190; *Cahill v. Palmer*, 45 N. Y. 478; *Collins v. Lynch*, 167 Pa. St. 635, 31 Atl. 921.

said, be exclusive.³⁵ It must be exclusive of the true owner and also of third persons. If the true owner is on the land as owner, the possession is, in the eye of the law, in such owner,³⁶ and another person who is on the land has, not only no adverse possession, but no possession whatsoever. He is on the land either as a licensee or a trespasser.³⁷ If, however, the true owner is shown to be on the land merely as a licensee, not asserting, by word or act, any right of ownership or possession, his presence on the land does not amount to an actual possession, and the possession may properly be attributed to him who is on the land exercising or claiming exclusive control thereof.³⁸

As regards the requirement that the possession be exclusive of third persons, this appears to follow from the very nature of legal possession. If two or more persons are on land, neither having title thereto, and each claiming possession independently of the other, neither can be regarded as in legal possession of

36. *Reading v. Royston*, Salk. 423; *Gafford v. Strauss*, 89 Ala. 282, 7 L. R. A. 568, 18 Am. St. Rep. 111, 7 So. 248; *Inskip v. Shields*, 4 Harr. (Del.) 345; *Spencer Christian Church's Trustees v. Thomas*, 27 Ky. L. Rep. 250, 84 S. W. 750; *Royer v. Benlow*, 10 Serg. & R. (Pa.) 303; *Illinois Steel Co. v. Tamms*, 154 Wis. 340, 141 N. W. 1011; Litt. § 701; *Lightwood, Possession of Land*, 36.

37. See *Gafford v. Strauss*, 89 Ala. 282, 7 L. R. A. 568, 18 Am. St. Rep. 111, 7 So. 248; *Hoyt v. Zumwalt*, 149 Cal. 381, 86 Pac. 600; *Brumback v. Brumback*, 198 Ill. 66, 64 N. E. 741; *Bellis v. Bellis*, 122 Mass. 414; *Smith v. Hitchcock*, 38 Neb. 104, 56 N. W. 791; *O'Hara v. Richardson*, 46 Pa.

385; *Lloyd v. Rawl*, 63 S. C. 219, 41 S. E. 312; *Larwell v. Stevens*, (C. C.) 12 Fed. 559.

The true owner has been regarded as being in possession of land over which the eaves of his house extended, so as to prevent the assertion of adverse possession by another who made use of the land under the eaves. *Lins v. Seefeld*, 126 Wis. 610, 105 N. W. 917, approved 24 Harv. Law Rev. at p. 232. *Contra*, *Randall v. Sanderson*, 111 Mass. 114; *Rooney v. Petry*, 22 Ont. L. Rep. 101.

38. *Feliz v. Feliz*, 105 Cal. 1, 38 Pac. 521; *Owsley v. Owsley*, 117 Ky. 47, 77 S. W. 397; *First Baptist Church of Sharon v. Harper*, 191 Mass. 196, 77 N. E. 778.

the land. Legal possession is in nature exclusive.³⁹ There is, however, one case in which the possession of an individual is not exclusive, and that is in the case of co-ownership. In that case, however, the possessions of the co-owners are not separate possessions, but rather a single possession, that is, as stated by Blackstone, a unity of possession exists.⁴⁰ In the case of persons thus claiming as co-owners the possession of each or, it seems, of one alone,⁴¹ will operate in favor of all.⁴²

One may be in possession, for the purpose of acquiring land under the statutes of limitation, although he permits the public to pass over the land,⁴³ nor is the existence of an easement thereover in favor of another individual,⁴⁴ or of the public,⁴⁵ inconsistent with his acquisition of title.

§ 503. Hostility of possession. In order that the statute of limitations may bar one of his right to recover land it is necessary, not only that the land be in possession of another, but that such possession be "adverse" or "hostile" to the true owner. It is somewhat surprising, in view of the frequency with which the courts have recognized this requirement, that they have so seldom ventured to explain what they mean by an adverse or hostile possession as distinguished from one which is not adverse or hostile. A possession, it

39. Lightwood, *Possession of Land*, 14; Pollock & Wright, *Possession* 21.

40. 2 Blackst. Comm. 180, 191.

41. Woodruff v. Roysden, 105 Tenn. 491, 80 Am. St. Rep. 905, 58 S. W. 1066.

42. Hutchinson v. Chicago etc. R. Co., 41 Wis. 541; Beedy v. Dine, 31 Pa. 13; Ward v. Ward, L. R. 6 Ch. 789.

43. Bendorff v. Uihlein, 132 Tenn. 193, 177 S. W. 481;.

44. Randall v. Sanderson, 111 Mass. 114; Barker v. Publishers' Paper Co.—N. H.—97 Atl. 749; Sowles v. Butler, 71 Vt. 271, 44 Atl. 355.

45. Webber v. Clark, 74 Cal. 11, 15 Pac. 431; Cady v. Fitzsimmons, 50 Conn. 209; Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350; Woodruff v. Paddock, 130 N. Y. 618, 29 N. E. 1021; Cocke v. Texas etc. R. Co., 46 Tex. Civ. App. 363, 103 S. W. 407.

appears, is adverse to the true owner when it is unaccompanied by any recognition, express or inferrible from circumstances, of the right in the latter. It does not involve the necessity of an express denial of the title of the true owner, and, it is evident, in the majority of cases there is no such denial.

The requirement that the possession be adverse has its logical justification in the consideration that the recognition by the person in possession of the title of the true owner is calculated to lull the latter into a false sense of security and so to induce him to refrain from asserting his right by entry or action. And in accord with this consideration are the decisions,⁴⁶ very considerable in number, that if the possession was originally not adverse to the true owner, the statute cannot be set in motion against him until the possessor has changed the character of the possession by a denial of the title of such owner, and such change has been brought to the knowledge of the latter.

46. *Trufant v. White*, 99 Ala. 536; *Cotton v. White*, 131 Ark. 273, 199 S. W. 116; *Kerns v. Dean*, 77 Cal. 555; *Millett v. Lagomarsino*, 107 Cal. 102, 38 Pac. 308; *Harrall v. Leverty*, 50 Conn. 46, 47 Am. Rep. 608; *Trask v. Success Mining Co.*, 28 Idaho. 483, 155 Pac. 288; *Thompson v. Toledo, St. L. & W. R. Co.* 271 Ill. 11, 110 N. E. 901; *Kirby v. Kirby*, 236 Ill. 255, 86 N. E. 259; *McClenahan v. Stevenson*, 118 Iowa. 106, 91 N. W. 925; *Frazier v. Morris*, 161 Ky. 72, 170 S. W. 496; *Lancey v. Parks*, 102 Me. 135, 66 Atl. 311; *Hall v. Stevens*, 9 Metc. (Mass.) 418; *Compau v. Lafferty*, 50 Mich. 114, 15 N. W. 40; *Collins v. Collieran*, 86 Minn. 199, 90 N. W. 354; *Stevenson v. Black*, 168 Mo. 549, 68 S. W. 909; *McCune v. Goodwillie*, 204 Mo.

306, 102 S. W. 997; *Smith v. Hitchcock*, 38 Neb. 104, 56 N. W. 791; *Lewis v. New York & H. R. Co.*, 162 N. Y. 202, 56 N. E. 540; *Acton v. Culbertson*, 38 Okla. 280, 132 Pac. 812; *Coquille Mill & Mercantile Co. v. Johnson*, 52 Ore. 547, 132 Am. St. Rep. 716, 98 Pac. 132; *Bannon v. Brandon*, 34 Pa. St. 263, 75 Am. Dec. 655; *Johns v. Johns*, 244 Pa. 48, 90 Atl. 535; *McCutchen v. McCutchen*, 77 S. C. 129, 12 L. R. A. (N. S.) 1140, 57 S. E. 678; *Duke v. Harper*, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; *Hulvey v. Hulvey*, 92 Va. 192, 23 S. E. 233; *Graydon v. Hurd*, 55 Fed. 724, 5 C. C. A. 258. But it has been decided that, if one purchases land in the possession of one other than his vendor, he is charged with notice that

It is sometimes said that the possession must be adverse, not only to the rightful owner, but to the whole world.⁴⁷ Such a requirement corresponds, apparently, in some degree to the requirement, so frequently asserted, that the possession be under claim of title, which is the subject of discussion in the following section. The basis of the asserted requirement that possession be adverse to the whole world is not readily perceptible. If the possession is adverse to the rightful owner, it is for the latter to assert his rights, regardless of whether the person in possession mistakenly assumes that the title is in a third person.^{47a}

— **Question of fact.** The question whether the possession was adverse is ordinarily a question of fact.⁴⁸

That the possession was adverse may be shown by evidence that possession was taken under color of title,⁴⁹

the possession, though originally subservient to the vendor's title, had become hostile. *Hovatt v. Green*, 139 Mich. 289, 102 N. W. 734.

47. *Ashford v. Ashford*, 136 Ala. 632, 96 Am. St. Rep. 82 34 So. 10 (*dictum*); *Ballard v. Hansen*, 33 Neb. 861, 51 N. W. 295; *Bracken v. Union Pac. R. Co.*, 75 Fed. 347, 21 C. C. A. 387 (Nebraska); *Altschul v. O'Neill*, 35 Ore. 202, 58 Pac. 95; *McNaught-Collins Imp. Co. v. May*, 52 Wash. 632, 101 Pac. 237.

47a. That the possession need not be adverse to the whole world, see *Skipwith v. Martin*, 50 Ark. 141, 6 S. W. 514; *Hayes v. Martin*, 45 Cal. 559; *McManus v. O'Sullivan*, 48 Cal. 485; *Adams v. Guerard*, 29 Ga. 651, 76 Am. Dec. 624; *Mather v. Walsh*, 107 Mo. 121, 17 S. W.

755; *Smith v. Badura*, 70 Ore. 58, 139 Pac. 107; *Smith v. Jones*, 103 Tex. 632, 31 L. R. A. (N. S.) 150, 132 S. W. 469. See note in 14 Harv. Law Rev. at p. 374, criticizing *Bond v. O'Gara*, 177 Mass. 139, 83 Am. St. Rep. 265, 58 N. E. 189.

48. *Hogan v. Kurtz*, 94 U. S. 773, 24 L. Ed. 317; *Snow v. Bray*, Ala., 73 So. 542; *Stevens v. Velde*, 138 Minn. 59, 163 N. W. 796; *Page v. Gaskill*, 84 N. J. L. 615, 87 Atl. 460; *Ramapo Mfg. Co. v. Mapes*, 216 N. Y. 362, 110 N. E. 772; *Stokes v. Murray*, 95 S. C. 120, 78 S. E. 741.

49. *Pillow v. Roberts*, 13 How. (U. S.) 472, 14 L. Ed. 228; *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146; *Taylor v. Danbury Public Hall Co.*, 35 Conn. 430; *Kendrick v. Latham*, 25 Fla. 819, 6

as well as by evidence of the declarations of the person in possession accompanying his possession.⁵⁰ It may also be shown by evidence of acts by the person in possession of such a character as would not be done by him if he conceded the other's title.⁵¹ The payment by him of taxes upon the land has been regarded as evidence that the possession is adverse.⁵²

— **Burden of proof.** Since the element of hostility or "adverseness" involves merely the absence of a course of action of an affirmative character, that is, of

So. 871; *Godfrey v. Dixon Power etc. Co.*, 228 Ill. 487, 81 N. E. 1089; *Brady v. Baltimore*, 130 Md. 506, 101 Atl. 142 (*semble*); *Chabert v. Russell*, 109 Mich. 571, 67 N. W. 902; *Brown v. Peaslee*, 69 N. H. 436, 45 Atl. 234; *Warne v. Greenbaum*—(N. J.)—101 Atl. 568; *Myers v. Folkman*, 89 N. J. L. 390, 99 Atl. 97; *La Frambois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463; *Steinwand v. Brown*, 38 N. D. 602, 166 N. W. 129; *Dikeman v. Parrish*, 6 Pa. St. 210, 47 Am. Dec. 455.

50. *Gibson v. Gaines*. —Ala. —, 73 So. 929; *Stockton Sav. Bank v. Staples*, 98 Cal. 189, 32 Pac. 936; *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306; *Rand v. Huff*, 59 Kan. 777, 53 Pac. 483; *Swope v. Ward*, 185 Mo. 316, 84 S. W. 895; *Harnage v. Berry*, 43 Tex. 567. The admissibility of such evidence is discussed with references to cases, in 3 Wigmore, *Evidence*, § 1778.

51. *Grim v. Murphy*, 110 Ill. 271; *Rennert v. Shirk*, 163 Ind. 542, 72 N. E. 546; *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. 522; *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060; *Whitaker v. Erie*

Shooting Club, 102 Mich. 454; 60 N. W. 983; *Davis v. Bowman*, 55 Miss. 671; *Benne v. Miller*, 149 Mo. 228, 50 S. W. 824; *Brock v. Bear*, 100 Va. 562, 42 S. E. 307; *Pioneer Wood Pulp Co. v. Chandos*, 78 Wis. 526, 47 N. W. 661.

52. *Holtzman v. Douglas*, 168 U. S. 278, 42 L. Ed. 466; *Chastang v. Chastang*, 141 Ala. 451, 109 Am. St. Rep. 45, 37 So. 799; *Gee v. Hatley*, 114 Ark. 376, 170 S. W. 72; *Frick v. Sinon*, 75 Cal. 337, 7 Am. St. Rep. 177, 17 Pac. 439; *Wren v. Parker*, 57 Conn. 529, 6 L. R. A. 80, 14 Am. St. Rep. 127, 18 Atl. 790; *Wilbur v. Cedar Rapids & M. R. R. Co.*, 116 Iowa, 65, 89 N. W. 101; *Carter v. Clark*, 92 Me. 225, 42 At. 398; *Whitman v. Shaw*, 166 Mass. 451, 44 N. E. 333; *Sauers v. Giddings*, 90 Mich. 50, 51 N. W. 265; *Mattson v. Warner*, 115 Minn. 520, 132 N. W. 1127; *Draper v. Shool*, 25 Mo. 197, 69 Am. Dec. 262; *Himmelberger-Harrison Lumber Co. v. Cralg*, 248 Mo. 319, 154 S. W. 73; *Royer v. Benlow*, 10 Serg. & R. 303; *Hunter v. Malone*, 49 Tex. Civ. App. 116, 108 S. W. 709.

the recognition of the other's title, it would seem that the lack of hostility, rather than the presence thereof, is an affirmative fact to be proven, in the absence of circumstances which are recognized as legally sufficient to create a presumption that the possession is not hostile, and this accords with the reason of the matter. Knowing, or having reason to know, that his land is in the possession of another, the true owner should be barred by reason of his laches in asserting his own right of possession, unless he can show that he was induced so to do by the possessor's recognition and admission of his rights. In some cases this view has been adopted, that the possession will, in the absence of countervailing evidence, be presumed to be hostile,⁵³ and this view would seem to be more or less involved in the numerous decisions⁵⁴ that, by reason of a particular relation, such as that of landlord and tenant or that of trustee and *cestui que trust*, the possession is *prima facie* not hostile or adverse, this apparently implying that, in the absence of such a relation, the possession is *prima facie* hostile, or at least that it is not *prima facie* lacking in hostility. It has, however, frequently been asserted that the person claiming by force of the statute of limitations has the burden of

53. *Boone v. Chiles*, 10 Pet. 177, 223; *Alexander v. Wheeler*, 69 Ala. 332; *Hammond v. Crosby*, 68 Ga. 767; *Craven v. Craven*, 181 Ind. 553, 103 N. E. 333, 105 N. E. 806; *Frazier v. Morris*, 161 Ky. 72, 170 S. W. 496; *Zabriska's Succession*, 119 La. 1076, 44 So. 893; *Greene v. Anglemire*, 77 Mich. 168, 43 N. W. 772; *Davis v. Bowmar*, 55 Miss. 742; *Monnot v. Murphy*, 207 N. Y. 240, 100 N. E. 742; *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766; *Neel v. McElhenny*, 69 Pa. St. 300; *Satcher v. Grice*,

53 S. C. 126, 121 S. E. 3; *Toltec Ranch Co. v. Babcock*, 24 Utah, 183, 606 Pac. 876; *Morse v. Churchill*, 41 Vt. 649; *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 48 L. R. A. 830, 80 Am. St. Rep. 54; 81 N. W. 1027, 82 N. W. 534.

That the user of another's land is presumed to be adverse, for the purpose of the creation of a prescriptive right in the nature of an easement, see *post*, § 519, note 73.

54. *Post*, § 513.

showing that his possession was hostile or adverse.⁵⁵ It is presumably true that such wrongful possessor has the burden of proof in the sense of risk of non persuasion of the jury, but in so far as we mean by burden of proof the duty of producing evidence,⁵⁶ the burden as to the hostility of the possession properly shifts, it is submitted, to the person having documentary title, so soon as the other has introduced evidence of his possession for the statutory period. When it is said, as it frequently is said,^{56a} that the burden of showing adverse possession is upon the party asserting it, this presumably refers to the burden of persuading the jury, and

55. Ricard v. Williams, 7 Wheat. 121 (*semble*); Davis v. Caldwell, 107 Ala. 526, 18 So. 103; Beasley v. Howell, 117 Ala. 499, 22 So. 989; Love v. Cowger, 130 Ark. 445, 197 S. W. 853; Janke v. McMahon, Cal. App., 133 Pac. 21; Russell v. Davis, 38 Conn. 562; Barrs v. Brace, 38 Fla. 265, 20 So. 991; McCullough v. East Tennessee, etc. R. Co., 97 Ga. 373, 23 S. E. 838; Thompson v. Toledo, St. Louis & W. R. Co., 271 Ill. 11, 110 N. E. 901; Benedict v. Bushnell, — Ind. App.—, 117 N. E. 267; McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 925; Edwards v. Fleming, 83 Kan. 653, 33 L. R. A. (N. S.) 923, 112 Pac. 836; Mounts v. Mounts, 155 Ky. 363, 159 S. W. 819; McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 891; Smith v. Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907; Weeping Water v. Reed, 21 Neb. 261, 31 N. W. 797; Johnson v. Atlantic R. Co., 73 N. J. L. 767, 64 Atl. 1061; Licari v. Carr, 84 N. J. L. 345, 86 Atl. 421; Heller v. Cohen, 154 N. Y. 299,

48 N. E. 527; Rathbunville Union Cemetery Ass'n v. Betson, 208 N. Y. 364, 101 N. E. 892; Monk v. Wilmington, 137 N. C. 322, 49 S. E. 345; Johns v. Johns, 244 Pa. 48, 90 Atl. 535; Smith v. Estill, 87 Tex. 264, 28 S. W. 801.

56. 4 Wigmore. Evidence, §§ 2485-2490.

56a. See *e. g.* Jones v. Temple, 117 Ark. 579, 176 S. W. 143; Tippenhauer v. Tippenhauer, 158 Ky. 639, 166 S. W. 225; Spicer v. Spicer, (Mo.), 155 S. W. 832; Vanderbilt v. Chapman, 172 N. C. 809, L. R. A. 1917C 143, 94 S. E. 703; Stokes v. Murray, 95 S. C. 120, 78 S. E. 741; Village Mills Co. v. Houston Oil Co., —(Tex.)—186 S. W. 785; People's Savings Bank v. Bufford, 90 Wash. 204, 155 Pac. 1068. Occasionally the statute in terms places the burden of proof on the party asserting adverse possession. Blue Ridge Land Co. v. Floyd, 167 N. C. 686, 83 S. E. 687, 88 S. E. 862; Sheppick v. Sheppick, 44 Utah, 131, 138 Pac. 1169.

such is probably the sense in which the expression "burden of proof" is used in some of the cases, above cited, in which it is stated that the person claiming by force of the statute of limitations has the burden of showing that his possession was hostile or adverse.

When possession was taken under circumstances which ordinarily give rise to a presumption that it is not adverse, the burden is obviously upon the possessor of showing that, by reason of the course of action adopted by him, such as denial of the title of the rightful owner, his possession has become adverse.⁵⁷

§ 504. **Necessity of claim of title.** It has been asserted, by perhaps most of the courts in this country, that in order that the statute of limitations may run in favor of one in possession of land, the possession must be under claim of right or title.⁵⁸ There would seem reason to doubt, however, whether, in asserting this requirement, the courts ordinarily have in mind anything more than a restatement of the requirement of hostility of possession.⁵⁹ They do not, so far as the writer has

57. *Zeller v. Eckert* 4 How. (U. S.) 295; *McClenahan v. Stevenson*, 118 Iowa, 106, 91 N. W. 925; *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997; *Collins v. Colleran*, 86 Minn. 199, 90 N. W. 364; *Hall v. Stevens*, 9 Metc. (Mass.) 418. See *ante*, this section, note 46.

58. See *e. g.* *McLester Bldg. Co. v. Upchurch*, 18 Ala. 23, 60 So. 173; *Janke v. McMahon*, 21 Cal. App. 781, 133 Pac. 21; *Stowell v. Lynch*, 269 Ill. 437, 110 N. E. 49; *Goulding v. Shonquist*, 159 Iowa, 647, 141 N. W. 24; *Chesapeake & O. R. Co. v. Roskamp*, 179 Ky. 175, 200 S. W. 496; *Erickson v. Crosby*, 100 Neb. 372, 160 N. W. 94; *Howard*

v. Wright, 38 Nev. 25, 143 Pac. 1184; *Vanderbilt v. Chapman*, 175 N. C. 11, 94 S. E. 703; *Thomas v. Spencer*, 66 Ore. 359, 133 Pac. 822; *Vermont Marble Co. v. Eastman*, 91 Vt. 425, 101 Atl. 151; *Skanski v. Novak*, 84 Wash. 39, 146 Pac. 160; *Custer v. Hall*, 71 W. Va. 119, 76 S. E. 183.

59. See, for instance, occasional statements that the possession "must be adverse, that is, under a claim of right." *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Colvin v. Burnet*, 17 Wend. (N. Y.) 565; *State v. Heapphy*, 88 Vt. 428, 92 Atl. 813. And see *O'Donnell v. McCool*, 89 Wash. 537, 154 Pac. 1090.

observed, undertake to explain why a claim of title on the part of the possessor is necessary, and it appears that the rightful owner is quite sufficiently protected by the requirement of adverseness or hostility of possession.⁶⁰ Did this requirement of the making of a claim of title really mean what it appears on its face to mean, that the person in possession must state that the land belongs to him, the effect would be, approximately, to limit the operation of the statute of limitations to the case of possession by one who believes himself to have title, since one who knows that he has no title is not apt to claim title until his title is questioned.

The notion of the necessity of a claim of title may possibly have originated in the following manner. One is not in adverse possession in case he makes acknowledgment to the rightful owner of the latter's title, that is,

60. That claim of right or title is unnecessary, see *Johnson v. Gorham*, 38 Conn. 513; *Carney v. Hennessey*, 74 Conn. 107, 53 L. R. A. 699, 92 Am. St. Rep. 199, 49 Atl. 910; *Campau v. Dubois*, 39 Mich. 274; *Carroll v. Mays*, 8 Dana. (Ky.) 178 (*semble*); *Rupley v. Fraser*, 132 Minn. 311, 156 N. W. 350; *Rude v. Marshall*, 54 Mont. 27, 166 Pac. 298; *Parker v. Southwick*, 6 Watts (Pa.) 377, per Gibson, C. J.; *Cox v. Sherman Hotel Co.*, (Tex. Civ. App.), 47 S. W. 808. Claim of title is not referred to as one of the necessary elements of adverse possession by the Supreme Court of the United States. See *Holtzman v. Douglas*, 168 U. S. 278, 42 L. Ed. 466. "The whole inquiry is reduced to the fact of entering and the intention to usurp possession." Per *Johnson, J.*, in *Bradstreet v. Huntington*, 5 Pet. 402, 439.

In Texas the statute defines adverse possession as an actual and visible appropriation of the land, commenced and continued under a "claim of right inconsistent with and hostile to the claim of another," but the expression claim of right in the statute has been decided to mean merely that "the entry of the limitation claimant must be with the intent to claim the land as his own, to hold it for himself." and that "such must continue to be the nature of his possession." *Houston Oil Co. of Texas v. Jones*, —Tex.—, 198 S. W. 290. See *Brown v. Fisher*, —Tex. Civ.—, 193 S. W. 357. And in Wisconsin a statutory requirement that the land be held under "claim of title" was regarded as satisfied if there was an entry hostile to the whole world, and an intention on the part of the possessor "to hold the land as

in case he disclaims title in himself,⁶¹ and there is authority for the view that his possession is not adverse if he acknowledges the title of the rightful owner by a communication to a third person.⁶² It being conceded that the statute does not run if there is a disclaimer of title by the person in possession, it was perhaps assumed as a corollary that a claim of title by such person was necessary to the running of the statute. This explanation of the origin of the requirement is, however, purely conjectural, and occasionally a different theory in this regard is indicated by expressions to the effect that the statute of limitations runs only when there is a technical disseisin, as recognized at common law, and that such a disseisin involves the necessity of a claim of title. In reference to such a theory, it may be said in the first place, as before explained, that adverse possession and disseisin are not absolutely the same.⁶³ In the second place, claim of title, that is, of right, appears never to have been regarded as necessary to effectuate a disseisin. The old digests make no mention of such a requirement, and that it did not exist is sufficiently apparent from the fact that there might be disseisin by one person for the use of another, which operated as a disseisin by the former alone until agreed to by the latter, and after such agreement made them both disseisors.⁶⁴ Indeed the repeated statements that one who wrongfully dispossesses another, though he claims merely as tenant for years or by statute, or even as tenant at will, is a disseisor, for the reason that he cannot qualify his own wrong,⁶⁵ would seem to show that claim of title by him was immaterial.⁶⁶

his own." Chicago & N. W. Rwy. Co. v. Groh, 85 Wis. 641, 55 N. W. 714.

61. *Post.* § 507, note 37.

62. *Post.* § 507, note 38.

63. *Ante.* § 500. notes 18-20.

64. See Vin. Abr. Disseisin (E); Bac. Abr. Disseisin (A);

Co. Litt. 180b.

65. 1 Rolle's Abr. Disseisin (I); Vin. Abr. Disseisin (I); Com. Dig. Seisin, (F1); Co. Litt.

271. See *post.* 511, notes 16-18.

66. As to the asserted necessity, that to constitute a disseisin, there must be an inten-

It has been said that by claim of right or title, in connection with the doctrine of adverse possession, is meant merely "an intention to appropriate and hold the land as owner, and to the exclusion, rightfully or wrongfully, of every one else."⁶⁷ It is most unfortunate, if this is the idea which the courts intend to convey, that they use language which on its face means something entirely different. The presence of such an intention to appropriate is no doubt necessary for the purpose of adverse possession, but this is, it is submitted, not because without it the possession would not be adverse, but because without it there would be no possession.⁶⁸

It was recognized at common law that, in determining whether one was a disseisor or a trespasser merely, his intention, as indicated by his acts, was to be considered,⁶⁹ and so at the present day, in determining whether one person has taken possession of property previously in the possession of another, his acts must be such as to show his intention to exercise exclusive control, at least for the time being.⁷⁰ And this, it is conceived, must be the meaning of the occasional judicial statements that, in order to acquire title by adverse

tion to claim a fee, see *post*, § 511, note 19.

67. Sedgwick & Wait, *Trial of Title to Land* (2d Ed.), § 756, quoted, apparently with approval, by Holmes, C. J., in *Bond v. O'Gara* 177 Mass. 139, 83 Am. St. Rep. 265, 58 N. E. 275. See also, to the same effect, *Fear v. Barwise*, 93 Kan. 131, 143 Pac. 505; *Rupley v. Fraser*, 132 Minn. 311, 156 N. W. 350; *Morrison v. Linn*, 50 Mont. 396, 147 Pac. 166 (construing statute).

68. *Ante*, § 14.

69. Co. Litt. 153b, quoting the statement of Bracton *quacrendum est a iudice, quo animo*

hoc fecerit, language which is again quoted in *Towle v. Ayer*, 8 N. H. 57; *Bond v. O'Gara*, 177 Mass. 139, 83 Am. St. Rep. 265, 58 N. E. 275.

70. So in *Pollock v. Wright*, *Possession*, § 14, it is said that "to constitute a dispossession there must in every case be positive acts which can be referred only to the intention of acquiring exclusive control." And as to the necessity of the element of intention in possession see *Lightwood*, *Possession of Land*, p. 21; *Holmes*, *The Common Law*, 206 *et seq.*; *Salmond*, *Jurisprudence*, § 97.

possession, there must be an intention to claim title.⁷¹ That is, there must be an intention to assert dominion over the property to the exclusion of others. But the requirement of an intention to exercise exclusive control over the property, involved in the asserted necessity of "an intention to claim title," in order that the rightful owner may be regarded as dispossessed, is to be distinguished from the asserted requirement of a "claim of title," in order to make the statute of limitations effective as against the dispossessed owner.

As tending to negative any requirement of claim of right or title as necessary to put the statute of limitations in motion, reference may be made to the general acceptance of the view that, in the absence of an express statutory requirement to that effect, the statute will run regardless of whether the wrongful possession was taken under a *bona fide* claim of right.⁷² There

71. *Brown v. Cockerall*, 33 Ala. 38; *Wilson v. Hunter*, 59 Ark. 626, 43 Am. St. Rep. 63, 28 S. W. 419; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139, 14 So. 805; *Riley v. Griffin*, 16 Ga. 141; *Winn v. Abeles* 35 Kan. 85, 57 Am. Rep. 138, 10 Pac. 443; *Worcester v. Lord*, 56 Me. 265, 96 Am. Dec. 456; *Ford v. Wilson*, 35 Miss. 490, 72 Am. Del. 137; *Pharis v. Jones*, 122 Mo. 125, 26 S. W. 1032; *Simmons v. Nahant* 3 Allen (Mass.) 316; *Haney v. Breeden*, 100 Va. 781, 42 S. E. 916.

72. *Newsome v. Snow*, 91 Ala. 641, 24 Am. St. Rep. 934, 8 So. 377; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Montgomery & Mullen Lumber Co. v. Quimby*, 164 Cal. 250, 128 Pac. 402; *French v. Pearce*, 8 Conn. 443, 21 Am. Dec. 480; *May v. Dobbins*, 166 Ind. 331, 77 N. E.

353; *Rutter v. Small*, 68 Md. 133, 6 Am. St. Rep. 434, 11 Atl. 698; *Warren v. Bowdran*, 156 Mass. 280, 31 N. E. 300; *Dawson v. Falls City Boat Club*, 136 Mich. 259 112 Am. St. Rep. 363, 99 N. W. 17; *Wilkerson v. Eilers*, 114 Mo. 245, 21 S. W. 514; *Omaha & F. Land & Trust Co. v. Hansen*, 32 Neb. 449, 49 N. W. 456; *Foulke v. Bond*, 41 N. J. L. 527; *Humbert v. Trinity Church* 24 Wend. (N. Y.) 587; *Morrison v. Holliday*, 27 Ore. 175, 39 Pac. 1100; *Reeves v. Dougherty*, 7 Yerg. (Tenn.) 222, 27 Am. Dec. 496; *Kinney v. Vinson*, 32 Tex. 135; *Lampman v. Van Alstyne*, 94 Wis. 417, 69 N. W. 171; *Ovig v. Morrison* 142 Wis. 243, 125 N. W. 449.

In Iowa good faith is necessary; *Litchfield v. Sewel*, 97 Iowa, 247, 66 N. W. 104; *Clark v. Sexton*, 122 Iowa, 310, 98 N.

would seem to be a certain inconsistency between such a view and the view that the statute will not run unless the wrongful possessor, after obtaining possession, asserts a claim of right.⁷³ To require one, in order to enjoy the benefit of the statute, to assert a claim of right, even though he knows it to be false, involves the placing of a premium upon dishonesty, in contravention of the ordinary judicial policy.⁷⁴

— **Evidence.** Conceding the necessity of a showing by the person in possession of a claim of right or title on his part, such claim may no doubt be shown by evidence of declarations by the possessor,⁷⁵ but ordinarily, it appears, it is to be inferred from the fact that the possessor's entry was under color of title,⁷⁶ or from the doing of acts by the possessor during his posses-

W. 127; *Goulding v. Shonquist*, 159 Iowa, 647, 141 N. W. 24. And such seems to be the view of the court in *Jaspersen v. Scharnikow*, 150 Fed. 571; *Skan-ski v. Novak*, 84 Wash. 39, 146 Pac. 160.

73. "The expressions claim of title, or right, or ownership are, in connection with a naked adverse possession, inaccurate, for they imply a belief in the validity of the claim, or good faith on the part of the claimant." *Sedgwick & Wait, Trial of Title to Land*, § 756. But it has been said in a recent New York case that claim of right, though necessary, need not be *bona fide*; *Ramapo Mfg. Co. v. Mapes*, 216 N. Y. 362, 110 N. E. 772.

74. In Iowa it has been said that one's knowledge of a defect in his title is not incompatible with good faith on his part. *Hughes v. Wyatt*, 146 Iowa, 392, 125 N. W. 34; *Collins v.*

Reimers, 181 Iowa, 1143, 165 N. W. 373.

75. *Henry v. Brown*, 143 Ala. 446, 39 So. 325. And see the following cases, in which assertions of title by the wrongful possessor were admitted to show the adverse character of the possession. *Stockton Sav. Bank v. Staples*, 98 Cal. 189; *St. Peters Church v. Beach*, 26 Conn. 355; *Burr v. Smith*, 152 Ind. 469, 53 N. E. 4; *Cottle v. Howerton*, 18 Ky. L. Rep. 121, 35 S. W. 552; *Jacobs v. Callaghan*, 57 Mich. 11, 23 N. W. 454; *Brown v. Kohout*, 61 Minn. 113, 63 N. W. 248; *Westenfelder v. Green*, 24 Ore. 448, 34 Pac. 23; *Texas & N. O. R. Co. v. Broom*, 53 Tex. Civ. App. 78, 114 S. W. 655.

76. *Goodson v. Brothers*, 111 Ala. 589, 20 So. 453; *Shipwith v. Martin*, 50 Ark. 141, 6 S. W. 514; *Wiggins v. Brewster*, 131 Ga. 162, 62 S. E. 40; *Hadlock v. Leary* 148 N. C. 378, 62 S.

sion such as ordinarily only an owner would do,⁷⁷ such as the making of improvements,⁷⁸ or the payment of taxes.⁷⁹ In other words the claim of title is to be established by evidence of the same character as is ordinarily relied on to establish the hostile or adverse character of the possession,⁸⁰ a consideration which harmonizes with the view above suggested, that in asserting the necessity of a claim of title, the courts ordinarily intend merely to restate the requirement of hostility or adverseness of possession.

— **Recognition of title in third person.** Apart from the fact that, as involving an affirmative fact, it is calculated to place upon the person in possession the burden of proof, and from the consideration that the presentation of this additional issue is calculated to confuse the jury, it does not seem that the assertion of the

E. 426; *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737.

77. *Kidd v. Browne*, —Ala.—, 76 So. 65; *Lyons v. Stroud*, 257 Ill. 350, 100 N. E. 973; *Rennert v. Shirk*, 163 Ind. 542, 72 N. E. 546; *Craven v. Craven*, 181 Ind. 553, 103 N. E. 333; *Woodcock v. Crosby's Unknown Heirs*, 92 Neb. 723, 139 N. W. 646; *Smith v. Badura*, 70 Ore. 58, 139 Pac. 107.

In New York the statute requires possession under claim of title, but it is said that the actual possession and improvement of the premises, as owners are accustomed to possess and improve their estates, without any payment of rent or recognition of title in another will, unless rebutted by other evidence, establish the fact of a claim of title. *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441; *Monnot v. Murphy*, 207 N. Y. 240, 100 N. E. 742.

78. *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45, 12 So. 454; *Lick v. Diaz*, 44 Cal. 479; *Grim v. Murphy*, 110 Ill. 271; *Illinois Cent. R. Co. v. Houghton*, 126 Ill. 233, 1 L. R. A. 213, 9 Am. St. Rep. 581; *Renneot v. Shirk*, 163 Ind. 542, 72 N. E. 546; *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060; *Barnes v. Light*, 116 N. Y. 34; *Rowland v. Williams*, 23 Ore. 515, 32 Pac. 402; *La Frambois v. Jackson*, 8 Cow. (N. Y.) 603.

79. *Frick v. Sinon*, 75 Cal. 337, 7 Am. St. Rep. 177, 17 Pac. 439; *Beecher v. Ferris*, 117 Mich. 108, 75 N. W. 294; *Murphy v. Doyle*, 37 Minn. 113, 33 N. W. 220; *Allen v. Mansfield*, 108 Mo. 343, 18 S. W. 901; *Dredla v. Patz*, 78 Neb. 506, 111 N. W. 136; *Thompson v. Burhans*, 79 N. Y. 93; *Paine v. Hutchins*, 49 Vt. 314.

80. *Ante*, § 503, notes 49-52.

requirement of claim of title rather than mere adverse-ness or hostility of possession will, in the ordinary case, affect the result. That is, if the jury can find that the possession is adverse, it will probably, from a consideration of the same evidence, find that it is under claim of title. In one case, however, the assertion of this requirement might become of primary importance, that is, when the wrongful possession was taken under the mistaken impression that the title is in a third person, and with full recognition of the supposed rights of such person. If possession adverse to the whole world⁸¹ is necessary to make the statutory bar effective as against the true owner, the possession in the case supposed is insufficient, although it be clearly adverse to the rightful owner. What is in substance this state of facts has been presented in a number of cases in which one took and held possession of vacant lands belonging to another, under the impression that it belonged to the government. In the majority of these cases it has been decided that the statute of limitations runs under such circumstances,⁸² while in others the contrary view has been adopted, on the ground that there is no claim of title by the person in possession, or, as otherwise expressed, his possession is not adverse to the whole world.⁸³ If claim of title is necessary to enable the stat-

81. *Ante*, § 503, note 47.

82. *Page v. Fowler*, 28 Cal. 611; *Hayes v. Martin*, 45 Cal. 559; *Blumer v. Ohio Land Co.*, 129 Iowa, 32, 105 N. W. 342; *Rathbone v. Boyd*, 30 Kan. 485, 2 Pac. 664; *Maas v. Burdetzke*, 93 Minn. 295, 106 Am. St. Rep. 436, 101 N. W. 182; *Boe v. Arnold*, 54 Ore. 52, 20 Ann. Cas. 533, 102 Pac. 290; *Sharpe v. Catron*, 67 Ore. 368, 136 Pac. 20; *Smith v. Jones*, 103 Tex. 632, 31 L. R. A. (N. S.) 150, 132 S. W. 469; *Price v. Eardley*, 34 Tex.

Civ. App. 60, 77 S. W. 416; *Trueheart v. Graham*, — Tex. Civ. App.—, 141 S. W. 281; *Franceour v. Newhouse*, 43 Fed. 236; *Northern Pac. R. Co. v. Kranich*, 52 Fed. 911. See editorial notes, 9 Columbia Law Rev. 640; 12 *Id.* 364; 10 Mich. Law Rev. 406.

83. *Hunnewell v. Burchett*, 152 Mo. 611, 54 S. W. 487; *Altschul v. O'Neill*, 35 Ore. 202, 58 Pac. 95; *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120; *McNaught-Collins Imp. Co. v. May*, 52 Wash. 632, 101 Pac. 237;

ute to run, it is difficult to see how it can run when the possessor admits the title to be in the government, even though such admission is based on a mistake. The statute does run in such case, it is submitted, for the reason that the possession is adverse to the rightful owner, and the latter is not excused from asserting his rights within the limitation period by the fact that the adverse possession is accompanied by an assertion of title in a third person. That such a view is incompatible with the asserted requirement of claim of title by the possessor would seem to be merely an additional reason for questioning whether claim of title is properly necessary in order that the statute may run.

The necessity that the possession be under claim of title has been referred to as ground for holding that the possession of a "mere squatter" is insufficient to give title under the statute of limitations.⁸⁴ The expression "squatter" is somewhat lacking in certainty, but it ordinarily means one who, while in possession of another's land, admits that the title is in another person, even though without knowledge of such person's identity. There is in such case no claim of title by the person in possession, but even apart from that consideration, the possession would seem, by reason of the

Skanski v. Novak, 84 Wash. 39, 146 Pac. 160. See editorial notes 5 Columbia Law Rev. 605; 18 Harv. Law Rev. 180.

84. Gay v. Mitchell, 35 Ga. 139, 89 Am. Dec. 278; Bell v. Fry, 5 Dana (Ky.) 341; Blake v. Shiver, 27 Wash. 593, 68 Pac. 330; Jasperson v. Scharnikow, 150 Fed. 571; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 S. E. 255. See Baber v. Henderson, 156 Mo. 566, 79 Am. St. Rep. 540, 57 S. W. 719. But in Patterson v. Reigler, 4 Pa. St. 201, that the person in pos-

session acknowledged that he had no title to the land was held not to prevent the running of the statute in his favor, he having "entered to hold the land as long as he could."

In Northern Pacific Ry. Co. v. Concannon, 75 Wash. 591, 135 Pac. 652, the fact that the one in possession made valuable improvements on the land was regarded as showing that he was something more than a mere squatter, for the purpose of the statute of limitations.

recognition of another's title, to be deprived of the element of hostility or adverseness, conceding, that is, that an acknowledgment of another's title will operate to deprive possession of the element of adverseness, although such acknowledgment is not made directly to such other.⁸⁵

— **Claim of easement.** The statement occasionally made that possession under a claim to a mere easement does not, although continued for the statutory period, confer title to the fee,⁸⁶ involves the misconception that one merely exercising, or undertaking to exercise, an easement in land, has possession, or may have possession, of the land. He does not acquire title to the land by adverse possession, for the reason that he never had possession, adverse or nonadverse.⁸⁷

— **Claim of fee simple.** Applying and extending the asserted requirement of claim of title, it has occasionally been said that the statute runs in favor of the person in possession only if he claims title in fee.⁸⁸ In so far as this may mean that the statute does not run against the rightful owner, if the possessor recognizes

85. *Post.* § 507, note 38.

86. *Dothard v. Denson*, 75 Ala. 482; *Indianapolis R. Co. v. Ross*, 47 Ind. 25. See *O'Banion v. Cunningham*, 168 Ky. 322, Ann. Cas. 1917A, 1017, 182 S. W. 185, *Roe v. Strong*, 107 N. Y. 350, 14 N. E. 294.

87. But in *Long Island Railway Co. v. Mulry*, 212 N. Y. 108, 105 N. E. 806, it seems to be held that a railroad company is in possession though asserting an easement merely.

88. *Harden v. Watson*, 104 Ark. 641, 148 S. W. 506; *Iona v. 'Uu*, 16 Hawaii, 432; *Leport v. Todd*, 32 N. J. L. 131; *Myers v. Folkman*, 89 N. J. L. 390, 99

Atl. 97; *Bedell v. Shaw*, 59 N. Y. 46.

In New York the statute, which asserts the necessity of claim of title in order that the possession may be adverse, has been regarded as requiring a claim of title in fee, so that if the person in possession claims merely an estate for years, the statute does not run in his favor. *Bedell v. Shaw*, 59 N. Y. 46. But a claim by a railroad company to a right of way merely has been regarded as so closely equivalent to a claim of title in fee as to enable the statute to run. *Long Island R. Co. v. Mulry*, 212 N. Y. 108, 105 N. E. 806.

the fee simple as being in such owner, there can be no question as to the correctness of the statement. But in so far as it may mean more than this, it would appear to be open to question, even conceding that some claim of title is necessary. Opposed to such a view are the cases, hereafter referred to,^{88a} in which a conveyance or devise having been made to a person for life with remainder to another, entry and possession by the former were held to enure to the benefit of the latter, so as to vest in him a fee simple estate. And the possession of one holding under a lease for years, though this involves no claim on his part to the fee simple, is sufficient as against the rightful owner.⁸⁹

§ 505. **Mistake in locating boundary.** The question has frequently arisen whether, when an owner of land, by mistake as to the boundary line of his land, takes possession of another's land, and holds it for the statutory period, he thereby acquires the title as against the real owner. In some states, in such a case, the possession has been regarded as adverse, without reference to the fact that it is based on mistake, it being sufficient that there is an actual and visible possession without any recognition of the other's title.⁹⁰ In other states

88a. *Post*, § 511, notes 30-33b.

89. *Ante*, § 501, note 31.

90. *Lucas v. Provinen*, 130 Cal. 270, 62 Pac. 509; *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680; *Krause v. Nolte*, 217 Ill. 298, 3 Ann. Cas. 1061, 75 N. E. 362 (*semble*); *Daily v. Boudreau*, 231 Ill. 228, 83 N. E. 218 (*semble*); *Rennert v. Shirk*, 163 Ind. 542, 72 N. E. 546; *Dowell v. Dillon*, 178 Ky. 531, 199 S. W. 6; *Jordon v. Riley*, 178 Mass. 524, 60 N. E. 7; *Greene v. Anglemire*, 77 Mich. 168, 43 N. W. 772; *Weeks v. Upton*, 99 Minn. 410, 109 N. W. 828; *Stevens v.*

Velde, 138 Minn. 59, 163 N. W. 796; *Crowder v. Neal*, 100 Miss. 730, 57 So. 1; *Rude v. Marshall*, 54 Mont. 27, 166 Pac. 298; *Baty v. Elrod*, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343; *Zweimer v. Vest*, 96 Neb. 399, 147 N. W. 1129; *Crary v. Goodman*, 22 N. Y. 170; *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122; *Parker v. Wolf*, 69 Ore. 446, 138 Pac. 463; *Miles v. Pennsylvania Coal Co.*, 245 Pa. 94, 91 Atl. 211; *Erck v. Church*, 87 Tenn. 575, 4 L. R. A. 641, 11 S. W. 794; *Williams v. Hewitt*, 128 Tenn. 689, 164 S. W. 1198; *Burnell v. Ma-*

the fact that, in such case, the possession of the other's land is under mistake, has been regarded as frequently material, and a distinction is asserted to the effect that, if such possession up to the boundary as located is with the intention of claiming title to that extent, even though the boundary be incorrect, the possession is adverse, while, if it is with the intention of claiming title to that extent only if the boundary is correct, the possession is not adverse.⁹¹ The decisions of a particular court in this regard are not infrequently lacking in entire consistency, one with another, and occasionally the judicial discussion of the subject is such as to leave us somewhat in the dark as to the exact position of the court on the question.

Though the courts which assert the possible materiality of mistake as to the boundary line, ordinarily state that whether an intention to claim title to the boundary as located in spite of any mistake therein is the important consideration, they fail to tell us what they mean by such an intention, and in the actual discussion

loney, 39 Vt. 579, 94 Am. Dec. 358; Wissinger v. Reed, 69 Wash. 684, 125 Pac. 1030; Mielke v. Dodge, 135 Wis. 388, 115 N. W. 1099; Ovig v. Morrison, 142 Wis. 243, 125 N. W. 449. See editorial notes 9 Harv. Law Rev. at pp. 289, 467; 10 Columbia Law Rev. at p. 665; 11 Mich. Law Rev. 57.

91. Smith v. Bachus, 195 Ala. 8, 70 So. 261; Couch v. Adams, 111 Ark. 604, 164 S. W. 728; Bossom v. Gillman, 70 Fla. 310, 70 So. 364; Grube v. Wells, 34 Iowa, 148; Keller v. Harrison, 151 Iowa, 320, Ann. Cas. 1913A, 30, 128 N. W. 851, 131 N. W. 53; Edwards v. Fleming, 83 Kan. 653, 33 L. R. A. (N. S.) 923, 112 Pac. 836; Turner v. Morgan, 158 Ky. 511, 52 L. R. A. (N. S.)

106, 165 S. W. 684; Preble v. Maine Cent. R. Co., 85 Me. 260, 21 L. R. A. 829, 35 Am. St. Rep. 366, 27 Atl. 119; Borneman v. Milliken, 116 Me. 76, 100 Atl. 5; Mulligan v. Fritts, 226 Mo. 189, 125 S. W. 1101; Vanderbilt v. Chapman, 175 N. C. 11, 94 S. E. 703; Dunnigan v. Wood, 58 Ore. 119, 112 Pac. 531; Chance v. Branch, 58 Tex. 490; Davis v. Owen, 107 Va. 283, 13 L. R. A. (N. S.) 728, 58 S. E. 581; Christian v. Bulbeck, 120 Va. 74, 90 S. E. 661; Shanski v. Novak, 84 Wash. 39, 146 Pac. 160; McCormick v. Sorenson, 58 Wash. 167, 137 Am. St. Rep. 1047, 107 Pac. 1055; Snell v. Stelling, 83 Wash. 248, 145 Pac. 466.

of the particular case they not infrequently shift the inquiry from one as to the existence of an intention to claim title in the contingency of mistake to one as to whether a claim of title was actually made or indicated during the period of possession. An intention to claim title in spite of a mistake in the location of the boundary might mean an intention to retain possession until legally ejected, even though convinced of the mistake, or it might mean merely an intention to assert a right to the possession although relinquishing possession by reason of proof of mistake. Probably what the courts have in view in asserting this distinction is that the possession is not adverse as regards land erroneously included in one's possession by reason of a mistake in the boundary line, provided he concedes that if there is any such land he has a mere permissive possession, that he holds possession, in other words, in subordination to any right therein on the part of the adjoining owner, while his possession is adverse if he does not concede the possibility of mistake, and thus fails to recognize any possibility of right in the other. So regarded, it may be questioned whether the position of the courts asserting the possible materiality of mistake in this regard is so entirely out of harmony with that of the courts which assert its immateriality as is frequently assumed. Even the latter courts would hardly regard one's possession of land enclosed by mistake as adverse, if the possessor explicitly acknowledges to the rightful owner that any such land is held by him in subordination to any right in the latter and their assertion of the immateriality of mistake in this regard appears to mean no more than that the fact of mistake is not a basis for inferring such an acknowledgment on the part of the possessor that he holds in subordination to any possible rights in the true owner. But this appears to involve the same position as that held by the courts which assert the possible materiality of the mis-

take, in so far as they recognize⁹² a presumption of intention to claim title regardless of the mistake, that is, a presumption that, in spite of the mistake, the possession is adverse. Adopting this view, it is only in so far as the courts, which assert the possible materiality of the mistake, recognize a contrary presumption,⁹³ of an intention on the part of the wrongful possessor not to claim title if he is mistaken as to the boundary, that the assertion of the materiality of mistake as to boundary becomes of substantial importance. That the presumption is properly in favor of the adverse or hostile character of the possession rather than against it has been previously argued,⁹⁴ but whatever presumption in this regard may be recognized, the introduction of the element of mistake in the discussion of the question of adverse possession is, it is submitted, unnecessary and undesirable. In no case except in that of a mistake as to boundary has the element of mistake been regarded as having any significance,⁹⁵ and there is no reason for

92. As in *Huffman v. White*, 90 Ala. 354, 7 So. 816; *Couch v. Adams*, 111 Ark. 604, 164 S. W. 728; *Heath v. Kirkpatrick*, 48 Iowa, 78; *Zimmerman v. Ginter*, 69 Kan. 331, 63 Pac. 657; *Patterson v. Hollis*, 90 Kan. 655, Ann. Cas. 1915B, 725, 136 Pac. 258; *Turner v. Morgan*, 158 Ky. 511, 52 L. R. A. (N. S.) 106, 165 S. W. 684 (*semble*); *Goltermann v. Schiermeyer*, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; *Mangold v. Phillips*, —Mo.—, 186 S. W. 988; *Nichols v. Tallman*, Mo., 189 S. W. 1184; *Pearson v. Dryden*, 28 Or. 350, 43 Pac. 166. See *ante*, § 295.

93. As in *Lecroix v. Malone*, 157 Ala. 434, 47 So. 725; *Jahnke v. Seydel*, 178 Iowa, 363, 159 N. W. 986; *Shanline v. Wiltsie*, 70 Kan. 177, 3 Ann. Cas. 140, 78 2 R. P.—48

Pac. 436; *Davis v. Alexander*, —Mo.—, 183 S. W. 563; *Ware v. Cheek*, Mo., 201 S. W. 847; *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661. See *Hornsby v. Tucker*, 180 Ala. 418, 61 So. 928.

94. *Ante*, § 503, note 54.

95. "If possession through mistake were held not to be adverse, very little room would be left for the statute of limitation, for almost every man who buys land under a bad title labors under the mistaken idea that his deed is good and effectual." 2 Dembitz, Land Titles, 1397. "Adopt the rule that an entry and possession under a claim of right, if through mistake, does not constitute an adverse possession. * * * the inquiry no longer is whether visible possession, with the intent to possess, under

attributing greater weight thereto when the mistake is as to the proper location of a boundary than when it is a mistake as to the title to all the land wrongfully possessed. And to introduce the element of mistake, and then limit its significance by an inquiry as to the intention which the possessor may have as to his course of action in case there should be a mistake, an intention which has ordinarily no existence whatsoever, is calculated only to cause confusion in the minds of the jury, without, it is conceived, any compensating advantage.

In case a temporary boundary line is located by agreement between the adjoining owners, with the understanding that they shall occupy with reference thereto until the proper line is ascertained, the possession of one beyond the proper line, in accordance with such temporary location, has been regarded as not adverse to the other.⁹⁶ His possession in such case is in effect permissive, and involves a recognition of the other's title to the extent of that title.

§ 506. **Necessity of right of action.** The purpose of the statutes of limitation is to debar one of his right to assert his claim when, having the power to assert such claim, he has failed to do so for the period named. Consequently the statutes do not commence to run as against a particular person until a right of entry or action accrues to him. So, as against one who has a remainder upon an estate for life, the statute does not

a claim of right, and to use and enjoy as one's own, is a disseisin, but from this plain and easy standard of proof we are to depart, and the invisible motives of the mind are to be explored." *French v. Pearce*, 8 Conn. 439, per Hosmer, C. J.

96. *Smith v. Keyser*, 115 Ala. 455, 22 So. 149; *Peters v. Gracia*, 110 Cal. 89, 42 Pac. 455; *Hassett v. Ridgely*, 49 Ill. 197; *McNamee*

v. Moreland, 26 Iowa, 96; *Murphy v. Comm.*, 187 Mass. 361, 73 N. E. 524; *Bunce v. Bidwell*, 43 Mich. 542, 5 N. W. 1023; *Majors v. Rice*, 57 Mo. 384; *Jackson v. Vermilyea*, 6 Cow. 677; *Bryson v. Slagle*, 44 N. C. 449; *Massengill v. Boyles*, 11 Humph. (Tenn.) 112; *Texas Land Co. v. Williams*, 51 Tex. 51; *Burnell v. Maloney*, 39 Vt. 579, 94 Am. Dec. 358.

ordinarily begin to run in favor of a third person, who takes wrongful possession during the life tenancy, until the termination of the estate for life,⁹⁷ and, presumably, as against one who has a reversion upon an estate for years, the statute does not begin to run, in favor of one who takes possession during the existence of the estate for years, until the termination of such estate.⁹⁸ Nor, it seems, does the fact that the reversioner or remainderman has a right of entry for a forfeiture before the normal expiration of the particular estate cause the statute to run as against him before such expiration.⁹⁹ In one or two states, however, the fact that the remainderman is by statute enabled to maintain a suit to quiet title even before the death of the life tenant is regarded as causing the statute to run as against him in favor of a wrongful possessor, immediately upon his acquisition of knowledge of such wrongful possession.¹

If the particular estate for life or for years is voluntarily created after the statute has begun to run, it

97. Angell, Limitations, § 371, *et seq.*; *Rosenau v. Childress*, 111 Ala. 214, 20 So. 95; *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151, 28 S. W. 796; *Anderson v. Northrop*, 30 Fla. 612, 12 So. 318; *Bagley v. Kennedy*, 81 Ga. 721, 8 S. E. 742; *Orthwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159, 4 L. R. A. 434, 13 N. E. 564, 21 N. E. 430; *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529; *Williams v. McClanahan*, 3 Metc. (Ky.) 420; *Pratt v. Churchill*, 42 Me. 471; *Wallingford v. Hearl*, 15 Mass. 471; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Watkins v. Green*, 101 Mich. 493, 60 N. W. 44; *Reed v. Lowe*, 163 Mo. 519, 85 Am. St. Rep. 578, 63 S. W. 687; *Pinckney v. Burrage*, 31 N. J. L. 21; *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433;

Childers v. Bumgarner, 53 N. C. 297; *Davis v. Dickson*, 92 Pa. St. 365; *Moseley v. Hankinson*, 25 S. C. 519; *Carver v. Maxwell*, 110 Tenn. 75, 71 S. W. 752; *Mansfield v. Neff*, 43 Utah, 258, 134 Pac. 1160.

98. *Potrero Nuevo Land Co. v. All Persons*, 29 Cal. App. 743, 156 Pac. 876; *Orrell v. Madox*, 3 Cruise, Dig. tit. 31, ch. 2, § 30. That the statute begins to run immediately on expiration of the lease, though it is renewed, see *Gartlan v. C. H. Hooper & Co.*, —Cal.—, 170 Pac. 1115.

99. *Doe v. Danvers*, 7 East 299; *Gwynn v. Jones*, 2 Gill. & J. (Md.) 173.

1. *Murray v. Quigley*, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869; *Criswell v. Criswell*, 101 Neb. 349, 163 N. W. 303.

will continue to run, as against the reversioner or remainderman as well as against the particular tenant.² That is, an owner in fee against whom the statute has commenced to run cannot interrupt its running by creating a particular estate, either with or without a remainder thereon.

Applying the principle that the statute does not run against one who has no right of entry or action, it has been decided that if, after the adverse possession has begun, the rightful owner, a married woman, dies, and her husband has then an estate for life, the statute does not run as against the woman's heirs during the existence of the life estate.³

In states in which an estate in fee tail is still recognized, since the reversioner or remainderman on the estate in fee tail has no right of entry or action until the failure of the designated heirs of the body, the statute of limitations cannot, in theory, run as against him until then. The English statute of limitations now in force provides in effect that after the statute shall have run as against the tenant in tail, it shall be regarded as having also run against all persons whom he might have barred by conveyance or otherwise, but before this statute was passed, it was recognized that "while possession adverse to a tenant in tail told against the issue in tail, who claimed in right of the same estate,⁴ such possession, though protracted for centuries, went for no-

2. *Hubbard v. Swofford Bros. Dry Goods Co.*, 209 Mo. 495, 123 Am. St. Rep. 488, 108 S. W. 15; *Sutton v. Clark*, 59 S. C. 440, 82 Am. St. Rep. 848, 38 S. E. 150; *Stackpoole v. Stackpoole*, 4 Dr. & War. at p. 347; 1 *Hayes, Conveyancing*, 257.

3. *Jackson v. Johnson*, 5 Cowen (N. Y.) 74, 15 Am. Dec. 434, followed in *Jackson v. Mancius*, 2 Wend. (N. Y.) 369; *McNeely v. South Penn. Oil*, 52 W. Va.

616, 62 L. R. A. 562, 44 S. E. 508. A contrary view is asserted in *Beattie v. Stewart*, 154 Ill. 273, 40 N. E. 340. See also *Henry v. Carson*, 59 Pa. St. 207.

4. That it bars such issue see *Tolson v. Kaye*, 3 Brod. & Bing. 217; *Croxall v. Shererd*, 5 Wall. (U. S.) 268, 18 L. Ed. 572; *Inman v. Barnes*, 2 Gall. 315, 13 Fed. Cas. No. 7048; *Martindale v. Troup*, 3 Harr. & McH. 244; *Wickes v. Wickes*, 98 Md. 307,

thing as against the remainderman or reversioner, who had a substantive right, which did not accrue until failure of the issue in tail."⁵ The matter is of little practical importance in this country, by reason not only of the small number of states in which estates in fee tail are recognized, and the rarity of their occurrence even in such states, but also of the fact that the reversioner or remainderman would ordinarily be barred by a conveyance by the first tenant in tail.

In so far as the government may be by statute liable to suit,⁶ or as the rightful owner can, by legal proceedings against the agents of the government, assert his right of possession,⁷ the statutory bar may run in favor of the government, while, it would seem, it cannot run in absence of such a right of action in his favor. There are several cases in which the right of the state to acquire title under the statute of limitations is recognized, without any reference being made to the question of the ability of the rightful possessor to enforce his claim,⁸ and these must, it seems, ordinarily be upheld on the theory that there was a right of action against the agents of the state in possession.

— **Bar of cestui que trust.** There is one case in which a person may be barred by the adverse possession of another although he has no right of action or

56 Atl. 1017; *Baldrige v. McFarland*, 26 Pa. 338 (*semble*); *Dow v. Warren*, 6 Mass. 328.

5. 1 Hayes, *Conveyancing* (5th Ed.), 258. See Angell, *Limitations*, § 361, quoting 3 Cruise's Dig. tit. 31, ch. 2, § 13. The case of *Bassett v. Hawk*, 118 Pa. 94, 11 Atl. 802, to the effect that the reversioner or remainderman is barred, is based on the express provision of the act of 1859.

6. *Baxter v. State*, 10 Wis.

454. See editorial note 17 Harv. Law Rev. 55.

7. *Stanley v. Schwalby*, 147 U. S. 508, 37 L. Ed. 259; *El Paso v. Ft. Dearborn Nat. Bank*, 96 Tex. 496, 74 S. W. 21.

8. *Atty. Gen. v. Ellis*, 198 Mass. 91, 15 L. R. A. (N. S.) 1120, 84 N. E. 430; *Eldridge v. Binghampton*, 120 N. Y. 309, 24 N. E. 262; *Birdsell v. Cary*, 66 How. Pr. 358; *Parker v. Southwick*, 6 Watts (Pa.) 377.

entry, that of a *cestui que trust*. If the possession is adverse to the trustee, so as to bar his right to recover possession after the statutory period, the *cestui que trust* is also barred.⁹ This rule, that the *cestui que trust* must suffer for the negligence of the trustee in failing to sue, has been in terms based on the consideration that were the rule otherwise, the *cestui*, having no right of action, would never be barred by the statute.¹⁰ In further justification of the rule reference has been made to the theory¹¹ that the *cestui que trust* has, properly speaking, merely a right *in personam* against the trustee and not an actual estate in the land, and that as he is not liable personally, as is a legal owner, upon an obligation attaching to the land, such as that on a covenant running therewith, so he is not entitled to protection as is a legal owner.¹²

The bar of the statute being based on the existence of a right of action in favor of the trustee, the fact that the *cestui que trust* is under disability, such as infancy

9. *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 360; *Cruse v. Kidd*, 195 Ala. 22, 70 So. 166; *East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737; *Hall v. Waterman*, 220 Ill. 569, 77 N. E. 142, 4 L. R. A. (N. S.) 776; *Barclay v. Goodloe*, 83 Ky. 493; *Stoll v. Smith*, 129 Md. 164, 98 Atl. 530; *Walton v. Ketchum*, 147 Mo. 209, 48 S. W. 924; *Bennett v. Garlock*, 79 N. Y. 302, 35 Am. Rep. 517; *Cameron v. Hicks*, 141 N. Car. 21, 7 L. R. A. (N. S.) 407, 53 S. E. 728; *Williams v. Otey*, 8 Humph. (Tenn.) 563, 47 Am. Dec. 632; *Collins v. McCarty*, 68 Tex. 150, 2 Am. St. Rep. 475, 3 S. W. 730. In *Ayer v. Chapman*, 145 Ga. 608, 91 S. E. 548, it was held that the statute did not run against the *cestui* when the trustee named in the creation

of the trust did not accept or qualify, and hence there was no person to bring suit. The decision has been criticized on the theory that the heir or personal representative of the creator of the trust held the legal title and could have brought suit on behalf of the *cestui*. See editorial note, 17 Columbia Law Rev. 568.

10. See the language of Lord Hardwicke in *Llewellyn v. Mackworth*, 2 Eq. Cas. Abr. 579, Barn. 445, quoted 2 Perry, Trusts, § 858.

11. *Ante*, § 103(b).

12. "If a man wants complete legal protection, let him acquire a true proprietary right, with its incident liabilities, for himself." T. Cyprian Williams, Esq. in 51 Solicitor's Journal, at p. 156.

or coverture, is immaterial,¹³ as is the fact that the *cestui que trust* has an equitable estate in remainder only, the legal title in fee being in the trustee.¹⁴

§ 507. **Interruption of running of statute.** It not infrequently occurs that, after the statute of limitations has begun to run against the right to recover land, and before it has run for the period named therein, it, for some reason, ceases to run. Since it runs by reason of the failure to assert one's right to the land as against one in possession thereof whose possession is adverse to the rightful owner, one would expect it to cease to run either upon the owner's assertion of the right to the land, upon the cessation of the possession, or upon the cessation of the hostile character of the possession. We will consider, in the above order, the operation in this regard of these various classes of circumstances.

—**By entry or action.** One whose land is in the wrongful possession of another may assert his right to the land either by entry or by action. It is well recognized that the running of the statute is interrupted by the owner's entry on the land, if, and only if, this is made openly and under claim of right, with a clearly

13. *Molton v. Henderson*, 62 Ala. 426; *Patchett v. Pac. Coast Ry.*, 100 Cal. 505, 35 Pac. 73; *Salter v. Salter*, 80 Ga. 178, 12 Am. St. Rep. 249, 4 S. E. 391; *Barelay v. Goodloe*, 83 Ky. 493; *Crook v. Glenn*, 30 Md. 71; *Ewing v. Shanahan*, 113 Mo. 188, 20 S. W. 1065; *Thompson v. Carmichael*, 122 Pa. St. 478, 15 Atl. 867; *Williams v. Otey*, 8 Humph. (Tenn.) 563, 47 Am. Dec. 632; *Collins v. McCarty*, 68 Tex. 150, 2 Am. St. Rep. 475, 3 S. W. 730.

14. *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46; *McLain v.*

Rabon, 142 Ga. 163, 82 S. E. 544; *Waterman v. Waterman Hall*, 220 Ill. 569; *Edwards v. Woolfolk*, 17 B. Mon. (Ky.) 376; *Ewing v. Shanahan*, 113 Mo. 188, 20 S. W. 1065; *King v. Rhew*, 108 N. C. 696, 23 Am. St. Rep. 76, 13 S. E. 174; *Watkins v. Specht*, 7 Cold. (Tenn.) 585.

Obviously, if the trustee has only a life estate, the statute does not run against the legal remainderman. *East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737; *Ewin v. Lindsey*, (Tenn.) 58 S. W. 388.

indicated purpose of taking possession.¹⁵ In several states, however, such an effect has been denied to a forcible entry, at least when not followed by continuous possession,¹⁶ and in some states there is a statutory provision restricting the operation of an entry as an interruption of the adverse possession, as by requiring it to be followed by possession for a certain time, or by an action of ejectment, and occasionally the statute expressly deprives the entry of any such effect.¹⁷

The bringing of an action by the true owner to recover the possession, if followed both by a judgment in his favor and the recovery of possession thereunder, interrupts the running of the statute,¹⁸ and such inter-

15. Doe v. Clayton, 81 Ala. 391, 2 So. 24; Burrows v. Gallup, 32 Conn. 493, 87 Am. Dec. 186; Brett v. Farr, 66 Iowa, 684, 24 N. W. 275; Batchelder v. Robbins, 93 Me. 579, 45 Atl. 837; Wickes v. Wickes, 98 Md. 307, 56 Atl. 1017; Bowen v. Guild, 130 Mass. 121; Musser-Sauntry Land, Logging & Mfg. Co. v. Tozer, 56 Minn. 443, 57 N. W. 1072; Campbell v. Wallace, 12 N. H. 362, 37 Am. Dec. 219; Landon v. Townshend, 129 N. Y. 166, 29 N. E. 71; Altemus v. Campbell, 9 Watts (Pa.) 28, 34 Am. Dec. 494; Evitts v. Roth, 61 Tex. 81; Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 N. W. 1019.

The owner may enter by an agent as well as in person. Batchelder v. Robbins, 93 Me. 579, 45 Atl. 837; Johnson v. Fitzgeorge, 50 N. J. L. 470, 14 Atl. 762; Ingersoll v. Lewis, 11 Pa. 212, 51 Am. Dec. 536; Camp v. Camp, 88 Vt. 119, 92 Atl. 12; Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 N. W. 1019.

16. Gould v. Carr. 33 Fla. 523,

24 L. R. A. 130, 15 So. 259; Pella v. Scholte, 24 Iowa, 283; Mendenhall v. Price, 88 Iowa, 203, 55 N. W. 321 (*semble*); Ferguson v. Bartholomew, 67 Mo. 212; Norvell v. Gray, 1 Swan (Tenn.) 96. *Contra*. San Francisco v. Fulde, 37 Cal. 349, 99 Am. Dec. 278. In Illinois an entry has been regarded as forcible for this purpose if against the will of the person in possession. Bugner v. Chicago Title & Trust Co., 280 Ill. 620, 117 N. E. 711.

17. See Place v. Place, 139 Mich. 509, 102 N. W. 996; Douglas v. Irvine, 126 Pa. 643, 17 Atl. 802; Cobb v. Robertson, 99 Tex. 138, 122 Am. St. Rep. 609, 86 S. W. 746, 87 S. W. 1148.

18. Moore v. Greene, 19 How. (U. S.) 69, 15 L. Ed. 533; Bishop v. Truett, 85 Ala. 376; McGrath v. Wallace, 85 Cal. 622; Smith v. Hornback, 4 Litt. (Ky.) 232, 14 Am. Dec. 122; Barrell v. Title Guarantee & Trust Co., 27 Ore. 77, 39 Pac. 992; Potts v. Wright, 82 Pa. 498.

ruption occurs, it has been decided, at the time of the bringing of the action.¹⁹ The bringing of an action, however, which results unsuccessfully to plaintiff, does not interrupt it.²⁰ There are a number of decisions to the effect that even though a judgment is rendered for plaintiff in such action, the statute does not cease to run unless there is a change of possession in accordance with the judgment,²¹ while there are other decisions to the contrary.²²

In some of the earlier cases,²³ the asserted ineffectiveness in this regard of a judgment, not followed by a change of possession in accordance therewith, was based upon the consideration that a judgment in ejectment decided only that the plaintiff was entitled to possession during the term named in the fictitious demise,

19. *Butler v. Secrist*, 92 Neb. 506, 138 N. W. 749; *Barrell v. Title Guarantee Co.*, 27 Ore. 77, 39 Pac. 992; *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588; *Dunn v. Miller*, 75 Mo. 260; *Breon v. Robrecht*, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33; *Ball v. Lively*, 1 Dana (Ky.) 60; *Beard v. Ryan*, 78 Ala. 37.

20. *Moore v. Greene*, 19 How. (N. Y.) 71; *Langford v. Poppe*, 56 Cal. 73; *Workman v. Guthrie*, 29 Pa. St. 495, 72 Am. Dec. 654; *Snell v. Harrison*, 131 Mo. 495, 52 Am. St. Rep. 642, 32 S. W. 37; *Nelson v. Triplett*, 99 Va. 421, 39 S. E. 150.

21. *Bradford v. Wilson*, 140 Ala. 633, 37 So. 295; *Carpenter v. Natoma, etc., Water Co.*, 63 Cal. 616; *Gould v. Carr*, 33 Fla. 523, 24 L. R. A. 130, 15 So. 259; *O'Neal v. Boone*, 53 Ill. 35; *Forbes v. Caldwell*, 39 Kan. 14, 17 Pac. 478; *Smith v. Trabue*, 1 McLean (U. S.) 87.

22. *Snell v. Harrison*, 131 Mo. 495, 52 Am. St. Rep. 642, 32 S. W. 37, overruling *Mabary v. Dollarhide*, 98 Mo. 204, 14 Am. St. Rep. 639, 11 S. W. 611; *Rogers v. Johnson*, 259 Mo. 173, 168 S. W. 613; *Perry v. Eagle Coal Co.*, 170 Ky. 824, 186 S. W. 875, apparently overruling *Martin v. Hall*, 152 Ky. 677, 153 S. W. 997; *Brolaskey v. McClain*, 61 Pa. St. 166; *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1026.

A like view has been taken as to the effect of a decree for a conveyance (*Gower v. Quinlan*, 40 Mich. 572) and a decree quieting title (*Hintrager v. Smith*, 89 Iowa, 270, 56 N. W. 456; *Oberlein v. Wells*, 163 Ill. 101, 45 N. E. 294).

23. *Kennerly v. Reynolds*, 27 Ala. 364; *Smith v. Hornback*, 4 Litt. 233; *Jackson v. Haviland*, 13 Johns. 229.

and was consequently not conclusive as to the title generally,²⁴ but this consideration has ceased to be effective with the change in the nature of the action. And the view that a change of possession is necessary can be based only on the theory that, in the absence of a change of possession, the running of the statute is not interrupted unless the possession loses its hostile character, and that it does not lose such character merely as a result of the rendition of a judgment in favor of the rightful owner. It is said on the other hand, that the judgment does have the effect of depriving the possession of its adverse character, for the reason that it estops the defendant therein from asserting that he holds under claim of title.²⁵ But conceding that a holding under claim of title is necessary to put the statute in motion,²⁶ it is by no means clear that a judgment in ejectment against the wrongful possessor should properly estop him from the assertion of such a holding. It estops him from asserting title in subsequent litigation, but he is at liberty, it would seem, after the rendition of the judgment, as before, to assert in conversation or otherwise, that he claims title to the property, and having made such assertion, to show, in subsequent litigation, that he did so. The bringing of an action by the true owner to assert his rights, followed by the recovery of a judgment by him, without any actual change of possession, might, it is submitted, be regarded as effective to stop the running of the statute against him, for the reason that in that way he has asserted, in the most conclusive manner possible, his rights in the land. While his failure to assert his rights by either action or entry involves laches on his part, it does not seem that he should be regarded as guilty of laches, and made to suffer accordingly, because, after asserting his rights by an action brought to a successful conclusion, he fails

24. See an excellent editorial note in 9 Columbia Law Rev. at p. 351.

25. 9 Columbia Law Rev. 351.

26. *Ante*, § 504.

to follow this up by an entry on the land. He has a right to assume, after judgment in his favor, and in the absence of anything to show the contrary, that defendant, in retaining possession, is doing so in his behalf, that is, in accord with the adjudication.²⁷

— **By cessation of possession.** Since the statute runs against the rightful owner only if there is an actual possession of the land by another, it ceases to run upon a cessation of such actual possession, an interruption of the continuity of possession, as it is frequently termed. If such an interruption occurs, and possession is thereafter resumed, the limitation period commences to run only from the time of such resumption.²⁸ Interruption of continuity of possession may result from the cessation by the person in possession of his exercise of acts of possession or ownership over the land,²⁹ but the mere fact that the acts of possession are not continuous, or that the owner does not continue in actual occupancy, does not necessarily show an interruption of the possession, this depending on the character of the acts necessary to constitute actual possession, the intention of the possessor, and the other circumstances of the case.³⁰ Nor is the continuity of possession interrupted

27. See *Sanford v. Herron*, 161 Mo. 176, 84 Am. St. Rep. 703, 61 S. W. 839.

28. *Ross v. Goodwin*, 88 Ala. 390, 6 So. 682; *Brown v. Hanauer*, 48 Ark. 277, 3 S. W. 27; *Townsend v. Edwards*, 25 Fla. 582, 6 So. 212; *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088; *Steeple v. Downing*, 60 Ind. 473; *Logan v. Williams*, 159 Ky. 412, 167 S. W. 124; *Armstrong v. Risteau's Lessee*, 5 Ind. 256, 59 Am. Dec. 115; *Old South Soc. v. Wainwright*, 156 Mass. 115, 30 N. E. 476; *Bliss v. Johnson*, 94 N. Y. 235; *Philipson v. Flynn*,

83 Tex. 580, 19 S. W. 136; *Illinois Steel Co. v. Budzisz*, 115 Wis. 68, 90 N. W. 1019.

29. *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264, 6 So. 837; *Sharp v. Johnson*, 22 Ark. 79; *Clark v. White*, 120 Ga. 957, 48 S. E. 357; *Downing v. Mays*, 153 Ill. 33, 46 Am. St. Rep. 896, 38 N. E. 620; *Nixon v. Porter*, 38 Miss. 401; *Barrell v. Title Guarantee & Trust Co.*, 27 Ore. 77, 39 Pac. 997; *Stephens v. Leach*, 19 Pa. St. 262; *Fitch v. Boyer*, 51 Tex. 336.

30. *Beasley v. Howell*, 117 Ala. 499, 22 So. 989; *Aldrich Mining*

by the entry of a third person upon the land, not effecting an ouster of the person previously in possession, such an entry constituting merely a trespass upon such person's possession.³¹

That the interruption of continuity of possession is the result of overwhelming necessity, such as the submersion of the property,³² sickness,³³ or military conditions,³⁴ appears to be immaterial in this regard, but when the cessation of occupation is temporary merely, the fact that it is obviously the result of such necessity is a consideration tending to show that the legal possession is nevertheless continuing.³⁵

— **By cessation of hostility.** Since the statute runs against the true owner in favor of one in possession only when such possession is hostile or adverse, it follows that if the possession, although otherwise continuous, ceases to be hostile or adverse, by reason of

Co. v. Pearce, 192 Ala. 195, 68 So. 900; Botsford v. Eyraud, 148 Cal. 431, 83 Pac. 1008; Downing v. Mayes, 153 Ill. 330, 46 Am. St. Rep. 896, 38 N. E. 620; Butt v. Houser — (Ky.) — 188 S. W. 628; McLellan v. McFadden, 114 Me. 242, 95 Atl. 1025; Ford v. Wilson, 35 Miss. 490; Hunter v. Pinnell, 193 Mo. 142, 91 S. W. 472; Pease v. Whitney, — N. H. —, 98 Atl. 62; Cross v. Seaboard Air Line R. Co., 172 N. C. 119, 90 S. E. 14; Hughs v. Pickering, 14 Pa. St. 297; Cathcart v. Matthews, 105 S. C. 329, 89 S. E. 1021; Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866; Chase v. Eddy, 88 Vt. 235, 92 Atl. 99.

31. Chastang v. Chastang, 141 Ala. 451, 109 Am. St. Rep. 45, 37 So. 799; Prouty v. Tilden, 164, Ill. 163, 45 N. E. 445; Martin v. Hall, 152 Ky. 677, L. R. A.

1918A, 1041, 153 S. W. 997; Batchelder v. Robbins, 95 Me. 59, 49 Atl. 210; Ballard v. Hansen, 33 Neb. 861, 51 N. W. 295; Clark v. Potter, 32 Ohio St. 49; Workman v. Guthrie, 29 Pa. 495, 62 Am. Dec. 382; Love v. Turner, 78 S. C. 513, 59 S. E. 529; Glover v. Pfeuffer, — Tex. Civ. —, 163 S. W. 984; Zeller v. Martin, 157 Wis. 341, 147 N. W. 371.

32. Western v. Flanagan, 120 Mo. 61, 25 S. W. 531. See 2 Columbia Law Rev. 562; 16 Harvard Law Rev. 224.

33. Taylor v. Dunn, 108 Tex. 337, 193 S. W. 663.

34. See Holliday v. Cromwell, 37 Tex. 437.

35. See McColgan v. Langford, 6 Lea (Tenn.) 108, 116; Robinson v. Nordman, 75 Ark. 593, 88 S. W. 592; Thomas v. Spencer, 66 Ore. 359, 133 Pac. 822.

the possessor's recognition of the title of the rightful owner, the statute thereupon ceases to run.³⁶ The possession also ceases to be hostile when the possessor acquires the right of possession, by a conveyance or lease.³⁷ In other words, if after the statute has commenced to run, the person in possession acquires the title to the land, and subsequently disposes thereof, retaining possession, the statutory period must be figured from the time of such separation of the title and the possession. There are occasional decisions or dicta to the effect that the possessor's recognition of the title of the rightful owner is effective for the purpose of negating the element of hostility although it is communicated, not to the rightful owner himself, but to some third person or persons,³⁸ but the soundness of such a view is, it is submitted, open to question. One who takes possession of another's land without permission from the owner is guilty of a tort regardless of the fact that he concedes

36. *Russell v. Erwin*, 38 Ala. 44; *Trufant v. White*, 99 Ala. 526, 13 So. 83; *Vittitow v. Burnett*, 112 Ark. 277, 165 S. W. 625; *Lovell v. Frost*, 44 Cal. 471; *McMahill v. Torrence*, 163 Ill. 277, 45 N. E. 269; *Litchfield v. Sewell*, 97 Iowa, 247, 66 N. W. 104; *Pratt v. Ard*, 63 Kan. 182, 65 Pac. 255; *Ray v. Barker's Heirs*, 1 B. Mon. (Ky.) 364; *Vaughan v. Bacon*, 15 Me. 455; *Warren v. Bowdran*, 156 Mass. 280, 31 N. E. 300; *City of St. Paul v. Chicago, M. & St. P. R. Co.*, 63 Minn. 330, 34 L. R. A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458; *Tomlinson v. Lynch*, 32 Mo. 160; *Stone v. Kansas City & W. B. R. Co.*, 261 Mo. 61, 169 S. W. 88; *Nebraska Ry. Co. v. Culver*, 35 Neb. 143, 52 N. W. 886; *Keneda v. Gardner*, 4 Hill (N. Y.) 464; *Williams v.*

Scott, 122 N. C. 545, 29 S. E. 877; *Ingersoll v. Lewis*, 11 Pa. St. 212, 51 Am. Dec. 536; *Erskine v. North*, 14 Gratt. (Va.) 60. *Contra*, *McAllister v. Hartzell*, 60 Ohio St. 69.

That the person in possession instituted a suit for specific performance against the rightful owner was held to involve an admission of the latter's title. *Central Pac. Ry. Co. v. Tarpey*, Utah—, 168 Pac. 554.

37. *Patton v. Smith*, 171 Mo. 231, 71 S. W. 187; *Joy v. Palethorpe*, 77 Ore. 552, 152 Pac. 230.

38. *Chicago etc. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088; *Patterson v. Reigle*, 4 Pa. 201; *Whitaker v. Thayer*, 38 Tex. Civ. 537, 86 S. W. 361; *City of Cleveland v. Cleveland, C. C. & St. L. Ry. Co.*, 93 Fed. 113; And see cases cited *ante*, § 504 note 84.

the other's title, and such other should be excused from the obligation of asserting his title within the statutory period only when the possessor acknowledges his title by direct communication, and the latter is thereby induced to refrain from asserting his title.

— **Effect of offer to purchase.** Whether, in a particular case, there was such a recognition of the rightful title as to change the character of the possession, would seem ordinarily to be a question of fact, but the courts have tended to discuss it as a matter of law, particularly with reference to the question whether the person in possession may offer to purchase from the rightful owner, without thereby recognizing the latter's title. The proper distinction would seem to be that between an offer to purchase the land, and an offer to purchase immunity from litigation, and that such is the distinction is recognized in a number of cases.³⁹ In some cases, on the other hand, such a distinction appears to be ignored, and an offer to purchase from the rightful owner is regarded as necessarily involving a recognition of the latter's title.⁴⁰

— **Effect of contract or conveyance.** The fact that the wrongful possessor actually contracts to pur-

see also *Bryan v. Atwater*, 5 Day, 181; *Bank v. Wilson*, 10 Watts, 261; *McAllister v. Hartzell*, 60 Ohio St. 69, 13 N. E. 715.

39. *Lovell v. Frost*, 44 Cal. 471; *Central Pacific R. Ca. v. Mead*, 63 Cal. 112; *Montgomery & Mullen Lumber Co. v. Quimby*, 164 Cal. 250, 128 Pac. 402; *Chapin v. Hunt*, 40 Mich. 595; *Walbrun v. Ballen*, 68 Mo. 164; *Oldig v. Fisk*, 53 Neb. 156, 73 N. W. 661 (*semble*); *Chambers v. Bessent*, 17 N. Mex. 487, 134 Pac. 237; *Headrick v. Fritts*, 93 Tenn. 270, 24 S. W. 11; *Meyer v. Hope*, 101 Wis. 123, 77 N. W. 720; *Clithero v. Fenner*, 122 Wis. 356, 106, Am.

St. Rep. 978, 99 N. W. 1027.

40. *Litchfield v. Sewell*, 97 Iowa, 247, 66 N. W. 104; *Gay v. Moffitt*, 2 Bibb (Ky.) 506, 5 Am. Dec. 633; *Moore v. Moore*, 21 Me. 350; *Croze v. Quincy Mining Co.*, 199 Mich. 515, 165 N. W. 786; *Jackson v. Britton*, 4 Wend. (N. Y.) 507; *Truman v. Raybuck*, 207 Pa. St. 357, 56 Atl. 944.

That such an offer tends to prove that the possession is not adverse, see *Liggett v. Morgan*, 98 Mo. 39, 11 S. W. 241. *Alsop v. Stewart*, 194 Ill. 595, 88 Am. St. Rep. 169, 62 N. E. 795; *Zweibel v. Myers*, 69 Neb. 294, 95 N. W. 597.

chase from the rightful owner, should not, it is conceived, any more than should his offer to purchase, be considered conclusive of his recognition of the latter's title, but there are occasional decisions in which it has been apparently so regarded.⁴¹ The language of the contract may of course show such recognition.⁴²

If the person in wrongful possession actually takes a conveyance from the true owner, he will ordinarily base his claim upon such conveyance rather than upon the statute of limitations, but it may occur that the conveyance is invalid, or that it covers only part of the property. The language of the conveyance may no doubt be such as to show a recognition of the grantor's title,⁴³ but apart from this, it seems that the wrongful possessor's acceptance of a conveyance, while it may be evidence of his recognition of the grantor's title,⁴⁴ is not conclusive thereof.⁴⁵

— **Effect of taking lease.** The taking of a lease from the true owner would almost necessarily, it seems, involve a recognition of the latter's title, since the lease cannot well be regarded as acquired merely to protect

41. *Olson v. Burk*, 94 Minn. 456, 103 N. W. 335; *Cluss v. Hackett*, 127 Minn. 397, 149 N. W. 647; *Texas, N. O. R. Co. v. Speights*, 94 Tex. 350, 60 S. W. 659.

42. *Cahuac v. Cochrane*, 41 Up. Can. Q. B. 437.

43. As in *Ingersoll v. Lewis*, 11 Pa. St. 212, 51 Am. Dec. 536.

44. *Price v. Greer*, 89 Ark. 300, 116 S. W. 676, 118 S. W. 1009.

45. *Ripley v. Miller*, 165 Mich. 47, 52, 130 N. W. 345, Ann. Cas. 1912C, 952; *Bryant v. Prewitt*, 132 Ky. 799, 117 S. W. 343; *John L. Roper Lumber Co. v. Richmond Cedar Works*, 168 N. C. 344, Ann. Cas. 1917B, 992, 84 S. E. 523;

Meyer v. Hope, 101 Wis. 123, 77 N. W. 720; *Elder v. McClaskey*, 70 Fed. 529, 17 C. C. A. 251. But that it necessarily interrupts the running of the statute, see *Jackson v. Sears*, 10 Johns. (N. Y.) 435.

That the acquisition of a tax title does not interrupt the running of the statute, see *Hayes v. Martin*, 45 Cal. 559; *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755; *Griffith v. Smith*, 27 Neb. 47, 42 N. W. 749; *Zweibel v. Myers*, 69 Neb. 294, 95 N. W. 597; *Bannon v. Brandon*, 34 Pa. 263, 75 Am. Dec. 655; *Silverstone v. Hanley*, 55 Wash. 458, 104 Pac. 767.

the lessee from an unfounded claim by the owner.⁴⁶ That it does interrupt the running of the statute has been decided in a number of cases.⁴⁷ A mere offer to take a lease would seem also to be strong evidence of recognition of the other's title, even if not conclusive in that regard.⁴⁸ But the taking of a lease of a tract adjoining the land of which the lessee is in wrongful possession cannot be regarded as involving a recognition of the lessor's title to the latter land, merely because he is the owner of both tracts.⁴⁹

— **Recognition of title in third person.** Whether the recognition or admission by the person in possession, that the title is in a third person, operates to interrupt the running of the statute as against the true owner, appears to depend on whether it is to be conceded that a claim of title, or as otherwise expressed, possession hostile to the whole world, is necessary to the running of the statute. It is, it is submitted, not necessary,⁵⁰ and consequently such recognition does not interrupt the running of the statute. Such recognition may, however, if it goes to the extent of an attornment to

46. But see *Bidwell v. Evans*, 156 Pa. 30, 26 Atl. 817.

47. *Abbey Homestead Ass'n v. Willard*, 48 Cal. 614; *Chicago etc. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088; *Boling v. Ewing*, 9 Dana (Ky.) 76; *Campau v. Lafferty*, 43 Mich. 429, 50 Mich. 114, 5 N. W. 648, 15 N. W. 40; *Olson v. Burk*, 94 Minn. 456, 103 N. W. 335; *Hermann v. McIver*, 51 Tex. Civ. App. 270, 111 S. W. 766; *Northern Pac. R. Co. v. George*, 51 Wash. 303, 98 Pac. 1126. In *Broad v. Beatty*, 73 Ark. 106, 83 S. W. 339, it is decided that the acceptance of a void lease raises merely a rebuttable presumption of an acknowledged-

ment of the lessor's title. It would rather seem, however, that the invalidity of the lease would ordinarily be immaterial in this regard.

48. *Risher v. Madsen*, 94 Neb. 72, 142 N. W. 700; *Horton v. Davidson*, 135 Pa. 186, 19 Atl. 934.

49. *O'Flaherty v. Mann*, 196 Ill. 304, 63 N. E. 727; *Rabberman v. Carroll*, 207 Ill. 253, 69 N. E. 759; *Tex v. Pflug*, 24 Neb. 66, 8 Am. St. Rep. 231, 39 N. W. 839; *Levy v. Yerga*, 25 Neb. 764, 13 Am. St. Rep. 525, 41 N. W. 773; *Dixon v. Baty*, L. R. 1 Exch. 259.

50. *Ante*, § 503, note 47a. In *Chicago & Alton R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088, it

such third person as tenant, or an agreement to hold as agent of such person, have the result of making the possession thereafter enure to the benefit of such person rather than of the actual possessor.⁵¹

That the person in wrongful possession purchases, or offers to purchase, the claim of a third person to the land, has been decided not to affect the running of the statute as against the true owner.⁵² These decisions might be based upon the theory, either that the purchase did not involve any recognition of the title of the third person, or that the recognition of the title of a third person does not interrupt the running of the statute against the rightful owner.

If two persons have distinct interests in property which is in the adverse possession of another person, the fact that the latter purchases or otherwise acquires the interest of one of such two persons does not affect the running of the statute as against the other of such persons.⁵³ Accordingly the fact that the wrongful possessor purchases the interest of one tenant in common does not preclude him from asserting the statute as against the other tenants in common.⁵⁴ Even were it conceded

appears to be decided that if one in adverse possession makes a conveyance of the land to another, without however relinquishing possession, the continuity of the adverse possession is broken. This would seem to be upon the theory that recognition of the title as being in a third person interrupts the running of the statute.

51. See *Robinson v. Bazoon*, 79 Tex. 524, 15 S. W. 585, and *ante*, § 501, note 31.

52. *Singer Mfg. Co. v. Stockman*, 36 Cal. 535, 95 Am. Dec. 205; *Clark v. Peckenpau*gh, 46 Ill. 11; *Medlock v. Suter*, 80 Ky. 101; *Bean v. Bachel*der, 74 Me. 202; *Warren v. Bowdr*an, 156

Mass. 280, 31 N. E. 300; *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060; *Wiese v. Union Pac. R. Co.* 77 Neb. 40, 108 N. W. 175; *Northrop v. Wright*, 7 Hill (N. Y.) 476; *West v. Edwards*, 41 Oreg. 609, 69 Pac. 992; *Bannon v. Brandon*, 34 Pa. St. 363, 75 Am. Dec. 655; *Alsworth v. Richmond, Cedar Works*, 172 N. C. 17, 89 S. E. 1008.

53. See *City of St. Paul v. Chicago M. & St. P. R. Co.*, 45 Minn. 387, 48 N. W. 17.

54. *Elder v. McClaskey*, 70 Fed. 529, 17 C. C. A. 251; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658; *Richardson v. Watts*, 94 Me. 476, 48 Atl. 180; *Cook v.*

that the recognition of a title, which is really in A, as being in B would interrupt the running of the statute against A, the recognition of the title to one interest as being in B would not interrupt the running of the statute against A as to an entirely distinct interest.

— **Effect of tenant's acknowledgment.** If one is in wrongful possession by his tenant,⁵⁵ a question may arise as to whether the tenant's acknowledgment of the true owner's title deprives the possession of the element of hostility, so as to interrupt the running of the statute. There are a number of decisions to the effect that such acknowledgment does not interrupt the running of the statute,⁵⁶ while it has occasionally been asserted that it does cause such interruption.⁵⁷ And in a few cases it has been decided that it causes such interruption if the rightful owner does not know of the relation of tenancy.⁵⁸ These latter cases would seem to indicate the proper distinction in this regard. If the rightful owner has no reason to suspect that the person wrongfully in possession of his land is so in possession, not in his own behalf but in behalf of another, he is justified in assuming that the person in possession has full power to characterize his possession, as being hostile or the reverse, and if such person acknowledges the true

Clinton, 64 Mich. 309, 8 Am. St. Rep. 816, 31 N. W. 317; St. Paul v. Chicago etc. R. Co., 45 Minn. 387, 48 N. W. 17; Jackson v. Smith, 13 Johns. (N. Y.) 406; Northrop v. Wright, 7 Hill. (N. Y.) 476; Coakley v. Perry, 3 Ohio St. 344.

55. *Ante*, § 501, note 31.

56. Elliott v. Dycke, 78 Ala. 150; Mills v. Bodley, 4 T. B. Mon. (Ky.) 248; Middlesboro Waterworks v. Neal, 105 Ky. 58, 49 S. W. 428; Warren v. Frederichs, 76 Tex. 647, 13 S. W. 643; Cobb v.

Robertson, 99 Tex. 138, 122 Am. St. Rep. 609, 86 S. W. 746, 87 S. W. 1148; Pickens v. Stout, 67 W. Va. 422, 68 S. E. 354.

57. Russell v. Irwin, 38 Ala. 44; Illinois Steel Co. v. Budsisz, 115 Wis. 68, 90 N. W. 1019; Western Union Beef Co. v. Thurman, 70 Fed. 960, 17 C. C. A. 532.

58. Koons v. Steele, 19 Pa. St. 203; Thompson v. Pioche, 44 Cal. 508; Louisiana & Texas Lumber Co. v. Alexander,—Tex. Civ. App. —, 154 S. W. 233.

owner's title, the latter is not guilty of *laches* in failing to take legal proceedings. On the other hand, if the rightful owner has reason to know that the person in possession is in possession merely in behalf of another, he has no right to assume that such person has authority to acknowledge his title, or, by reason of such acknowledgment, to refrain from legal proceedings. In at least one state⁵⁹ it has been said that the fact that the landlord is unaware of the acknowledgment by his tenant of the true owner's title is a reason for not regarding such acknowledgment as effecting an interruption.⁶⁰ This view is apparently based on the theory that if the landlord is aware of the acknowledgment by the tenant, he may be regarded as having previously authorized it, or as being in a position to repudiate it and to recover possession from the tenant.

Occasionally the asserted inability of the tenant to interrupt the running of the statute by taking a lease from the true owner is in terms based⁶¹ on the rule that a tenant in possession cannot attorn to a third person not having the reversion.⁶² But whether the acknowledgment of title takes the form of an attornment, that is, the acceptance of a lease, is immaterial. The tenant cannot usually interrupt the running of the statute in favor of his landlord, by acknowledging title in the true owner, for the reason that he has no authority to make such an acknowledgment. He represents his landlord

59. *Haynes v. Boardman*, 119 Mass. 414. And see *Rankin v. Tenbrook*, 5 Watts (Pa.) 383.

60. In *Coyle v. Franklin*, 54 Fed. 644, 4 C. C. A. 538, it is decided that the acknowledgment by the tenant does not interrupt the running of the statute if the landlord immediately takes measures to recover the possession as having been forfeited by the tenant. In *Custer v. Hall*, 71 W. Va. 119, 76 S. E. 183, a failure to

takes such measures was regarded as showing that the running of the statute was interrupted.

61. See *Elliott v. Dycke*, 78 Ala. 150; *Ellsworth v. Eslick*, 91 Kan. 287, 137 Pac. 973; *Cobb v. Robertson*, 99 Tex. 138, 122 Am. St. Rep. 609, 86 S. W. 746, 87 S. W. 1148; *Rankin v. Tenbrook*, 5 Watts (Pa.), 386.

62. See 1 Tiffany, *Landlord & Tenant*, § 19.

for the purpose of holding possession against third persons, but not for the purpose of acknowledging the title of third persons.

§ 508. **Tacking.** The question has frequently arisen whether the running of the statute against the true owner is affected by the fact that during the statutory period, although the possession was continuously hostile to the true owner, it was the possession, not of one person alone, but of two or more persons in succession. This question is ordinarily discussed with reference to the relation between themselves of the successive possessors, and it is said that successive possessions by different persons may be "tacked," so as to defeat the claim of the rightful owner, if such persons are in privity one with another, the expression "privity" serving to indicate the relationship which exists between two or more persons, one of whom claims under the other or others, as representing the same *persona* or estate.⁶³

That an heir is entitled to tack his ancestor's possession to his own is generally conceded,⁶⁴ and, by the very great weight of authority, one to whom another, having adverse possession of the land, voluntarily transfers the possession, can tack to his own possession the possession of the latter,⁶⁵ even though the transfer of

63. Holmes, *The Common Law*, 368.

64. *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Fugate v. Pierce*, 49 Mo. 441; *Montague v. Marunda*, 71 Neb. 805, 99 N. W. 653; *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757, 24 S. E. 748; *Barrett v. Brewer*, 153 N. C. 547, 42 L. R. A. N. S. 403, 69 S. E. 614; *McNeely v. Langan*, 22 Ohio St. 32; *Rowland v. Williams*, 23 Or. 515, 32 Pac. 402; *Overfield v. Christie*, 7 Serg. & R. (Pa.) 173; *Epperson v. Stansill*, 64 S. C. 485,

42 S. E. 426; *Civil v. Toomey*, 103 S. C. 460, 88 S. E. 261; *East Tennessee Iron & Coal Co. v. Broyles*, 95 Tenn. 613, 32 S. W. 761.

65. *Frost v. Courtis*, 172 Mass. 401, 52 N. E. 515; *Gage v. Gage*, 30 N. H. 421; *McNeely v. Langan*, 22 Ohio St. 32; *Overfield v. Christie*, 7 Serg. & R. (Pa.) 173. And see cases cited in next note. *Contra*, *King v. Smith*, Rice (S. C.) 10; *Garrett v. Weinberg*, 48 S. C. 28.

possession is accompanied merely by an oral agreement of transfer of title or by an invalid written conveyance.⁶⁶ Consequently, in spite of decisions that, if the land in dispute is not included in the description in a particular conveyance, the possessions of the grantor and grantee cannot be tacked,⁶⁷ it seems that even in such case the possessions can be tacked if there was an oral transfer of the possession by the former to the latter, in addition to the making of the written conveyance.⁶⁸

A devisee can tack to his possession that of his devisor,^{68a} and even in the case of a sale under judicial process or decree, the purchaser has been held entitled

66. *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835; *Shedd v. Alexander*, 270 Ill. 117, 110 N. E. 327; *Comm. v. Gibson*, 85 Ky. 666; *Wishart v. McKnight*, 178 Mass. 356, 86 Am. St. Rep. 486, 59 N. E. 1028; *Sherin v. Brackett*, 36 Minn. 152, 30 N. W. 551; *Crispen v. Hannavan*, 50 Mo. 536; *Davock v. Nealon*, 58 N. J. Law 21, 32 Atl. 675; *McNeely v. Longan*, 22 Ohio St. 32; *Parker v. Wolf*, 69 Or. 446, 138 Pac. 463; *Hughs v. Pickering*, 14 Pa. St. 297; *Illinois Steel Co. v. Budsisz*, 106 Wis. 499, 48 L. R. A. 830, 80 Am. St. Rep. 54, 81 N. W. 1027, 82 N. W. 524; *Rambert v. Edmondson*, 99 Tenn. 15, 63 Am. St. Rep. 819, 41 S. W. 935; *Moran v. Moseley*—Tex. Civ. App. —, 164 S. W. 1093. But see *Sheldon v. Michigan Cent. R. Co.* 161, Mich. 503, 126 N. W. 1056, criticized 10 Columbia Law Rev. 763.

67. *Southern Iron & Steel Co. v. Stowers*, 189 Ala. 314, 66 So. 677; *Messer v. Hibernia Sav. etc. Soc.* 149 Cal. 122, 84 Pac. 835; *Rich v. Naffziger*, 255 Ill. 98, 99

N. E. 341; *Lake Shore & M. S. Ry Co. v. Sterling*, 189 Mich. 366, 155 N. W. 383; *Jennings v. White*, 139 N. C. 23, 51 S. E. 799; *Ferguson v. Prince*, 136 Tenn. 543, 190 S. W. 543; *Allis v. Field*, 89 Wis. 327, 62 N. W. 85.

68. *St. Louis Southwestern R. Co. v. Mulkey*, 100 Ark. 71, Ann. Cas. 1913C. 1339, 139 S. W. 643; *Rich v. Naffziger*, 255 Ill. 98, 99 N. E. 341; *Helmick v. Davenport*. R. I. & N. W. Ry. Co., 174 Iowa, 558, 156 N. W. 736; *Vandall v. St. Martin*, 42 Minn. 163, 44 N. W. 525; *Crowder v. Neal*, 100 Miss. 730, 57 So. 1; *West v. Edwards*, 41 Or. 609, 69 Pac. 992; *Naher v. Farmer*, 60 Wash. 600, 111 Pac. 768; *Mielke v. Dodge*, 135 Wis. 388, 115 N. W. 1099; *Clithero v. Fenner*, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. Rep. 978.

68a. *Shaw v. Nicholay*, 30 Mo. 99; *Sherin v. Brackett*, 36 Minn. 152, 36 N. W. 551; *Dunbar v. Aldrich*, 79 Miss. 698, 31 So. 341; *Hart v. Williams*, 189 Pa. 31, 41 Atl. 983. *Contra*, *Burnett v. Crawford*, 50 S. Car. 161, 27 S. E. 645.

to tack to his possession the possession of the person or persons whose title the sale was intended to divest.⁶⁹

It has been held that one claiming as remainderman under a will may tack to his own possession the possession of the testator and the life tenant under the will, since the possession of each is under the same title.⁷⁰

If the personal representative of decedent, without statutory or testamentary authority, takes possession, his possession is in effect that of a wrongdoer, and it cannot be tacked to the possession of decedent.⁷¹ The rule is different, however, if he has authority to take possession.⁷²

When, upon the death of a tenant in fee simple, his widow remains in possession claiming by reason of a statute giving to a widow the right of possession, there would seem to be such a "privity" between the deceased and his widow as to entitle her to tack his possession to her own,⁷³ the case being somewhat analogous to that of tacking by the heir. And in such a case the temporary possession of the widow may, it seems, be tacked to that of the husband's heirs, in order to give the latter title

69. *Riggs v. Fuller*, 54 Ala. 141; *Memphis L. R. R. Co. v. Organ*, 67 Ark. 84, 55 S. W. 952; *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871; *Dunbar v. Aldrich*, 79 Miss. 698, 31 So. 341; *Miller v. Bumgardner*, 109 N. C. 412, 13 S. E. 935; *Clark v. Bundy*, 29 Ore. 190, 44 Pac. 282; *Cooper v. Great Falls Cotton Mills Co.*, 94 Tenn. 588, 30 S. W. 353; *Hall v. Hall*, 27 W. Va. 468.

70. *Haynes v. Boardman*, 119 Mass. 414; *Hart v. Williams*, 189 Pa. 31, 41 Atl. 983. *Contra*, *Austin v. Rutland R. Co.*, 45 Vt. 215. See *Hickman v. Link*, 97 Mo. 482, 10 S. W. 600.

71. *Bullen v. Arnold*, 31 Me. 583; *East Tennessee Iron & Coal*

Co. v. Ferguson,—Tenn. Ch.—, 35 S. W. 900.

72. *Cannon v. Prude*, 181 Ala. 629, 62 So. 24; *Vanderbilt v. Chapman*, 172 N. C. 809, 90 S. E. 993; *Rowland v. Williams*, 23 Ore. 515, 32 Pac. 402. See *Ricker v. Butler*, 45 Minn. 545, 48 N. W. 407.

73. To that effect see *McEntire v. Brown*, 28 Ind. 347; *Mills' Heirs v. Bodley*, 4 T. B. Mon. (Ky.) 248; *Atwell v. Shook*, 133 N. Car. 387, 45 S. E. 777; *Johnson v. Johnson*, 106 Ark. 9, 152 S. W. 1017; *Mielke v. Dodge*, 135 Wis. 388, 115 N. W. 1099. *Contra*, *semble*, *Robinson v. Allison*, 124 Ala. 325, 27 So. 461.

by adverse possession.⁷⁴ When the widow has no right of possession immediately on the husband's death, but merely a right to have dower assigned to her, the possession of the widow can, it has been held, not be tacked to the possession of the husband.⁷⁵ This view has, however, been questioned, it being asserted that the possession of the widow in such case, not being adverse to the heirs,⁷⁶ should be regarded as in their behalf and consequently subject to be tacked to the possession of the decedent to the same extent as that of the heirs.⁷⁷

If one who is in adverse possession leases in turn to different persons, the possession of each of these lessees is, for the purpose of the statute of limitations, the possession of the lessor,⁷⁸ and the possessions of the lessees may be tacked together, and may also be tacked to that of the lessor.⁷⁹ And if one in adverse possession in his own right attorns to a third person, or agrees to hold as the latter's agent, his possession in his own right may, it would seem, be tacked to his possession in behalf of such third person, for the purpose of barring the claim of the true owner.⁸⁰

It has been asserted, in quite a number of cases, that one who disseises another whose own possession

74. *Hickman v. Link*, 97 Mo. 482, 10 S. W. 600; *Atwell v. Shook*, 133 N. Car. 387, 45 S. E. 777; *Jacobs v. Williams*, 173 N. C. 276, 91 S. E. 951; *Mills' Heirs v. Bodley*, 4 T. B. Mon. (Ky.) 248.

75. *McEntire v. Brown*, 28 Ind. 347; *Sawyer & Kendall*, 10 Cush. (Mass.) 241; *Marr v. Gilliam*, 1 Coldw. (Tenn.) 488; *Baker v. Hale*, 6 Baxt. (Tenn.) 46; *Doe v. Barnard*, 13 Q. B. 945.

76. *Post*, § 513 (k), note 66.

77. *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777; *Mill's Heirs v. Bodley*, 4 T. B. Mon. (Ky.) 248.

See editorial note 17 Harv. Law Rev. at p. 277.

78. *Ante*, § 501, note 31.

79. *Ramsey v. Glenny*, 45 Minn. 401, 22 Am. St. Rep. 736, 48 N. W. 322; *Landon v. Townshend*, 129 N. Y. 166, 29 N. E. 71; *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757, 24 S. E. 748; *Weaver v. Love*, 146 N. C. 414, 59 S. E. 1041; *Thompson v. Kauffelt*, 110 Pa. St. 209, 1 Atl. 267; *Sims v. Eastland*, 3 Head 368; *Hanks v. Houston Oil Co. of Texas*,—Tex Civ.—, 173 S. W. 635.

80. But *Robinson v. Bazoon*, 19 Tex. 524, 15 S. W. 585, is *contra*,

was that of a disseisor, and so adverse to the record owner, cannot tack the adverse possession of such other to his own adverse possession, in order to make up the statutory period.⁸¹ There are a few cases of a contrary tendency,⁸² and the view first referred to has been criticized on the ground that the statute of limitations should be applied as against one who allows himself to remain out of possession for the statutory period, without reference to who may happen to be seised of the land during that period.⁸³

There can be no tacking if the possession of one person does not immediately follow upon that of the other, since in that case the element of continuity of possession is absent.⁸⁴

§ 509. Personal disabilities. The statute of limitations invariably extends the period for bringing an ac-

81. *Little v. Vice*,—Ala.—, 76 So. 942; *Lucy v. Tennessee & C. R. Co.*, 92 Ala. 246, 8 So. 806; *City & County of San Francisco v. Fulde*, 37 Cal. 349, 99 Am. Dec. 278; *Smith v. Chapin*, 31 Conn. 531; *McEntire v. Brown*, 28 Ind. 347; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Sherin v. Brackett*, 36 Minn. 152, 30 N. W. 551; *Crispen v. Hannavan*, 50 Mo. 536; *Locke v. Whitney*, 63 N. H. 597, 3 Atl. 920; *Low v. Schaffer*, 24 Ore. 239, 33 Pac. 678; *Erck v. Church*, 87 Tenn. 75, 4 L. R. A. 641, 11 S. W. 794; *Heflin v. Burns*, 70 Tex. 347, 8 S. W. 48; *Jarrett v. Stevens*, 36 W. Va. 445, 15 S. E. 177.

82. *Fanning v. Willcox*, 3 Day 258; *Shannon v. Kinny*, 1 A. K. Marsh 3; *Hord v. Walton*, 2 A. K. Marsh 620; *Candler v. Lunsford*, 4 Dev. & B. 407; *Davis v. McArthur*, 78 N. C. 357; *Scales v.*

Cockrill, 3 Head, 432. And see *Wishart v. McKnight*, 178 Mass. 356, 86 Am. St. Rep. 486, 59 N. E. 1028.

83. 3 Harv. Law Rev. at p. 324, article by Professor J. B. Ames, reprinted, *Lectures on Legal History*, at p. 205. See also 1 Harvard Law Rev. 248, 10 Columbia Law Rev. 761. The merits of the prevailing view are excellently presented by Professor Henry W. Ballantine, 32 Harv. Law Rev. at p. 147 *et seq.*

84. *Louisville N. R. Co. v. Philyaw*, 88 Ala. 264, 6 So. 837; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226; *Brandt v. Ogden*, 1 Johns. 156; *Jackson v. Leonard*, 9 Cow. (N. Y.) 653; *Cunningham v. Patton*, 6 Pa., 355; *Warren v. Fredericks*, 76 Tex. 647, 13 S. W. 643; *Winslow v. Newell*, 19 Vt.

tion to recover land in case the plaintiff was under disability at the time the right of action accrued. The Statute of James I. contained such provision in favor of (1) persons under twenty-one years, (2) *femes covert*, (3) persons *non compos mentis*, (4) persons imprisoned, and (5) persons "beyond the seas."

The saving clause in favor of infants is retained in most, if not all, of the state statutes, though the time at which infancy ceases differs in different states. The saving in favor of married women also still exists in the majority of states, though in some it has been expressly abolished, in view of legislation enabling a married woman to sue alone. The saving in favor of persons *non compos mentis* is usually retained, and those in favor of persons imprisoned and of persons "beyond the seas," or, what is regarded as equivalent, "absent from the United States," are also frequently to be found. In some states, moreover, there are exceptions in favor of alien enemies. The statutes differ greatly as to the extent of time after the removal of the disability within which an action may be brought, some naming the full period of limitation, and others naming a much shorter period.⁸⁵

These exceptions in statutes limiting the time for the recovery of land, as in those applicable to personal actions only, are usually construed as applicable only to a disability existing at the time of the accrual of the right of action, and the fact that a disability in the owner to sue arises after such accrual does not affect the running of the statute.⁸⁶ Accordingly, if the right of action has once existed in favor of a person, the fact

164; *Jarrett v. Stevens*, 36 W. Va. 445, 15 S. E. 177.

85. The statutory provisions as to disabilities are summarized in Wood, *Limitations* (3d Ed.) § 237. *Dembitz*, *Land Titles* § 177.

86. *Doe d. Caldwell v. Thorp*, 8 Ala. 253; *Wellborn v. Weaver*, 17

Ga. 267, 63 Am. Dec. 235; *Currier v. Gale*, 3 Allen (Mass.) 328; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 476; *Holmes v. Carr*, 172 N. C. 213, 90 S. E. 152; *Milton v. Pace*, 85 S. C. 373, 67 S. E. 458.

that it passes from him by descent to one under the disability of infancy does not extend the time for bringing suit.⁸⁷ And if a disability existing at the time of the disseisin or other accrual of the cause of action is once removed, the fact that a subsequent disability intervenes, as when a female infant, after arriving at age, marries, such subsequent disability does not operate in her favor.⁸⁸

If the owner of the land is under two or more disabilities at the time of the accrual of the cause of action, he may take advantage of both, or, rather, of the one which endures the longest;⁸⁹ but if only one disability exists at that time, he can take advantage of that alone, and the fact that, before such disability terminates, another intervenes, as when an infant *feme sole* marries, does not extend the time for the recovery of the land, or, as it is frequently stated, disabilities cannot be "tacked."⁹⁰ Likewise, the disabilities of different per-

87. *Harris v. McGovern*, 99 U. S., 61 affirming 2 Sawy. 515, Fed. Cas. No. 6125; *Oates v. Beckworth*, 112 Ala. 356, 20 So. 399; *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516; *Hale's Heirs v. Ritchie*, 142 Ky. 424, 134 S. W. 474; *Ray v. Thurman's Ex'r*, 13 Ky. L. Rep. 3, 15 S. W. 1116; *Burdett v. May*, 100 Mo. 13, 12 S. W. 1056; *Lyons v. Carr*, 77 Neb. 883, 110 N. W. 705; *Jackson v. Moore*, 13 Johns. (N. Y.) 513, 7 Am. Dec. 398; *Campbell v. Dick*,—Okla.—, 157 Pac. 1062; *Lynch v. Cox*, 23 Pa. 265; *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706; *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354. *Contra*, *Everett's Ex'rs v. Whitfield's Adm'rs*, 27 Ga. 133. That the disability of a devisee is not avail-

able, if the statute had begun to run in favor of testator, see *De Hatre v. Edmunds*, 200 Mo. 246, 98 S. W. 744.

88. *Gherson v. Brooks*,—(Ark.) —, 5 S. W. 329; *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434; *Priddy v. Boice*, 201 Mo. 309, 99 S. W. 1055, 119 Am. St. Rep. 762, 9 Ann. Cas. 874, 9 L. R. A. (N. S.) 718.

89. *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Butler v. Howe*, 13 Me. 397; *North v. James*, 61 Miss. 761; *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 530; *Blake v. Hollandsworth*, 71 W. Va. 387, 43 L. R. A. (N. S.) 714, 76 S. E. 814.

90. *Bunce v. Wolcott*, 2 Conn. 27; *White v. Clawson*, 79 Ind. 188; *Duckett v. Crider*, 11 B. Mon. (Ky.) 188; *Wickes v. Wickes*, 98 Md. 307, 56 Atl. 1017;

sons cannot be tacked, in order to make up the statutory period; and so, if the owner is under a disability from the time of the accrual of the right of action till his death, his infant heir cannot tack his own disability to that of his ancestor, in order to extend the statutory period.⁹¹

§ 510. **Exception in favor of the sovereign.** According to the maxim *Nullum tempus occurrit regi*, the adverse possession of land belonging to the state cannot, unless the statute otherwise provides, divest the government title.⁹² Nor can the state authorities, even by an express provision to that effect, make the statute of limitations effective as against the United States.⁹³ The statutory limitation begins, however, to run in favor of one in hostile possession of public land so soon as its ownership passes to a grantee of the government. In determining the time at which the private ownership begins for this purpose, the decisions are not in accord, some holding that it does not begin until the issue of the patent,⁹⁴ while others consider it as beginning so

Herndon v. Yates —(Mo.)—, 194 S. W. 46; Nutter v. De Roche-mont, 46 N. H. 80; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 9 Am. Dec. 476; Cozzens v. Farnan, 30 Ohio St. 491, 27 Am. Rep. 470; Thompson v. Smith, 7 Serg. & R. (Pa.) 209; McFarland v. Stone, 17 Vt. 165, 44 Am. Dec. 325; *Contra*, Miller v. Bumgardner, 109 N. C. 412, 13 S. E. 935.

91. Dowell v. Tucker, 46 Ark. 438; Griswold v. Butler, 3 Conn. 227; Pim v. City of St. Louis, 122 Mo. 654, 27 S. W. 525; Henry v. Carson, 59 Pa. St. 297; Jackson v. Houston, 84 Tex. 622, 19 S. W. 799.

92. Wagon v. Fairbanks, 105 Ala. 528, 17 So. 20; Doran v.

Central Pac. R. Co., 24 Cal. 245; Twining v. City of Burlington, 68 Iowa, 284, 27 N. W. 243; Hall v. Jittings' Lessee, 2 Har. & J. (Md.) 112; Munshower v. Patton, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678; Hall v. Webb, 21 W. Va. 318. See, as to statutes on the subject, 2 Demblitz, Land Titles, § 179.

93. Gibson v. Chouteau, 13 Wall. (U. S.) 92, 20 L. Ed. 534; Redfield v. Parks, 132 U. S. 239, 33 L. Ed. 327.

94. Redfield v. Parks, 132 U. S. 239, 33 L. Ed. 327; Stringfellow v. Tennessee Coal, Iron & R. R. Co., 117 Ala. 250, 22 S. E. 997; Mathews v. Ferrea, 45 Cal. 51; Chiles v. Calk, 4 Bibb

soon as, by payment for the land, the individual has become entitled to a patent.⁹⁵

The question of the extent to which the statute of limitations runs against a municipal or *quasi* municipal corporation, as regards land belonging to it, has been the subject of much discussion, and the decisions are not in accord on the question. In the majority of the states, land owned by a municipality, and devoted to uses of a purely public character, as when the "fee" of a street or park is vested in the municipality, or land is conveyed to the municipality for a public building, hospital, or the like, the municipality is regarded as merely the agent of the state, and its rights cannot be affected by the statute of limitations,⁹⁶ though in a

(Ky.) 554; *Smith v. McCorkle*, 105 Mo. 135, 16 S. W. 602; *King v. Thomas*, 6 Mont. 409, 12 Pac. 865; *South End Min. Co. v. Tinney*, 22 Nev. 221, 38 Pac. 402; *La Frombois v. Jackson*, 8 Cow 589, 18 Am. Dec. 463; *Clark v. Southard*, 16 Ohio St. 408; *Steele v. Boley*, 7 Utah, 64, 24 Pac. 755.

95. *Hibben v. Malone*, 85 Ark. 584, 109 S. W. 1008; *Bauman v. Grubbs*, 26 Ind. 419; *Dolen v. Black*, 48 Neb. 688, 67 N. W. 760; *Ambrose v. Huntington* 34 Ore. 484, 56 Pac. 513; *Patten v. Scott*, 118 Pa. St. 115, 12 Atl. 292, 4 Am. St. Rep. 576; *Udell v. Peak*, 70 Tex. 547, 7 S. W. 786; *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026.

96. *Mobile Transportation Co. v. Mobile*, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333; *Board of Education of City & County of San Francisco v. Martin*, 92 Cal. 209, 28 Pac. 799; *Norrell v. Augusta R. & Electric Co.*, 116 Ga. 313, 59 L. R. A. 101,

42 S. E. 466; *City of Sullivan v. Tichenor*, 179 Ill. 97, 53 N. E. 561; *Close v. Chicago*, 257 Ill. 47, 100 N. E. 215; *Cheek v. City of Aurora*, 92 Ind. 107; *Kuehl v. Town of Bettendorf*, 179 Iowa, 1, 161 N. W. 28; *Inhabitants of Charlotte v. Pembroke Iron Works*, 82 Me. 391, 8 L. R. A. 828, 19 Atl. 902; *Brady v. City of Baltimore*, 130 Md. 506, 101 Atl. 142; *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286; *Heddlston v. Hendricks*, 52 Ohio St. 460, 40 N. E. 408; *Comm. v. Moorehead*, 118 Pa. 344, 4 Am. St. Rep. 559, 12 Atl. 424; *McKee v. Pennsylvania R. Co.*, 255 Pa. 560, 100 At. 454; *Almy v. Church*, 18 R. I. 182, 26 Atl. 58; *Norfolk & W. R. Co. v. Supervisors of Carroll County*, 110 Va. 95, 65 S. E. 531; *Gustaveson v. Dwyer*, 83 Wash. 303, 145 Pac. 458; *Ralston v. Town of Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326.

But the city may, by some au-

number of states a different view obtains.⁹⁷ But even in the former class of states there is a tendency to distinguish between land devoted to public use and that which is held by the municipality in a "private capacity," and over which it has the power of alienation, the latter being regarded as subject to the bar of the statute.⁹⁸

While there are authorities to the effect that land held by a railroad company for right of way purposes is so devoted to a public use as not to be the subject of adverse possession,⁹⁹ such land is, by the weight of authority, so subject.¹

thorities, be estopped, by reason of its acquiescence in improvements made on its land, to claim title to the land; *Christopherson v. Incorporated Town Forest City*, 178 Iowa, 893, 160 N. W. 691; *Barton v. City of Portland*, 74 Ore. 75, 144 Pac. 1146; *Wall v. Salt Lake City*,—Utah—, 168 Pac. 766; See *Dillon, Mun. Corp.*, §§ 1187, 1191, 1194.

97. *Fort Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19; *Axmear v. Richards*, 112 Iowa, 657, 84 N. W. 686; *Covington v. McNickles's Heirs*, 18 B. Mon. (Ky.) 262; *Pastorino v. City of Detroit*, 182 Mich. 5, 148 N. W. 231; *Wayzata v. Great Northern Ry. Co.*, 50 Minn. 438, 52 N. W. 913; *St. Charles County v. Powell*, 22 Mo. 525, 66 Am. Dec. 637; *Meyer v. City of Lincoln*, 33 Neb. 566, 18 L. R. A. 146, 29 Am. St. Rep. 500, 50 N. W. 763; *Oxford Township v. Columbia*, 38 Ohio St. 87; *Ostrom v. City of San Antonio*, 77 Tex. 345, 14 S. W. 66.

98. *Simplot v. Chicago M. & St. P. Ry. Co. (C. C.)* 16 Fed. 350; *Ames v. City of San Diego*, 101 Cal. 390, 35 Pac. 1005;

Robinson v. Lemp, 29 Idaho, 661, 161 Pac. 1024; *City of Chicago v. Middlebrooke*, 143 Ill. 265, 32 N. E. 457; *City of Bedford v. Willard*, 133 Ind. 562, 36 Am. St. Rep. 563, 33 N. E. 368; *City of New Orleans v. Salmen Brick & Lumber Co.*, 135 La. 828, 66 So. 237; *In re Willard Parker Hospital*, 217 N. Y. 1, 111 N. E. 256; *Turner v. Hillsboro*, 127 N. C. 153, 37 S. E. 191; *Board of Supervisors of Tazewell County v. Norfolk & W. R. Co.*, 119 Va. 763, 91 S. E. 124; *Gastavason v. Dwyer*, 83 Wash. 303, 145 Pac. 458, 2 *Dillon, Mun. Corp.* (5th Ed.), § 1188 *et seq.*

99. *Southern Pac. Co. v. Hyatt*, 132 Cal. 240, 54 L. R. A. 522, 64 Pac. 272; *McLucas v. St. Joseph, etc., R. Co.* 67 Neb. 603, 93 N. W. 928, 97 N. W. 312, 2 Ann Cas 715; *Conwell v. Philadelphia, etc., R. Co.*, 241 Pa. 172, 88 Atl. 417.

1. *Mobile & G. R. Co. v. Rutherford*, 184 Ala. 204, 63 So. 1003; *St. Louis, etc. R. Co. v. Martin*, 104 Ark. 274, 149 N. W. 69; *Illinois Cent. R. Co. v. Houghton*, 126 Ill. 233, 18 N. E. 301, 9 Am. St. Rep. 581, 1 L. R. A. 213;

§ 511. **Effect as vesting and divesting title.** While occasionally the statutes limiting the time for the bringing of an action to recover land provide that a failure to sue within the time named shall operate to transfer the title to the person in possession, they almost invariably in terms bar the remedy merely. They have, however, with few, if any, exceptions, been regarded as operating to divest the title of the former owner and to give title to the wrongful possessor. The theory on which this result may be regarded as based has been stated by a great master of the law as follows: True property or ownership consists of possession coupled with the unlimited right of possession, and when one person is dispossessed by another only the right of possession remains vested in the former, and the dispossessor has complete ownership except for this outstanding right of possession. When the period of limitation has run, the statute, by forbidding the exercise of this right, virtually annihilates it, and the imperfect title thereupon becomes perfect.²

Pittsburgh, etc. R. Co. v. Strickley, 155 Ind. 312, 58 N. E. 192; Louisville, etc. R. Co. v. Smith, 125 Ky. 336, 101 S. W. 317, 128 Am. St. Rep. 254; Matthews v. Lake Shore etc. R. Co., 110 Mich. 170, 67 N. W. 1111, 64 Am. St. Rep. 336; Northern Pac. R. Co. v. Townsend, 84 Minn. 152, 87 Am. St. Rep. 342, 86 N. W. 1007; Paxton v. Yazoo, etc., R. Co., 76 Miss. 536, 24 So. 536; Northern Pac. R. Co. v. Hasse, 28 Wash. 353, 68 Pac. 882, 92 Am. St. Rep. 840.

2. Professor J. B. Ames, 3 Harvard Law Rev. at p. 318, Lectures on Legal History, 193, 198. So it is said by the Judicial Committee of the Privy Council, in an opinion delivered by Lord Macnaghten; "It cannot be disputed that a person in pos-

session of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the statute of limitations applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title." Perry v. Clissold, App. Cas. (1907) 72.

"Possession itself is a species of title, of the lowest grade, it is true; yet it is good against all who cannot show a better, and by lapse of time may become, under the statute, perfect and in-

The title being thus vested in the wrongful possessor by reason of the running of the statute, it follows that he may assert his ownership, in an action of ejectment or otherwise, against the whole world,³ including the original owner,⁴ and a legal conveyance is necessary in order to revest the ownership in the latter, after the lapse of the statutory period, a mere disclaimer of the benefit of the statute by the wrongful possessor being insufficient.⁵

A court of equity will frequently compel a purchaser to accept a title acquired by adverse possession.⁶

defeasible." *White, J., in McNeally v. Langan*, 22 Ohio St. 32.

3. *Harpending v. Reformed Protestant Dutch Church of New York City*, 16 Pet. (U. S.) 455; *Jacks v. Chaffin*, 34 Ark. 534; *McDuffee v. Sinnott*, 119 Ill. 449, 10 N. E. 385; *Sutton v. Pollard*, 96 Ky. 640, 29 S. W. 637; *Armstorn v. Risteau's Lessee*, 5 Md. 256; *Joseph v. Bonaparte*, 118 Md. 591, 85 Atl. 962; *Schock v. Falls City*, 31 Neb. 599, 48 N. W. 468; *Sherman v. Kane*, 86 N. Y. 57; *Baker v. Oakwood*, 123 N. Y. 16, 10 L. R. A. 378, 25 N. E. 312; *Mitchell v. Campbell*, 19 Ore. 198, 24 Pac. 455; *Spath v. Sales*, 70 Ore. 269, 141 Pac. 160; *Way v. Hooton*, 156 Pa. 8, 26 Atl. 784; *Gulf, C. & S. F. Ry. Co. v. Cusenberry*, 86 Tex. 525, 26 S. W. 43; *Hughes v. Graves*, 39 Vt. 359.

4. *Sharon v. Tucker*, 144 U. S. 533; *Jacks v. Chaffin*, 34 Ark. 534; *Cannon v. Stockman*, 36 Cal. 535, 95 Am. Dec. 205; *Goetz v. Glos*, 266 Ill. 238, 107 N. E. 464; *Armstrong v. Risteau's Lessee*, 5 Md. 256, 59 Am. Dec. 115; *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441; *Hall v. Hall*,

27 W. Va. 468, 480.

5. *Tennessee Coal I. & W. R. Co. v. Linn*, 123 Ala. 112, 26 So. 245, 82 Am. St. Rep. 108; *Todd v. Kauffman*, 8 Mackey (D. C.) 304; *Illinois Cent. R. Co. v. Wakefield*, 173 Ill. 564, 50 N. E. 1002; *Riggs v. Riley*, 113 Ind. 208, 15 N. E. 253; *Inhabitants of School Dist. No. 4, in Winthrop v. Benson*, 31 Me. 381; *Allen v. Mansfield*, 82 Mo. 688; *Towles v. Hamilton*, 94 Neb. 588, 143 N. W. 935; *Bell v. Adams*, 81 N. C. 118; *Round Mountain Lumber & Coal Co. v. Bass*, 136 Tenn. 687, 191 S. W. 341; *Bruce v. Washington*, 80 Tex. 368, 15 S. W. 1104; *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703.

6. See *c. g. Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 353; *Stevenson v. Polk*, 71 Iowa, 278, 32 N. W. 340; *Keepers v. Yocum*, 84 Kan. 554, 114 Pac. 1063; *Logan v. Bull*, 78 Ky. 607; *Westerfield v. Cohen*, 130 La. 533, 58 So. 175; *Stewart v. Kreuzer*, 127 Md. 1, 95 Atl. 1052; *Conley v. Finn*, 171 Miss. 70, 68 Am. St. Rep. 399, 50 N. E. 460; *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432, 70 N.

and it has been held that one may maintain a suit to remove the cloud on the title thus acquired, created by the documentary title of the original owner.⁷ A title thus acquired cannot be affected by the repeal of the statute of limitations under which it was acquired.⁸

Although the effect of the statute is to divest the title of the former owner, and to vest title in the wrongful possessor, the statute does not, it appears, transfer the former title, but the wrongful possessor acquires an entirely new title.⁹ Consequently the liability on covenants does not pass to the new owner.¹⁰ But a legal right of a proprietary character, such as an easement,¹¹ a mortgage,¹² or presumably a right of entry,¹³

W. 1038; *Long v. Lackawanna Coal & Iron Co.*, 233 Mo. 713, 136 S. W. 673; *Pratt v. Eby*, 67 Pa. 396; *Miller v. Cramer*, 48 S. C. 282, 26 S. E. 657; *Summers v. Hively*, 78 W. Va. 53, 88 S. E. 608. *Contra*, *Mays v. Blair*, 120 Ark. 69, 179 S. W. 331; *Hartley v. James*, 50 N. Y. 38. And see *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527; *Adkins v. Gillespie*, —Tex.—, 189 S. W. 275.

7. *Pendleton v. Alexander*, 8 Cranch, 462; *Clemmons v. Cox*, 116 Ala. 567, 23 So. 79; *Arrington v. Liscom*, 34 Cal. 365; *Mickey v. Barton* 194 Ill. 446, 62 N. E. 802; *Cramer v. Clow*, 81 Iowa, 255, 9 L. R. A. 772, 47 N. W. 59; *Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich*, 153 Mass. 42, 26 N. E. 239; *Pence v. Miller*, 140 Mich. 205, 103 N. W. 582; *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060; *Webster v. City of Lincoln*, 56 Neb. 502, 76 N. W. 1076; *Nash v. Northwest Land Co.* 15 N. Dak. 566, 108 N. W. 792; *Hamilton v. Fluornoy*, 44 Ore. 97, 74 Pac. 483;

Hatch v. Lusignan, 117 Wis. 428, 94 N. W. 332. *Contra*, *McCoy v. Johnson*, 70 Md. 490, 17 Atl. 387; *Contee v. Lyon*, 19 D. C. 207; *Miller v. Robertson*, 35 Can. Sup. Ct. 80.

8. *Sharp v. Blankenship*, 59 Cal. 288; *Bowen v. Preston*, 48 Ind. 367; *Trim v. McPherson*, 7 Cold. (Tenn.) 15; *Grigsby v. Peak*, 57 Tex. 142; *Sprecker v. Wakely*, 11 Wis. 432. See *Campbell v. Holt*, 115 U. S. 620, 29 L. Ed. 483.

9. *Price v. Lyon*, 14 Conn. 291; *Tichborne v. Weir*, 67 Law Times (N. S.) 735; *Coal Creek Consol. Coal Co. v. East Tennessee Iron & Coal Co.*, 105 Tenn. 563, 59 S. W. 634.

10. *Tichborne v. Weir*, 67 Law Times (N. S.) 735.

11. *Re Nisbett & Potts* (1905) 1 Ch. 391, (1906) 1 Ch. 386; *Reformed Church v. Schoolcraft*, 65 N. Y. 134.

12. *Fletcher v. Bird*, *Fisher on Mortgages*, Appendix.

13. See *Banning, Limitations* 84, 85.

can be enforced against the land in the hands of its new owner as of the old, the statute operating to bar only the person who was entitled to sue on account of the wrongful possession.

— **Character of estate.** The question of the character of the estate acquired by the wrongful possessor is, in some cases, one of considerable difficulty. The common-law rule was that one who disseised another acquired an estate in fee simple,¹⁴ and this regardless of whether he claimed a less estate,¹⁵ since “wrong is unlimited and ravens all that can be gotten,”¹⁶ and one cannot qualify his own wrong.¹⁷ The only case in which one who dispossessed another appears not to have acquired a wrongful fee simple was when there was an existing particular estate, and the dispossessor claimed merely such particular estate.¹⁸ And in such a case, if the particular estate was of a chattel character, there was no disseisin, but only a dispossession. Apart from this single case of an existing particular estate and a claim by the dispossessor restricted thereto, it appears that the effect of a wrongful dispossession as constituting a disseisin and as so conferring an estate in fee simple by wrong was, and presumably is,¹⁹ absolutely independent of the character of the estate claimed by the dispossessor, or of whether he makes any claim. The statement occasionally made by American judges and writers, that a claim of a fee simple,²⁰ or

14. Litt, § 519; Pollock & Wright, Possession, 94; Watkins, Conveyancing (7th Ed.) 78.

15. See citations, *ante* § 504, note 65.

16. Hobart 323.

17. Co. Litt. 271a.

18. Co. Litt 271a and Butler's note; 2 Preston, Conveyancing, 321; 2 Preston, Abstracts of Title, 293.

19. See Williams, Seisin, 7, quoted by Professor J. B. Ames, 3 Harv. Law Rev. at p. 323;

Lectures on Legal History, at p. 173; T. Cyprian Williams, Esq., in 51 Solicitors' Journal, p. 143.

20. Ricard v. Williams, 7 Wheat. (U. S.) 59, at p. 107, 5 L. Ed. 221, per Story, J.; Bedell v. Shaw, 59 N. Y. 46; Bond v. O'Gara, 177 Mass. 139, 83 Am.

of a freehold,²¹ estate is necessary to a disseisin is, it is respectfully submitted, without support in the older books.

From what has been said in the preceding paragraph, it appears that the effect of a dispossession, as conferring a wrongful title in fee simple upon the disseisor, is ordinarily independent of whether the person actually dispossessed was a tenant in fee simple or merely a particular tenant, such as a tenant for life or years, the only exception being when the dispossessor claims merely as against the particular tenant. He has a fee simple title, good as against everybody except the particular tenant whom he has dispossessed and the reversioner or remainderman. After the statute has run against the former, he has a fee simple title good as against everybody except the latter, and if he retains possession for the statutory period after a right of action has accrued to the remainderman or reversioner, his fee simple title becomes valid as against everybody.²² A different view as to the operation of the statute of limitations in such a case has, however, been suggested, that the dispossessor acquires successively, by the running of the statutory period against the successive tenants, an estate equal in *quantum* to the estate of each tenant,²³ that, for instance, if A is tenant for life, with remainder to B for life, with remainder to C in fee simple, and A is wrongfully dispossessed, the wrongful possessor would acquire, by the completion of the statutory period during A's life, an estate for the life of A, by the completion of such period after A's death and during B's life, an estate for the life of B, and

St. Rep. 265, 58 N. E. 275, per Holmes, C. J.; editorial note 12 Columbia Law Rev. 364.

21. Editorial notes, 5 Columbia Law Rev. 605; 22 Harv. Law Rev. 139.

22. This view is asserted in 1 Hayes, Conveyancing (5th Ed.)

270; Dart, Vendors & Purchasers (6th Ed.) 464; Lightwood, Possession of Land, 275, and is indicated in *Tichborne v. Weir*, 67 Law Times (N. S.) 735.

23. This view is favored in *Rankin v. McMurtry*, 24 L. R. Ir. 297.

by the completion of such period after B's death, an estate in fee simple. The former theory would seem to be preferable from the standpoint of principle, and is certainly more in accord with the common law decisions upon the effect of disseisin.

In case one makes, without authority, a lease of another's land, the question whether the lessee will acquire the fee simple title by the lapse of the statutory period, would seem ordinarily to depend on whether the lease was in the name of the true owner. If it was in such owner's name, the lessee's possession is not hostile to such owner, any more than if the lease had been made by the latter, while if it is not in the true owner's name the lessee's possession would ordinarily be hostile to the latter, the case being that, before referred to,²⁴ of adverse possession by a tenant in behalf of his landlord.²⁵ In neither case, it is conceived, should the fact that the possession purported to be under a lease for years have the effect of carving out of the fee simple an estate for years in favor of the possessor.²⁶

24. *Ante*, § 501, note 30.

25. But it has been decided in New York (*Bedell v. Shaw*, 59 N. Y. 46; *Sanders v. Riedinger*, 30 N. Y. App. Div. 277, 51 N. Y. Supp. 937, 164 N. Y. 564, 58 N. E. 1092) that one entering under an invalid "tax lease" did not acquire adverse possession as against the owner, for the reason that he asserted no claim to the fee. See *ante*, this section, note 20.

26. "If a man enter claiming a particular estate, when in point of fact there is not any such estate, then the disseisin is, of necessity, of the fee; for in things *in esse* there cannot be a particular estate without a re-

version or remainder, and a particular estate cannot be created by claim or entry." 2 Preston, Abstracts of Title, 293. But in several Mississippi cases it is decided that if one enters under an invalid lease, made without authority in the name of the county for a term of ninety-nine years, possession by the lessee for the statutory period gives him a right to retain possession until the end of the term. See *Brown v. Isaquena County Supervisors*, 54 Miss. 230; *Jones v. Madison County*, 72 Miss. 777, 18 So. 87; *Warren County v. Lambkin*, 93 Miss 123, 22 L. R. A. (N. S.) 920, 46 So. 497. See note in 22 Harv. Law Rev. 138.

— **As vesting title in third person.** Reference has before been made to the case of a hostile entry on land under the mistaken impression that it belongs to the government, in which case, by the weight of authority, the statute runs against the rightful owner.²⁷ The question then arises whether the statutory bar operates to vest the title in the person in possession or in the government, and this appears to depend primarily on whether he is to be regarded as holding on behalf of the government, or on his own behalf, the reasonable presumption being that he holds in his own behalf.²⁸ And even though he takes and holds possession in behalf of the government, a wrongful estate cannot be regarded as vested in the government, for the purpose of being perfected by the statute of limitations, unless the government in some way indicates its assent thereto. the case being in effect that of a disseisin to the use of another, which does not give a freehold to the other until the other agrees.²⁹

— **As vesting title in remainderman.** Although, as above stated,³⁰ according to the common law authorities, a disseisin has the effect of conferring a fee simple, except in the single case when there previously existed a particular estate, and the disseisor claims such particular estate only, it may occur, according to modern decisions, that the fee simple is conferred on a person other than the person in wrongful possession, by reason of the fact that the person in possession entered under an instrument which purported to give him a life estate only, with remainder in favor of such other. There are several decisions to the effect that if one having no title undertakes to convey or devise particular land to A for life with remainder in fee simple to another, and A

27. *Ante*, § 504, note 82.

Disseisin (E) (G); Bacon's Abr.

28. See editorial notes, 14
Harvard Law Rev. 374, 18 Id.
380.

Disseisin (A).

30. *Ante*, this section, notes
14-18.

29. Co. Litt. 180b; Viner's Abr.

enters, and the statutory period expires with him in possession, the statute runs in favor not only of A but also of the remainderman named.³¹ In other words, in such a case, the wrongful estate in fee simple is gained for the remainderman and not for the life tenant. This view has been based upon the theory of estoppel, and the case has been assimilated to that of the estoppel of a tenant to deny the title of the lessor.³² Applying such an analogy, the idea would seem to be that the intended life tenant, having acquired possession by force of the devise or conveyance, as a lessee acquires possession by force of the lease, he, and those in privity with him, are precluded from asserting, as against any person, such as the remainderman, who is in privity with the testator or grantor, that the title in fee was at the time outstanding in another, and was so capable of being acquired by the intended life tenant by force of the statute of limitations. In this country the same result has been held to follow in the case of a conveyance or devise to one for life with remainder to another in fee simple, when the conveyance or devise was invalid or inoperative as regards the particular property, not by reason of lack of title in the grantor or testator, but for some other reason.³³ In England, on the other hand, the estoppel has not been applied in such case as against the intended life tenant, for the reason, apparently, that the asserted remainderman cannot be regarded as in privity with the grantor or testator, and is consequently unable to assert the estoppel.^{33a} The

31. *Board v. Board*, L. R. 9 Q. B. 48; *Reynolds v. Trawick*, —Ala.—, 78 So. 827; *Charles v. Pickens*, 214 Mo. 212, 24 L. R. A. (N. S.) 1055, 112 S. W. 551.

32. *Board v. Board*, L. R. 9 Q. B. 48, per Blackburn, J.

33. *Hanson v. Johnson*, 62 Ind. 25, 50 Am. Rep. 199; *Anderson v. Rhodes*, 12 Rich. Eq. 104. See *Brown v. Brown*, 82 Tenn. 253,

where the will was voidable and not void. Compare 28 Yale Law Journ., p. 234, remarks of Professor Ballantine.

33a. *Dalton v. Fitzgerald*, (1897), 1 Ch. 87; *Paine v. Jones*, L. R. 18 Eq. 320; *Re Stringer's Estate*, 6 Ch. D. 1; *In re Anderson* (1905), 2 Ch. 70; *In re Tenant's Estate* (1913), 1 Ir. 280.

English view, rather than that asserted in this country, harmonizes with the common law rule that a disseisin does not operate to create a particular estate. In order, however, that the estoppel operate in any case in favor of the person named as remainderman, it would seem to be necessary, as a recent writer has well pointed out,^{33b} that the grantor or testator have been himself in possession, since if he was not in possession, there was nothing which could be regarded as passing by the conveyance or devise, so as to create a privity in the remainderman named.

— **As between husband and wife.** In case both husband and wife are upon the land belonging to a third person, and the wife alone has color of title, the statute, it appears, will run in her favor rather than in favor of the husband, that is, the possession will be presumed to accord with the color of title.³⁴

— **As against bona fide purchaser.** One who acquires title by adverse possession for the statutory period may, it has been decided, assert such title as against a *bona fide* purchaser of the record title, although such adverse possessor had relinquished possession previous to the sale.³⁵ The recording acts protect a *bona fide* purchaser only as against a prior

33b. Article by Professor Henry Winthrop Ballantine, 28 Yale Law Journ. at pp. 224-235. This appears to be recognized by Jessel, M. R. in *Re Stringer's Estate*, 6 Ch. D. 1.

34. *McLeod v. Bishop*, 110 Ala. 640, 20 So. 130; *Clark v. Gilbert*, 39 Conn. 96; *Meraman v. Caldwell*, 8 B. Mon. (Ky.) 32; *Potter v. Adams*, 125 Mo. 118, 46 Am. St. Rep. 478, 28 S. W. 490; *Templeton v. Twitty*, 88 Tenn. 595, 14 S. W. 435; *Holton v. Whitney*, 30 Vt. 405; *Hatch v. Lusignan*,

117 Wis. 428, 94 N. W. 332. And See *Collins v. Lynch*, 157 Pa. St. 246, 37 Am. St. Rep. 723, 27 Atl. 721.

35. *Faloon v. Simhauser*, 130 Ill. 649, 22 N. E. 835; *Schall v. Williams Valley R. Co.*, 35 Pa. St. 191; *MacGregor v. Thompson*, 7 Tex. Civ. App. 32, 26 S. W. 649; *East Texas Land etc. Co. v. Shelby*, 17 Tex. Civ. App. 685, 41 S. W. 542; *Winters v. Powell*, 180 Ala. 425, 61 So. 96 (*semble*). See *Ridgeway v. Holliday*, 59 Mo. 444.

instrument which might have been, but was not, recorded,³⁶ and there is no obligation upon one who has acquired title by adverse possession to retain the possession in order to charge a subsequent purchaser with notice of his rights. But if one in wrongful possession of land, before the end of the limitation period, obtains a conveyance from the true owner, his possession should thereafter, it seems, be regarded as based on the conveyance, so that, if he fails to record it, a subsequent *bona fide* purchaser will acquire a superior title although, if the person in possession had not received the conveyance from the true owner, he would, by the running of the statute of limitations, have acquired a title superior to that of the subsequent *bona fide* purchaser.³⁷ Having obtained a deed from the rightful owner, his possession ceases to be wrongful, and the statute runs only in favor of a wrongful possession.

§ 512. **Extent of possession.** As a general rule, one can acquire by adverse possession so great an extent of land only as is covered by his acts of actual possession, continued through the statutory period.³⁸ It is, however, a well-recognized doctrine in this country that one having "color of title" that is, claiming under what purports to be a valid muniment of title, although he actually occupies a part only of the tract covered by his muniment of title, is to be regarded as in possession of the whole tract for the purpose of barring the entry of the owner after the lapse of the statutory period, "constructive possession," as it is usually termed, of the part not actually occupied by

36. *Post* § 567.

37. See editorial note, 26 Harv. Law Rev. 762, criticizing *Winters v. Powell*, 180 Ala. 425, 61 So. 96.

38. *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107; *Langhorst v. Rogers*, 88 Ark. 318, 114 S. W.

915; *Garrison v. Sampson*, 15 Cal. 93; *Mattes v. Hall*, 21 Cal. App. 552, 132 Pac. 295; *Roberts v. Merwin*, 80 Conn. 347, 68 Atl. 377; *Tillman v. Bomar*, 134 Ga. 660, 68 S. E. 504; *Bristol v. Carroll County*, 95 Ill. 84; *Meade v. Ratliff*, 133 Ky. 411, 134

him. As a result of this doctrine, the owner of land who fails to assert his rights within the statutory period as against one in adverse possession of part may be deprived of the whole of the tract, although he had no reason to suppose that the adverse possession was under color of title.

The doctrine referred to applies not only when possession is taken under a conveyance which is invalid, either for want of title or capacity in the grantor, or for want of proper formalities in the execution of the instrument,³⁹ but also when it is taken under a void or voidable decree of court,⁴⁰ and generally when there is what is known as a "paper title." There is, however, considerable question as to whether a conveyance void on its face constitutes "color of title" for this purpose, or for the purpose of the short limitation acts.⁴¹ A conveyance which does not contain any suf-

Am. St. Rep. 467, 118 S. W. 271; *Proprietors of Kennebeck Purchase v. Springer*, 4 Mass. 416; *Barber v. Robinson*, 78 Minn. 193, 80 N. W. 968; *Allen v. Mansfield*, 108 Mo. 343, 18 S. W. 901; *Anderson v. Meadows*, 162 N. C. 400, 78 S. E. 279; *Humphries v. Huffman*, 33 Ohio St. 395; *Lars v. Smith*, 63 Ore. 206, 127 Pac. 26; *Ege v. Medlar*, 82 Pa. St. 86; *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866.

39. *Wright v. Mattison*, 18 How. (U. S.) 50, 15 L. Ed. 280; *Carter v. Chevalier*, 108 Ala. 563, 19 So. 798; *Noyes v. Dyer*, 25 Me. 468; *Hecock v. Van Dusen*, 80 Mich. 359, 45 N. W. 343; *Miesen v. Canfield*, 64 Minn. 513, 67 N. W. 632; *Fugate v. Pierce*, 49 Mo. 447; *Ellington v. Ellington*, 103 N. C. 54, 9 S. E. 208; *Swift v. Mulkey*, 17 Ore. 532, 21 Pac. 871; *Stull v. Rich Patch*

Iron Co., 92 Va. 253, 23 S. E. 293.

40. *Reedy v. Camfield*, 159 Ill. 254, 42 N. E. 833, *Jones v. Thomas*, 124 Mo. 586, 24 S. W. 76; *Bynum v. Thompson*, 25 N. C. 578. See *Brind v. Gregory*, 120 Cal. 640, 53 Pac. 25; *Salter v. Salter*, 80 Ga. 178, 12 Am. St. Rep. 249, 4 S. E. 391; *Wright v. Stice*, 172 Ill. 571, 51 N. E. 71.

41. That a conveyance void on its face does not give color of title, see *Redfield v. Parks*, 132 U. S. 239, 33 L. Ed. 327; *Larkin v. Wilson*, 28 Kan. 513; *Frique v. Hopkins*, 8 Mart. (La.) 110; *Fitschen v. Olsen*, 155 Mich. 320, 119 N. W. 3; *Wafford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53; *Matthews v. Blake*, 16 Wyo. 116, 27 L. R. A. 339, 92 Pac. 242. *Contra*, *Reddick v. Long*, 124 Ala. 260, 27 So. 402; *Wilson v. Atkinson*, 77 Cal. 485, 11 Am. St.

ficient description of the land sought to be conveyed is necessarily insufficient as color of title for the purpose of constructive possession.⁴²

According to some decisions this doctrine of constructive possession is not applicable unless the person seeking to avail himself thereof acquired the color of title in the honest belief that the instrument was effective for the purpose of passing title⁴³ and furthermore fraud on his part in its acquisition has been regarded as depriving him of the right to assert the doctrine.⁴⁴ It is not clearly apparent why the effect of the instrument as showing a constructive possession greater than the actual possession should be regarded as dependent on the existence of a belief in its validity or a lack of fraud in its acquisition.⁴⁵

Rep. 299, 20 Pac. 66; *Barger v. Hobbs*, 67 Ill. 592; *Miesen v. Canfield*, 64 Minn. 513, 67 N. W. 632; *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 729, 86 N. W. 737.

The view is sometimes taken that a conveyance defective on its face will be sufficient as color of title provided only the defect is such that a person unlearned in the law would have reason to consider the instrument valid. *Bloom v. Strauss*, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563; *De Foresta v. Gast*, 20 Cal. 307, 38 Pac. 244; *Beverly v. Burke*, 9 Ga. 443, 54 Am. Dec. 351; *Ipock v. Gaskins*, 161 N. C. 673, 77 S. E. 843; *Burns v. Stewart*, 162 N. C. 360, 78 S. E. 321.

42. *Reddick v. Long*, 124 Ala. 260; 27 So. 402; *Ohio & M. Ry. Co. v. Barker*, 125 Ill. 303, 17 N. E. 797; *Bellows v. Jewell*, 60 N. H. 420; *Jackson v. Woodruff*, 1

Cow. (N. Y.) 276, 13 Am. Dec. 525; *Davis v. Stroud*, 104 N. C. 484, 10 S. E. 666; *Humphries v. Huffman*, 33 Ohio St. 395; *Ege v. Medlar*, 82 Pa. St. 86; *Garvin v. Garvin*, 40 S. C. 435, 19 S. E. 74; *Bassett v. Martin*, 83 Tex. 339, 18 S. W. 587; *Blakey v. Morris*, 89 Va. 717, 17 S. E. 126.

43. *Walsh v. Hill*, 38 Cal. 481; *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208; *Lee v. O'Quin*, 103 Ga. 355, 30 S. E. 356; *Godfrey v. Dixon Power & Lighting Co.*, 228 Ill. 487, 81 N. E. 1089; *Smith v. Young*, 89 Iowa, 338, 56 N. W. 506; *Fculke v. Bond*, 41 N. J. L. 527; *Ege v. Medlar*, 82 Pa. St. 86; *Texas Land Co. v. Williams*, 51 Tex. 51; *Gregg v. Sayre*, 8 Pet. (U. S.) 244, 253, 8 L. Ed. 932.

44. *Miller v. Rich*, 204 Ill. 414, 68 N. E. 488.

45. See editorial note 23 Harv. Law Rev. at p. 57.

In order that this doctrine, giving one constructive possession beyond the limits of his actual occupancy, may apply, the part of the land not actually occupied by him, and the part occupied, must belong to the same person, and the owner of land is not affected with notice as of a constructive possession of his land by the fact that it is included in a conveyance with other land not belonging to him, if such other land alone is occupied by the claimant.⁴⁶ Were the rule otherwise, the owner of land might be deprived thereof by force of the statute of limitations, although no part was in the possession of another, and there was consequently no reason for asserting his title.

The fact that the true owner is in actual possession of part of his land prevents the application, in favor of another, of the doctrine of constructive possession by color of title as to the land not occupied by either.⁴⁷ In such case the constructive possession of the true owner takes precedence over the constructive possession

46. *Henry v. Brown*, 143 Ala. 446, 39 So. 325; *Hardie v. Investment Guaranty etc. Co.*, 81 Ark. 141, 98 S. W. 701; *Kimball v. Stormer*, 65 Cal. 116, 3 Pac. 408; *Wheatley v. San Pedro, L. A. & S. L. R. Co.*, 169 Cal. 505, 147 Pac. 135; *Tennis Coal Co. v. Sackett*, 172 Ky. 729, Ann. Cas. 1917E, 629, 190 S. W. 130; *Walsh v. Wheelwright*, 96 Me. 174, 52 Atl. 649; *Turner v. Stephenson*, 72 Mich. 409, 2 L. R. A. 277, 40 N. W. 735; *Leavenworth v. Reeves*, 106 Miss. 722, 64 So. 660; *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190; *Schmitt v. Traphagen*, 73 N. J. Eq. 399, 133 Am. St. Rep. 739, 69 Atl. 189; *Lewis v. Covington*, 130 N. C. 541, 41 S. E. 677; *Hicklin v. McClear*, 18 Ore. 126, 22 Pac. 1057; *Hole v. Rittenhouse*, 25 Pa. St. 491;

Coal Creek Min. Co. v. Heck, 15 Lea (Tenn.) 497; *Daniel v. Dayton Coal & Iron Co.*, 132 Tenn. 501, 178 S. W. 1187; *Word v. Box*, 66 Tex. 596, 3 S. W. 93; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877; *Robinson v. Lowe*, 66 W. Va. 665, 66 S. E. 1001.

47. *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. Ed. 113; *Semple v. Cook*, 50 Cal. 26; *Wilkins v. Pensacola City Co.*, 36 Fla. 36, 18 So. 20; *Harriss v. Howard*, 126 Ga. 325, 55 S. E. 59; *Peoria etc. R. Co. v. Tamplin*, 156 Ill. 285, 40 N. E. 960; *Hopson v. Cunningham*, 161 Ky. 160, 170 S. W. 522; *Stearns Coal & Lumber Co. v. Boyatt*, 168 Ky. 111, 181 S. W. 962; *Schlossnagle v. Kolb*, 97 Md. 285, 54 Atl. 1006; *Bellis v. Bellis*, 122 Mass. 414; *Bradley v. West*, 60 Mo. 33; *Benne v.*

of the trespasser.⁴⁸ And, in spite of occasional statements to the contrary,⁴⁹ this would seem to be so, regardless of whether the constructive possession of the trespasser commenced before or after the constructive possession of the true owner.⁵⁰

The land in actual possession must adjoin that of which constructive possession is claimed,⁵¹ and they must, according to some decisions, be included within one description in the instrument under which the claim is made, and, if they are described or referred to as separate tracts or lots, it is immaterial that they are both included in one conveyance.⁵² Occasionally the

Miller, 149 Mo. 228, 50 S. W. 824; Schmitt v. Traphagen, 73 N. J. Eq. 399, 133 Am. St. Rep. 739, 69 Atl. 189; Hall v. Powel, 4 Serg. & R. (Pa.) 456, 8 Am. Dec. 722; Renneker v. Warren, 17 S. C. 139; Sequatchie & South Pittsburg Coal & Iron Co. v. Tennessee Coal, Iron & Railroad Co., 131 Tenn. 221, 174 S. W. 1122; Jones v. Coal Creek Min. & Mfg. Co., 133 Tenn. 183, 180 S. W. 991; Claiborne v. Elkins, 79 Tex. 380, 15 S. W. 395; Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866; Fry v. Stowers, 98 Va. 417, 36 S. E. 482.

48. But in North Carolina the constructive possession of the true owner is denied this effect. McLean v. Smith, 106 N. C. 172, 11 S. E. 184; Currie v. Gilchrist, 147 N. C. 648, 61 S. E. 146; Simmons v. DeFrance Fox Co., 153 N. C. 261, 69 S. E. 146

49. Fox v. Hinton, 4 Bibb. (Ky.) 55; Kentucky Land & Immigration Co. v. Reynolds, 22 Ky. L. Rep. 1389, 60 S. W. 635; Richie v. Owsley, 143 Ky. 1, 135 S. W. 439; Miniard v. Napler, 167 Ky. 208, 180 S. W. 363; Stull v.

Rich Patch Iron Co., 92 Va. 253, 23 S. E. 293; Garrett v. Ramsey, 26 W. Va. 345, 360 (*dictum*).

50. Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113; Semple v. Cook, 50 Cal. 26; Altemus v. Long, 4 Pa. St. 254, 45 Am. Dec. 688; Ament v. Wolf, 33 Pa. St. 331; Creech v. Jones, 5 Sneed (Tenn.) 631; Evitts v. Roth, 61 Tex. 81; Combes v. Stringer, 106 Tex. 427, 167 S. W. 217. See note 6 Columbia Law Rev. 583.

51. Brown v. Bocquin, 57 Ark. 97, 20 S. W. 813; Georgia Pine Inv. & Mfg. Co. v. Holton, 94 Ga. 551, 20 S. E. 434; Stephenson v. Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; Louisville Property Co. v. Lawson, 156 Ky. 288, 160 S. W. 1034; Farrar v. Eastman, 10 Me. 191; Herbst v. Merrifield, 133 Mo. 267, 34 S. W. 571; Wilson v. McEwan, 7 Ore. 85. Lands have been held to be contiguous within this requirement when merely a corner of one coincides with a corner of the other. Parsons v. Dils, 172 Ky. 774, Ann. Cas. 1918E, 796, 189 S. W. 1158.

52. Grimes v. Ragland, 28 Ga. 123; Rowe v. Henderson Naval

criterion in this regard has been stated to be whether the instrument shows that the two pieces adjoin one another.⁵³

In some states there is a restriction upon the application of the rule of constructive possession, to the effect that it will apply only when the land claimed by reason of constructive possession is such, in character and extent, that its use in connection with the land actually occupied would be in accord with the custom of the country.⁵⁴ In other states no such restriction upon the application of the rule is recognized, it being only necessary that the actual possession be of a visible character, however small it may be in extent in comparison with the land claimed.⁵⁵

Stores Co., 143 Ga. 756, 85 S. E. 917; Hornblower v. Banton, 103 Me. 375, 125 Am. St. Rep. 300, 69 Atl. 568; Morris v. McClary, 43 Minn. 346, 46 N. W. 238; Den d. Carson v. Mills, 18 N. C. 546, 30 Am. Dec. 143; Doe d. Laflin v. Cobb, 46 N. C. 406, 62 Am. Dec. 173; Willamette Real Estate Co. v. Hendrix, 28 Ore. 485, 52 Am. St. Rep. 800, 42 Pac. 514; Camp v. Riddle, 128 Tenn. 294, Ann Cas. 1915C, 145, 160 S. W. 844; Montgomery v. Gunther, 81 Tex. 320, 16 S. W. 1073. *Contra*, Johnson v. Simerly, 90 Ga. 612, 16 S. E. 951; Dills v. Hubbard, 21 Ill. 328; Parsons v. Dills, 159 Ky. 471, 167 S. W. 415, 172 Ky. 774, Ann. Cas. 1918E, 796, 189 S. W. 1158; Brougher v. Stone, 72 Miss. 647, 17 So. 509; Roller v. Armentrout, 118 Va. 173, 86 S. E. 906; Webb v. Richardson, 42 Vt. 465.

53. Griffin v. Lee, 90 Ga. 224, 15 S. E. 810; Den d. Carson v. Mills, 18 N. C. 546, 30 Am. Dec. 143.

54. Louisville etc. R. Co. v. Gulf of Mexico Land etc. Co., 82 Miss. 188, 33 So. 845, 100 Am. St. Rep. 627; Jackson v. Woodruff, 1 Cow. (N. Y.) 276; Simpson v. Downing, 23 Wend. (N. Y.) 316; Thompson v. Burhans, 61 N. Y. 52; Paine v. Hutchins, 49 Vt. 314; Pepper v. O'Dowd, 39 Wis. 538 (statute). See Zirngibl v. Calumet & C. Canal & Dock Co., 157 Ill. 430, 42 N. E. 431; Turner v. Stephenson, 72 Mich. 409, 2 L. R. A. 277, 40 N. W. 735; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Chandler v. Spear, 22 Vt. 388.

55. Marietta Fertilizer Co. v. Blair, 173 Ala. 524, 56 So. 131; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Furgerson v. Bagley, 95 Ga. 516, 20 S. E. 241; Taliaferro v. Butler, 77 Tex. 578, 14 S. W. 191. See 6 Columbia Law Rev. 583, for a criticism of the New York rule. See also Doe d. Lenoir v. South, 32 N. Car. 237.

When a person having color of title to a tract of land conveys a part of such tract to another, who takes possession of that part and no more, such possession of a part by the grantee is not equivalent to possession by the grantor, for the purpose of giving the latter constructive possession of the balance.⁵⁶ But if the person having color of title to a tract makes a lease of part of the tract, and the lessee takes possession of that part, the possession of the lessee in behalf of the lessor will, by the weight of authority, be regarded as extending to the whole tract.⁵⁷

— **Minerals in the land.** The question has quite frequently arisen, under what circumstances does the statute of limitations run as regards rights in minerals beneath the surface of land. There exists in this connection a primary distinction between the case in which the ownership of the surface of the land is not already separated from that of the minerals, and that in which it is so separated.

If one person owns both the surface of the land and the minerals thereunder, and another takes wrongful possession of the surface, his actual possession of the surface is ordinarily extended by construction to

56. *Trotter v. Cassaday*, 3 A. 1066; *Knorr v. Raymond*, 73 Ga. 749; *Williams v. Ballance*, 23 Ill. 193, 74 Am. Dec. 187; *Murphy v. Comm.* 187 Mass. 361, 73 N. E. 524 (*semble*); *Heinemann v. Bennett*, 144 Mo. 113, 45 S. W. 1092; *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. 251; *Cochran v. Linville Imp. Co.*, 127 N. C. 386, 37 N. E. 496; *Bowles v. Brice*, 66 Tex. 724, 2 S. W. 729. *Contra*, *Massengill v. Bayles*, 11 Humph. (Tenn.) 113; *Texas Land Co. v. Williams*, 51 Tex. 61; *Walker v. Knox*, Tex. Civ. App., 191 S. W. 730.
57. *Zundel v. Baldwin*, 114 Ala. 328, 21 So. 420; *Wheeler v. Foote*, 80 Ark. 435, 97 S. W. 447 (distinguished in *Johnson & Burr v. Elder*, 92 Ark. 30, 121 S. W.

the minerals beneath the surface,⁵⁸ and if the statute runs against the rightful owner as regards the surface it also runs as regards the minerals.⁵⁹ It has been decided that the running of the statute in such case as regards the minerals is not affected by the fact that the wrongful possessor undertakes to convey the minerals alone to another, who does not take possession, the continued possession of the surface by the grantor in such case being regarded as extending to the minerals in behalf of the grantee.⁶⁰ And conversely it was held in the same state that if one who had taken wrongful possession of the land conveyed the surface, retaining the minerals, the subsequent possession of the surface by the grantee extended to the minerals in behalf of the grantor.^{60a} But the wrongful possession of the surface does not extend by construction to the minerals, if the possession was originally taken under color of a conveyance which expressly excepted the minerals.⁶¹ And it has been decided that, when a company was mining part of the minerals contained in a tract belonging to it, but not that part of the minerals beneath the portion of the surface of which defendant had wrongful possession, defendant, by the lapse of the statutory period, although he acquired title to the portion of the surface of which he had possession, did not acquire title to the minerals beneath such portion of the surface, he having been fully informed as to the operations

58. See *Armstrong v. Caldwell*, 53 N. Y. 284; editorial note 10 *Columbia Law Rev.* 70.

59. *Baker v. Clark*, 128 Cal. 181, 60 Pac. 677; *Davis v. Shepherd*, 31 Colo. 141, 72 Pac. 57; *Bradley v. Johnson*, 11 Idaho. 689, 83 Pac. 927.

60. *Black Warrior Coal Co. v. West*, 170 Ala. 346, 54 So. 200; *McBurney v. Glenmary Coal & Coke Co.*, 121 Tenn. 275, 118 S. W. 220. The latter case was,

however, overruled by *Northcut v. Church*, 135 Tenn. 541, 188 S. W. 220.

60a. *Moore v. Empire Land Co.*, Ala., 61 So. 940. See editorial notes 24 *Harv. Law Rev.* 582, 27 *Id.* 173.

61. *Louisville v. Nashville R. Co.*, 136 Ala. 156, 96 Am. St. Rep. 17, 33 So. 896. See editorial note 10 *Columbia Law Rev.* 70, and cases cited, *post*, note 64.

of the company, and that, by such operations, the company had in effect made a severance of the minerals from the surface, analogous to the severance or separation of ownership referred to in the next paragraph.⁶² This theory of severance by the working of the mineral deposits is somewhat obscure, and the same result might, it is submitted, have been attained on the theory, above referred to, that actual possession is not extended by construction as against the rightful owner in possession of part of his land.

If the ownership of the minerals becomes separated from that of the surface, the subsequent⁶³ possession of the surface owner is not regarded as extending to the minerals, so as to give him title thereto under the statute, even though the owner of the minerals makes no attempt to remove the minerals.⁶⁴ The two properties are entirely distinct and there is no more reason that the owner of one property should be regarded as in wrongful possession of the other than if the plane by which they are separated was vertical instead of horizontal. And in order that the surface owner may be regarded as in possession of the minerals, so that the statute may run in his favor with reference thereto, he must conduct mining operations with such

62. *Delaware & Hudson Canal Co. v. Hughes*, 183 Pa. 66, 38 L. R. A. 826, 38 Atl. 568, 63 Am. St. Rep. 743.

63. If the separation of ownership does not occur until after the taking of wrongful possession of the surface, it does not, it has been decided, prevent the running of the statute as to the minerals as well as the surface. *Finnegan v. Stineman*, 5 Pa. Super. Ct. 124.

64. *Birmingham Fuel Co. v. Boshell*, 190 Ala. 597, 67 So. 403; *Crandall v. Goss*, 30 Idaho, 661,

167 Pac. 1025; *Crowe Coal & Mining Co. v. Atkinson*, 85 Kan. 357, Ann. Cas. 1912D, 1196, 116 Pac. 499; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. 295, 113 Am. St. Rep. 962, 78 N. E. 433; *Kingsley v. Hillside Coal & Iron Co.*, 144 Pa. 613, 23 Atl. 250; *Armstrong v. Caldwell*, 53 Pa. St. 284; *Murray v. Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740, 39 L. R. A. 249, 43 S. W. 355; *Northcutt v. Church*, 135 Tenn. 541, 188 S. W. 220, Ann. Cas. 1918B, 545; *Morison v. American*

a degree of continuity as accords with the nature of the business, and in such a way as will indicate his intention of exclusive appropriation.⁶⁵

If, after the ownership of the minerals has become separated from that of the surface, a third person takes possession of the minerals, the statute will run in his favor as regards the minerals,⁶⁶ if his possession is not only adverse, but also visible and notorious.⁶⁷ But if, after the ownership of the minerals has become separated from that of the surface, a third person takes wrongful possession of the surface, his possession does not extend to the minerals, so as to enable him, by the running of the statutory period, to acquire title thereto.⁶⁸

§ 513. Particular relations— (a) Landlord and tenant. Possession for the statutory period by the tenant under a lease is, it is agreed, not ordinarily sufficient to confer title upon him as against his landlord.⁶⁹

Ass'n, 110 Va. 91, 65 S. E. 469; Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 6 Ann. Cas. 140, 52 S. E. 485.

65. Hooper v. Bankhead, 171 Ala. 626, 54 So. 549; Gordon v. Park, 219 Mo. 600, 117 S. W. 1163, 119 Am. St. Rep. 802; Armstrong v. Caldwell, 53 Pa. 284. See editorial notes, 11 Columbia Law Rev. 673, 26 Harv. Law Rev. 555.

66. Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N. E. 144.

67. Pierce v. Barney, 209 Pa. 132, 58 Atl. 152; Huss v. Jacobs, 210 Pa. 145, 59 Atl. 1904. See French v. Lansing, 73 N. Y. Misc. 80, 132 N. Y. Supp. 523.

68. Catlin Coal Co. v. Lloyd, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214; Moreland v. H. C. Frick Coke Co., 170 Pa. St. 33, 32 Atl. 634.

69. Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 So. 43; Rigg v. Cook, 9 Ill. 336; Pharis v. Jones, 122 Mo. 125, 26 S. W. 1932; Gwynn v. Jones' Lessee, 2 Gill & J. 173; Lyebrook v. Hall, 73 Miss. 509, 19 So. 348; Carson v. Broady, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; Lepport v. Todd, 32 N. J. L. 124; Jackson v. Carns, 20 Johns. (N. Y.) 301; Whiting v. Edmunds, 94 N. Y. 309; Doherty v. Matsell, 119 N. Y. 646, 23 N. E. 994; Taylor v. Kelly, 56 N. C. (3 Jones Eq.) 240; Schuylkill & D. Imp. & R. Co., 58 Pa. 304; Nessley v. Ladd, 29 Ore. 354, 45 Pac. 904; Duke v. Harper, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; Flanagan v. Pearson, 61 Tex. 302; Sherman v. Champlain Transportation Co., 31 Vt. 162; Emerick v. Tavenner,

The tenant's possession, taken under the lease, involves a recognition of the landlord's title in reversion, and is consequently not adverse or hostile to the latter. If, however, one becomes tenant of another without being aware of the fact, there is no recognition by him of the other's title, and his possession is consequently adverse, so as to cause the statute to run in his favor, provided only the landlord has no reason to suppose the possession to be otherwise. If, for instance, one takes possession by virtue of an invalid conveyance in fee simple, even an oral gift, under the impression that it is a valid conveyance, he is *prima facie* a tenant at will under his grantor or donor,⁷⁰ but his possession is nevertheless, in the ordinary case, adverse to the latter.⁷¹ And if one takes possession under a conveyance which he supposes to give him a fee simple estate, but by reason of lack of form gives him a life estate merely, the possession is to be regarded as adverse to his grantor, so that the statute will ordinarily commence to run in favor of those claiming under him, so soon as, by reason of the expiration of the life estate, the landlord has a right of action to recover possession.⁷²

Even though the landlord has a right to enforce a forfeiture for breach of an express condition, he is under no obligation so to do, and the statute does not commence to run by reason of the occurrence of a cause of forfeiture.⁷³ Since the statute does not run even after the term has come to an end,⁷⁴ it could hardly run merely by reason of a right to bring the term to an end.

9 Gratt. (Va.) 220, 58 Am. Dec. 217; Swann v. Young, 36 W. Va. 57.

70. *Ante*, § 61(a).

71. *Post*, § 513(e).

72. Jackson v. Harsen, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517; Henley v. Wilson, 77 N. Car. 216. See Breland v. O'Neal, 88 Miss.

449, 40 So. 865. In New Haven Trust Company v. Camp, 81 Conn. 539, 71 Atl. 788, it appears to be held that the statute begins to run even before the life estate is out of the way.

73. Doe v. Danvers, 7 East 299; Gwynn v. Jones, 2 Gill & J. (Md.) 173.

It has been frequently asserted that, although the tenant's possession is *prima facie* not adverse to the landlord, it may become adverse by reason of his open repudiation of the tenancy, and notice thereof brought home to the landlord.⁷⁵ The repudiation of the tenancy must, it has been said be "clear, positive, and continued,"⁷⁶ and the landlord is not affected by the repudiation of the tenancy, even though this takes the form of an attornment to another,⁷⁷ unless and until notice thereof is brought home to him.⁷⁸ Express notice is not necessary, it being sufficient that he in

74. *Post*, this subsection, note 90.

75. *Willison v. Watkins*, 3 Pet. 43; *Ponder v. Cheeves*, 104 Ala. 307, 16 So. 145; *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462; *Austin v. Wilson*, 46 Iowa, 362; *Patterson v. Hansel*, 4 Bush (Ky.) 654; *Sanscrainte v. Torongo*, 87 Mich. 69, 49 N. W. 497; *Meridian Land & Industrial Co. v. Ball*, 68 Miss. 135, 8 So. 316; *Doherty v. Matsell*, 119 N. Y. 646, 23 N. E. 944; *Nessley v. Ladd*, 29 Ore. 354, 45 Pac. 904; *McGinnis v. Porter*, 20 Pa. 80; *Duke v. Harper*, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423.

76. *Morris v. Wheat*, 11 App. Dist. Col. 201; *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462; *Wilkins v. Pensacola City Co.*, 36 Fla. 36, 18 So. 20; *Nessley v. Ladd*, 29 Ore. 354, 45 Pac. 904.

77. *Doe v. Clayton*, 81 Ala. 391, 2 So. 24; *De Jarnette v. McDaniel*, 93 Ala. 215, 9 So. 570; *Camden Orphan Soc. v. Lockhart*, 2 Mull. Law (S. C.) 84. *Contra*,

semble, *Holtzman v. Douglas*, 168 U. S. 278, 42 L. Ed. 466.

Occasionally it appears to be asserted that the tenant's attornment to another cannot start the running of the statute as against the landlord. *Dausch v. Crane*, 109 Mo. 323, 19 S. W. 61; *Fowler v. Simpson*, 79 Tex. 611, 23 Am. St. Rep. 370, 15 S. W. 682. This does not accord with the decisions that the tenant's possession becomes adverse if he repudiates the tenancy and so informs the landlord.

78. *Willison v. Watkins*, 3 Pet. (U. S.) 43; *Le Croix v. Malone*, 157 Ala. 434, 47 So. 725; *Wilkins v. Pensacola City Co.*, 36 Fla. 36, 18 So. 20; *Farrow's Heirs v. Edmundson*, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; *Leport v. Todd*, 32 N. J. L. 124; *Campbell v. Shipley*, 41 Md. 81; *Holman v. Bonner*, 63 Miss. 131; *Greenwood v. Moore*, 79 Miss. 201, 30 So. 609; *Hamilton v. Boggess*, 63 Mo. 233; *Ross v. McManigal*, 61 Neb. 90, 84 N. E. 610; *Nesley v. Ladd*, 29 Ore. 354, 45 Pac. 904; *McGinnis v. Porter*, 20 Pa. 80; *Whaley v. Whaley*, 1 Speer Law

some way acquires knowledge of the tenant's action.⁷⁹ And according to some decisions he is chargeable with notice by reason of the open and notorious character of the repudiation of the tenancy.⁸⁰

Since the statute of limitations cannot commence to run until there is a right of action in favor of the rightful owner, it follows that the doctrine above referred to, that the repudiation of the tenancy starts the running of the statute, necessarily involves the assumption that such repudiation gives a right to the landlord to assert a forfeiture of the tenant's estate, and there are quite a number of decisions that it does give such right.⁸¹ In a few jurisdictions, however, it appears that a mere oral disclaimer of the tenancy does not give any right of action to the landlord,⁸² and in any such jurisdiction adopting that view, the repudiation of the tenancy could not start the statute in favor of the tenant, until after the expiration of the term for which the tenancy was created.

(S. C.) 225, 40 Am. Dec. 594; Bryce v. Cayce, 62 S. C. 546, 40 S. E. 948; Duke v. Harper, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; Udell v. Peak, 70 Tex. 547, 7 S. W. 786; Stacy v. Bostwick, 48 Vt. 192; Allen v. Paul, 24 Gratt. (Va.) 332; Voss v. King, 33 W. Va. 236, 10 S. E. 402.

79. Wells v. Sheerer, 78 Ala. 142; Cotton v. White, 131 Ark. 273, 199 S. W. 116; Morton v. Lawson, 1 B. Mon. (Ky.) 45; Catlin v. Decker, 38 Conn. 262; Brandon v. Bannon, 38 Pa. 63; Cosgrove v. Franklin, 35 R. I. 527, 87 Atl. 544; Floyd v. Mintsey, 7 Rich. Law (S. Car.) 181; Udell v. Peak, 70 Tex. 547, 7 S. W. 786; Rensens v. Lawson, 91 Va. 226, 21 S. E. 347; Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423.

80. Wells v. Sheerer, 78 Ala. 142; Rigg v. Cook, 9 Ill. 336, 46 Am. Dec. 462; Farrow v. Edmundson, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; Myers v. Silljacks, 53 Md. 319; McClanahan v. McClanahan, 258 Mo. 579, 167 S. W. 991.

81. These decisions are cited 2 Tiffany, Landlord & Tenant, § 192.

82. See Jackson v. Kisselbrack, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341; De Lancey v. Ganong, 9 N. Y. 9; Bedlow v. N. Y. Floating Dry Dock Co. 112 N. Y. 263, 287, 2 L. R. A. 629, 19 N. E. 800; Rosseel v. Jarvis, 15 Wis. 571, 82 Am. Dec. 298; Gale v. Oil Run Petroleum Co., 6 W. Va. 200; Doe d. Graves v. Wells, 10 Adol. & El. 427; Doe d. Daniels v. Weese, 5 Up. Can. Q. B. 589.

Occasionally it has been asserted that, in order that the tenant may start the statute running in his favor, he must not only repudiate the tenancy, but must also relinquish the possession acquired under the lease and then reënter.⁸³ This view appears to be based on the theory that by reason of the doctrine that a tenant is estopped or precluded to deny his landlord's title,⁸⁴ he cannot make his possession adverse by such a denial, but that such doctrine ceases to apply after the tenant has relinquished possession. The doctrine of the estoppel of the tenant to deny the landlord's title has, it is submitted, no bearing whatsoever upon the question. That doctrine precludes the tenant from denying, in certain classes of action, that the lessor had a valid title at the time of the lease, but it does not, and in fact it cannot, preclude him from making such a denial out of court, and there is nothing in the doctrine to prevent him from subsequently showing, in the course of a legal proceeding, that he did make such denial, and that as a result of such denial the title of the lessor was extinguished by the statute of limitations. Furthermore, if this doctrine of estoppel did apply for this purpose, it is most questionable whether it should cease to apply merely because the tenant relinquishes possession,⁸⁵ unless such relinquishment is accepted by the landlord, so as to effect a surrender by operation of law,⁸⁶ in which case the former tenant's subsequent entry might well be adverse.

There are occasional decisions to the effect that if one holding under a lease assumes to transfer a fee simple estate in the property, and the transferee takes possession in ignorance of the fact that his transferor

83. <i>Millett v. Lagomarsino</i> , 107 Cal. 102, 40 Pac. 25; <i>Alderson v. Marshall</i> , 7 Mont. 288, 16 Pac. 576; <i>Whiting v. Edmunds</i> , 94 N. Y. 309; <i>Dasher v. Ellis</i> , 102 Ga. 830, 30 S. E. 544; <i>Flannery v.</i>	<i>Hightower</i> , 97 Ga. 592, 25 S. E. 371. See 2 <i>Columbia Law Rev.</i> 52, 9 <i>Id.</i> 451. 84. <i>Ante</i> , § 57. 85. <i>Ante</i> , § 57 (d). 86. <i>Ante</i> , § 431.
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had merely a leasehold interest to transfer, the possession of the transferee is adverse to the original landlord, although the latter has no notice to that effect.⁸⁷ Such decisions do not appear to accord with the well settled rule that the statute does not commence to run by reason of the repudiation of the tenancy unless and until notice of such repudiation is brought home to the landlord. The landlord has a right to assume, until notified of the contrary, that one in possession under a transfer from the lessee is in possession as tenant merely, and while the fact that the transferee is ignorant of the lease shows that there is no recognition by him of the landlord's title, this is no reason for applying as against the landlord a doctrine which has properly no application in the absence of laches on the part of the latter.⁸⁸ And so, if one holding as tenant at will dies, and his widow succeeds him in the possession, her possession is presumed, in the absence of any repudiation by her of the tenancy, to be subordinate to the title of the true owner.^{88a}

If the tenant under a lease holds over without the consent of the reversioner, that is, without right, he is not, properly speaking, a tenant of the person whom he wrongfully excludes from possession,⁸⁹ but nevertheless his possession is, *prima facie*, not regarded as adverse to the latter.⁹⁰

87. *Macdougall v. Reedy*, 71 Ga. 750; *Dikeman v. Parrish*, 6 Pa. 225, 47 Am. Dec. 455; *Townsend v. Boyd*, 217 Pa. 386, 12 L. R. A. N. S. 1148, 66 Atl. 1099; *Illinois Steel Co. v. Budzisz*, 139 Wis. 281, 119 N. W. 935, 121 N. W. 362.

88. See *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263, 287, 2 L. R. A. 629, 19 N. E. 800;

Philips v. Rothwell, 4 Bibb. (Ky.) 33; *Millett v. Lagomarsino*, 107 Cal. 102, 38 Pac. 308; *Gee v. Hatley*, 114 Ark. 376, 170 S. W. 72; editorial notes 9 Columbia Law Rev. 451, 22 Harvard Law Rev. 604; 7 Mich. Law Rev. 592.

88a. *Frazer v. Naylor*, 1 Mete. (Ky.) 593; *Neilson v. Grignon*, 85 Wis. 550, 55 N. W. 890.

89. *Ante*, § 68.

90. *Gwynn v. Jones' Lessee*, 2 Gill. & J. (Md.) 173; *Lyebrook*

— (b) **Trustee and cestui que trust.** The possession of the trustee under an express trust is ordinarily not adverse to the *cestui que trust*,⁹¹ But although the possession of the trustee is originally not adverse, it becomes so in case he repudiates the trust by unequivocal words or acts, and such repudiation is brought to the notice of the *cestui que trust*.⁹²

In the case of a constructive trust, which is recognized by a court of equity for the purpose of relief against fraud,⁹³ the possession of the holder of the legal title is ordinarily adverse to the person who

v. Hall, 73 Miss. 509, 19 So. 348; Carson v. Broady, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; Jackson v. Carns, 20 Johns. (N. Y.) 301; Taylor v. Kelly, 3 Jones Eq. (56 N. Car.) 240; Leport v. Todd, 32 N. J. L. 124; Nessley v. Ladd, 29 Ore. 354, 45 Pac. 904; Whaley v. Whaley, 1 Speer Law (S. C.) 225, 40 Am. Dec. 594; Brandon v. Bannon, 38 Pa. 63; Duke v. Harper, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; Flannagan v. Pearson, 61 Tex. 302; Fahey v. Kaies,—Tex. Civ.—, 181 S. W. 782; Sherman v. Champlain Transportation Co., 31 Vt. 162; Emerick v. Tavener, 9 Gratt. (Va.) 220, 58 Am. Dec. 217; Swann v. Young, 36 W. Va. 57, 14 S. E. 426.

In New York the statute provides that the holding of a tenant shall not be adverse till twenty years after the expiration of the term. See Whiting v. Edmunds, 94 N. Y. 309.

91. Seymour v. Freer, 8 Wall. (U. S.) 202, 19 L. Ed. 306; Cruse v. Kidd, 195 Ala. 22, 70 So. 166; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Meacham

v. Bunting, 156 Ill. 586, 47 Am. St. Rep. 239, 28 L. R. A. 618; Dunn v. Wheeler, 86 Me. 238, 29 Atl. 985; Hatt v. Green, 180 Mich. 383, 147 N. W. 593; Kane v. Bloodgood, 7 Johns. Ch. 125; Miller v. Bingham, 36 N. C. 423, 36 Am. Dec. 58; Williams v. First Presbyterian Soc. in Cincinnati, 1 Ohio St. 478; Smith v. McElyea, 68 Tex. 70, 3 S. W. 258; Redford v. Clarke, 100 Va. 115, 40 S. E. 630.

92. Willison v. Watkins, 3 Pet. 42, 52; Schlessinger v. Mallard, 70 Cal. 326, 11 Pac. 728; Terry v. Davenport, 185 Ind. 561, 112 N. E. 998; McGuire v. Nugent, 103 Mo. 161, 15 S. W. 551; Stanton v. Helm, 87 Miss. 287, 39 So. 457; Lamberton v. Youmans, 84 Minn. 109, 86 N. W. 894; Congregational Soc. etc. v. Newington, 53 N. H. 595; Boydston v. Jacobs, 38 Nev. 175, 147 Pac. 447; Williams v. Cincinnati First Presby. Church, 1 Ohio St. 478; Long v. Cason, 4 Rich. Eq. 60; Fennell v. Loague, 107 Tenn. 239, 63 S. W. 1121.

93. *Ante*, § 108(a).

is asserting the fraud.⁹⁴ That is, the statutory period within which one must seek to be relieved against another's fraud is not extended by reason of the fact that such fraud has resulted in placing the legal title to land in the wrongdoer, and that the court, in relieving against the fraud, does so by declaring him to hold in trust for the person defrauded. But if the fraud arises from the repudiation of a promise or undertaking to hold the land for the benefit of another, the statute does not begin to run until the repudiation actually occurs, and knowledge thereof is brought home to the person entitled to assert the fraud.⁹⁵ And the view, adopted in many states, that the statute of limitations does not run against a right of action based on fraud, until the fraud is discovered, would frequently operate to extend the time for the assertion of a constructive trust.⁹⁶

To what extent, in the case of a resulting trust, that is, a trust implied in accordance with presumed intention,⁹⁷ the possession of the trustee is to be regarded as adverse or not adverse to the person beneficially entitled, the cases are not entirely clear. It has been decided in a number of cases that, when the trust resulted from the payment of a consideration by one person for property conveyed to another, the possession of the latter was not adverse to the person making the payment until there was an explicit repudiation of the trust, reference being made, however, in some of these cases, to the fact that the circumstances showed an acknowledgment by the former of

94. *Lewis v. Hawkins*, 23 Wall. 119; *Hunter v. Dennis*, 112 Ill. 568; *Terry v. Davenport*, 185 Ind. 561, 112 N. E. 998; *Kennedy v. Kennedy*, 25 Kan. 151; *Edwards v. University*, 21 N. C. 325, 30 Am. Dec. 170; *Church v. Winton*, 196 Pa. St. 107, 46 Atl. 362.

95. *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555; *Carr v. Craig*, 138 Iowa, 526, 116 N. W. 720; *Newls v. Topfer*, 121 Iowa, 433, 96 N. W. 905.

96. *Markley v. Camden Safe Deposit & Trust Co.*, 74 N. J. Eq. 279, 69 Atl. 1100.

97. *Ante*, § 107.

the existence of a trust.⁹⁸ When the title is taken in the other's name with a fraudulent intention on the part of such other, the trust is to be regarded as a constructive rather than a resulting trust, and the statute would run at least from the time of the discovery of the fraud.⁹⁹

In case the trustee under an express trust transfers the legal title to a third person, who takes with notice of the trust, or who pays no consideration, the *cestui que trust* may assert the trust as against such transferee.¹ The possession of such transferee for the statutory period has been regarded as sufficient to bar the rights of the *cestui que trust*, in some cases on the ground that his possession is adverse to the original trustee,² applying the rule that the *cestui que trust* is barred when the trustee is barred,³ while in other cases the *cestui que trust* has been regarded as barred on the theory that the possession of the transferee of the legal title is that of a constructive trustee, and is consequently adverse to the person equitably entitled.⁴ In

98. Long v. King, 117 Ala. 423, 23 So. 534; Haney v. Legg, 129 Ala. 619, 87 Am. St. Rep. 81, 30 So. 34; Plass v. Plass, 122 Cal. 3, 15; Norton v. Bassett, 154 Cal. 411, 129 Am. St. Rep. 162, 87 Pac. 894; Corr's Appeal from Com'rs, 62 Conn. 403, 26 Atl. 478; Warren v. Adams, 19 Colo. 515, 36 Pac. 604; Reynolds v. Sumner, 126 Ill. 58, 1 L. R. A. 327, 9 Am. St. Rep. 523; Zunkel v. Colson, 109 Iowa, 695, 81 N. W. 175; *In re Mahin's Estate*, 161 Iowa, 459, 143 N. W. 420; Smith v. Smith, 132 Iowa, 700, 119 Am. St. Rep. 581, 109 N. W. 194; Lufkin v. Jakeman, 188 Mass. 528, 74 N. E. 933; Condit v. Maxwell, 142 Mo. 266, 44 S. W. 467, (but see Reed v. Painter, 145 Mo. 341, 46 S. W. 1089); Hanson v. Hanson,

78 Neb. 584, 111 N. W. 368; Crowley v. Crowley, 72 N. H. 241, 56 Atl. 190; Fawcett v. Fawcett, 85 Wis. 332, 39 Am. St. Rep. 844, 55 N. W. 405.

99. Kennedy v. Kennedy, 25 Kan. 151; Cox v. Menzing, —(Miss.)—30 So. 41; Reed v. Painter, 145 Mo. 341, 46 S. W. 1089.

1. *Ante*, § 114.

2. Merriam v. Hassam, 14 Allen (Mass.) 516, 92 Am. Dec. 795; Smilie v. Biffle, 2 Pa. St. 52, 44 Am. Dec. 156; McCrary v. Clements, 95 Ga. 778, 22 S. E. 675.

3. *Ante*, § 506, note 9.

4. Robinson v. Pierce, 118 Ala. 273, 45 L. R. A. 66, 72 Am. St. Rep. 160, 24 So. 984; Smith v. Dallas Compress Co., 195 Ala.

at least one case the conclusion that the beneficiary is barred is based upon the theory that the transfer of the legal title by the original trustee involves a repudiation of the trust by him, which starts the running of the statute in favor of him and of any person claiming under him.⁵ It has occasionally been decided that the possession of the transferee is adverse as against the beneficiary of the trust even though the latter is not *sui juris*⁶ and that it is adverse even as against one equitably entitled in remainder only,⁷ decisions which are evidently based on the theory, above referred to, that the beneficiary is barred by reason of the bar of the original trustee. To regard, however, an innocent beneficiary as barred by his trustee's failure to take legal action to set aside a wrongful transaction in which the latter knowingly participated does not seem entirely in accord with equitable principles. And the rule that the *cestui* is barred of relief as against the transferee of the trustee merely because the statute has run as against the trustee himself has been occasionally asserted to be inapplicable in favor of one who thus colluded with the trustee in a breach of trust.⁸ The bar of the *cestui que trust* may,

534, 70 So. 662; *Nougues v. Newlands*, 118 Cal. 102, 50 Pac. 386; *Stillwell v. Leavy*, 84 Ky. 379, 1 S. W. 590 (*semble*); *Cummings v. Stovall*, 6 Lea (Tenn.) 679; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630. See *Newman v. Newman*, 60 W. Va. 371, 7 L. R. A. N. S. 370. In *Norton v. Bassett*, 154 Cal. 411, 129 Am. St. Rep. 162, 97 Pac. 894, it was decided that if the legal title passes by descent on the death of the trustee, the heirs taking possession are constructive trustees merely, in favor of whom the statute runs.

5. *Peters v. Jones*, 35 Iowa,

512; *Williams v. First Presbyterian Soc.* 1 Ohio St. 478.

6. *McCrary v. Clements*, 95 Ga. 778, 22 S. E. 675; *Wilson v. Louisville Trust Co.*, 102 Ky. 522, 44 S. W. 121; *Ewing v. Shannahan*, 113 Mo. 188, 20 S. W. 1065.

7. *Robinson v. Pierce*, 118 Ala. 273 45 L. R. A. 66, 72 Am. St. Rep. 160, 24 So. 984.

8. *Chase v. Cartright*, 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90; *Parker v. Hall*, 2 Head. (Tenn.) 641; *Elliott v. Landis Mach. Co.*, 236 Mo. 546, 139 S. W. 356, distinguishing *Ewing v. Shannahan*, 113 Mo. 188, 20

it is submitted, be most satisfactorily based upon the theory that the transfer by the the original trustee involves a repudiation of the trust, which sets the statute in motion as against him and those claiming under him, so soon, and not until, it becomes known to the *cestui que trust*.

The possession of the *cestui que trust* under an express trust is *prima facie* not hostile to the trustee, though it may become so by the assertion by him of a claim in his own right.¹⁰ The possession of one whose beneficial interest exists by reason of a resulting trust implied from his payment of the purchase price has been regarded as adverse to the person to whom he had the legal title conveyed.¹¹

— (c) **Licenser and licensee.** One who goes on land as a licensee merely has no possession of the land,¹² and consequently the statute does not begin to run in his favor unless and until he in effect takes possession by denying that he is in the position of a licensee.¹³

— (d) **Principal and agent.** Whether one who is upon another's property in the capacity of agent has, strictly speaking, possession of the property

S. W. 1065 on the ground that in the earlier case the purchase was not directly from the trustee. See also *Deans v. Gay*, 132 N. Car. 227, 43 S. E. 643.

9. As to the necessity of knowledge on the part of the beneficiary, see *Marshall's Estate*, 138 Pa. St. 285, 22 Atl. 24; *Jones v. Godwin*, 10 Rich. Eq. 226; *Neal v. Bleckley*, 51 S. C. 506, 29 S. E. 249; editorial note 11 *Columbia Law Rev.* 686.

10. *Burrows v. Holt*, 20 Conn. 464; *Winn v. Strickland*, 34 Fla. 610, 16 So. 606; *McClenahan v.*

Stevenson, 118 Iowa, 106, 91 N. W. 925; *Matthews v. Ward*, 10 G. & J. (Md.) 443; *Whiting v. Whiting*, 4 Gray (Mass.) 236; *Newmarket v. Smart*, 45 N. H. 103; *Marr's Heirs v. Gilliam*, 1 Cold. (Tenn.) 488.

11. *Ripley v. Bates*, 110 Mass. 161.

12. *Ante*, § 349(a).

13. *Sanitary Dist. of Chicago v. Allen*, 178 Ill. 330, 53 N. E. 109; *Blaisdell v. Portsmouth, G. F. & C. R. Co.*, 51 N. H. 483; *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; *Curtis*

appears to be open to doubt.^{13a} But assuming that he can be regarded as having possession, his possession is *prima facie* not adverse to the owner, his principal.¹⁴ He may, however, acquire an adverse possession as against the latter by a repudiation of the relation of agency, or assertion of a claim to the property in his own right, so soon as the principal is affected with knowledge thereof.¹⁵

— (e) **Grantor and grantee.** If one who has made a conveyance of land retains possession of the land, his possession is regarded as *prima facie* in subordination to the title of his grantee, and as consequently not adverse, unless and until he in some way indicates to the latter that he holds in his own behalf.¹⁶

v. La Grande Hydraulic Water Co., 20 Ore. 34; Kittaning Academy v. Brown, 41 Pa. St. 269; Raleigh v. Wells, 29 Utah, 217, 110 Am. St. Rep. 689, 81 Pac. 908.

In Cameron v. Chicago, M. & St. P. Ry. Co., 60 Minn. 100, 61 N. W. 814, it was held that the fact that the licensee undertook to transfer the land to another, who took possession, did not start the running of the statute in favor of such other, since it might be assumed that the owner, in not objecting to the latter's presence on the land, in effect regarded him as a licensee. The decision seems open to question, since it does not appear that the transferee in possession regarded himself as a licensee. But see Bond v. O'Gara, 177 Mass. 139, 83 Am. St. Rep. 265; 58 N. E. 275, criticized 14 Harv. Law Rev. 374.

13a. See Pollock & Wright, Possession 17; Lightwood, Pos-

session of Land, 22; Holmes, The Common Law, 227.

14. Baucum v. George, 65 Ala. 259; Hoskins v. Byler, 53 Ark. 532, 14 S. W. 864; Peabody v. Tarbell, 2 Cush. (Mass.) 226; Combs v. Goldsworthy, 109 Mo. 151, 18 S. W. 1130; Leigh v. Howard, 87 N. J. L. 113, 93 Atl. 680; Martin v. Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Peabody v. Leach, 18 Wis. 657.

15. Carney v. Hennessey, 77 Conn. 577, 60 Atl. 129; Whiting's Heirs v. Taylor's Heirs, 8 Dana (Ky.) 403; Martin v. Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Williams v. Pott, L. R. 12 Eq. 149. As to adverse possession by an agent, holding by one to whom he has leased the land for his principal, see note in 14 Columbia Law Rev. at p. 266.

16. Daniels v. Williams, 177 Ala. 140, 58 So. 419; Stuttgart v. John, 85 Ark. 520, 109 S. W. 541; Gernon v. Sisson, — (Cal.) — 131 Pac. 85; Jay v. Wheelchel,

The cases do not clearly explain why the possession of the grantor is thus presumed not to be in his own behalf.¹⁷ Obviously, if the grantor retains possession by reason of permission to that effect from the grantee, his possession is not adverse, it being in effect that of a tenant, ordinarily a tenant at will, of the latter,¹⁸ but the desirability of regarding the grantor as a tenant of the grantee, or as otherwise holding in behalf of the

78 Ga. 786; *Trask v. Success Mining Co.*, 28 Idaho, 483, 155 Pac. 288; *Rowe v. Beckett*, 30 Ind. 154, 95 Am. Dec. 676; *Iowa Cent. R. Co. v. Homan*, 151 Iowa, 404, 131 N. W. 878; *Sellers v. Crossan*, 52 Kan. 570, 35 Pac. 205; *Nugent v. Peterman*, 137 Mich. 646, 100 N. W. 895; *Collins v. Collieran*, 86 Minn. 199, 90 N. W. 364; *Robinson v. Reynolds*,—(Mo.)—, 176 S. W. 3; *Cohn v. Plass*, 85 N. J. Eq. 153, 95 Atl. 1011; *Jackson v. Burton*, 1 Wend. (N. Y.) 341; *Flesher v. Callahan*, 32 Okla. 283, 122 Pac. 489; *Gardner v. Wright*, 49 Ore. 609, 91 Pac. 286; *Pierce v. Barney*, 209 Pa. 132, 58 Atl. 152; *Lowe v. Turner*, 78 S. C. 513, 59 S. E. 529; *Virginia Midland R. Co. v. Barbour*, 97 Va. 118, 33 S. E. 554; *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306; *Schwaback v. Chicago, M. & St. P. Ry. Co.*, 69 Wis. 292, 2 Am. St. Rep. 740, 34 N. W. 128.

17. It is occasionally said that the grantor's possession is not adverse, because he is to be regarded as tenant at sufferance of the grantee. See *e. g.* *Daniels v. Williams*, 177 Ala. 140, 58 So. 419; *Building & Loan Ass'n v. Warren*, 101 Ark. 163, 141 S.

W. 765; *McNeil v. Jordan*, 28 Kan. 7; *Bloomer v. Henderson*, 8 Mich. 395. A tenant at sufferance is a wrongful possessor, and he is not properly a tenant of the person whom he deprives of possession. And consequently that one is tenant at sufferance does not appear to be conclusive that his possession is not adverse. In other words, the fact, if it be a fact, that the grantor retaining possession is tenant at sufferance (See 1 *Tiffany, Landlord & Ten.*, § 44) does not in itself show that his possession is not adverse. For instance, if a *tenant per autre vie* retains possession after the death of the *cestui que vie*, his possession is usually regarded as adverse to the remainderman [see *post* § 513(g)], although he is a tenant at sufferance.

18. See *Prichard v. Tabor*, 104 Ga. 64, 30 S. E. 415; *Butler v. Nelson*, 72 Iowa, 732, 32 N. W. 399; *Hunt v. Comstock*, 15 Wend. (N. Y.) 665; *Preston v. Hawley*, 101 N. Y. 586, 5 N. E. 770, Id., 139 N. Y. 296, 34 N. E. 906; *Cadwallader v. Lovece*, 10 Tex. Civ. App. 1, 29 S. W. 666, 917; *Hodges v. Gates*, 9 Vt. 178.

latter, in the absence of any evidence to that effect, appears to be open to question.¹⁹

One who goes into possession of land under a transfer of the land from the owner, whether by way of gift or otherwise, which is invalid because oral merely, may usually assert the bar of the statute against the owner if his possession continues for the statutory period, since his possession is presumed to be adverse to any right in the owner.²⁰ And generally a grantee's possession is regarded as adverse to the rights of the grantor, whatever be the character of the defects in the grant.²¹

19. See, in this connection, *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306; *Waltemeyer v. Baughman*, 63 Md. 200; *Smith v. Montes*, 11 Tex. 24; *Brinkman v. Jones*, 44 Wis. 498, 524.

In Arkansas it is said that when the grantor's possession continues unexplained for an unreasonable length of time, the presumption that it is in subordination to the grantee's title is gradually overcome. *Tegarden v. Hurst*, 123 Ark. 354, 185 S. W. 463. It does not appear whether, if the presumption is thus overcome, the limitation period is to be regarded as beginning to run from the date of the grant or when the presumption is overcome.

20. *Gillespie v. Gillespie*, 149 Ala. 184, 43 So. 12; *Trotter v. Neal*, 50 Ark. 340, 7 S. W. 384; *New Haven Trust Co. v. Camp*, 81 Conn. 539, 71 Atl. 788; *Studstill v. Wilcox*, 94 Ga. 690, 20 S. E. 120; *Stewart v. Duffy*, 116 Ill. 47, 6 N. E. 424; *Albright v. Albright*, 153 Iowa, 397, 133 N. W. 737; *Tippenhauer v. Tippen-*

hauer,—(Ky.)—, 166 S. W. 225; *Sumner v. Stevens*, 6 Mete. (Mass.) 337; *Schafer v. Hauser*, 111 Mich. 622, 35 L. R. A. 835, 66 Am. St. Rep. 403, 70 N. W. 136; *Sinclair v. Matter*, 125 Minn. 484, 147 N. W. 655; *Rannels v. Rannels*, 52 Mo. 109; *Davidge v. Talbot*, 98 Neb. 816, 154 N. W. 543; *Parker v. Kelsey*, 82 Ore. 334, 161 Pac. 694; *Nulton v. Nulton*, 247 Pa. 572, 93 Atl. 630; *Bartlett v. Secor*, 56 Wis. 520, 14 N. W. 714.

It has been said that unless the donee's entry into possession is under the honest belief that the land was given him, he is presumed to be holding under a license, and the possession not to be adverse. *Johns v. Johns*, 244 Pa. 48, 90 At. 535; *O'Boyle v. Kelley*, 249 Pa. 13, 94 Atl. 448. The idea apparently is that if the person so entering knows that the land was not legally given him, he is presumed to regard his possession as permissive merely until a valid gift is actually made.

21. *Robinson v. Thornton*, 102

— (f) **Vendor and vendee.** The possession of the vendee of land under an executory contract of sale is presumed to be in subordination to the rights of his vendor so long as the purchase price has not been paid or the contract is otherwise unperformed on his part,²² while, by the weight of authority, so soon as he has completely performed his part of the contract, his possession becomes adverse to the vendor,²³ as it does, even before performance by him, if he explicitly repudiates holding under the vendor.²⁴

Cal. 675, 34 Pac. 120; Carmody v. Chicago & A. R. Co., 111 Ill. 69; Big Sandy Co. v. Ramey, 162 Ky. 236, 172 S. W. 508; Melvin v. Proprietors of Locks & Canals on Merrimack River, 5 Metc. (Mass.) 15, 38 Am. Dec. 384; Case v. Green, 53 Mich. 615, 19 N. W. 554; Mattison v. Ausmuss, 50 Mo. 551; Nowlin v. Adams, 25 Gratt (Va.) 137; Parkersburg Nat. Bank v. Neal, 28 W. Va. 744.

22. Lewis v. Hawkins, 23 Wall 119; Sample v. Reeder, 107 Ala. 227, 18 So. 214; Perry v. Arkadelphia Lumber Co., 83 Ark. 374, 103 S. W. 724; Woodward v. Hennegan, 128 Cal. 293, 60 Pac. 769; Spratt v. Livingston, 32 Fla. 507, 22 L. R. A. 453; Moore v. Mobley, 123 Ga. 424, 51 S. E. 351; Peabody v. Hewett, 52 Me. 33, 83 Am. Dec. 486; Brown v. King, 5 Metc. (Mass.) 173; Burke v. Douglass, 115 Mich. 197, 73 N. W. 133; Moring v. Ables, 62 Miss. 263, 52 Am. Rep. 186; *In re* Department of Public Parks, 73 N. Y. 560; Worth v. Wrenn, 144 N. C. 656, 57 S. E. 388; West v. Edwards, 41 Ore. 609, 69 Pac. 992; Moore v. Kelly, 57 Okla. 348, 157 Pac. 81; McCulloch v.

Nicholson,—Tex. Civ. App—, 162 S. W. 432; William James Sons Co. v. Hutchinson, 79 W. Va. 389, 90 S. E. 1047. The possession of the vendee has been regarded as becoming adverse in case the vendor repudiates the contract, as by conveying to another person. Pearson v. Boyd, 62 Tex. 541.

23. Alabama State Land Co. v. Matthews, 168 Ala. 200, 53 So. 174; Dickson v. Sentell, 83 Ark. 385, 104 S. W. 148; New Domain Oil & Gas Co. v. Gaffney Oil Co., 134 Ky. 792, 121 S. W. 699; Grigsby v. Smith, 174 Ky. 819, 192 S. W. 856; Brown v. King, 5 Metc. (Mass.) 173; Moring v. Ables, 62 Miss. 263, 52 Am. Rep. 186; Ogle v. Hignet, 161 Mo. 47, 61 S. W. 596; Lanham v. Bowlby, 86 Neb. 148, 125 N. W. 149; Anderson v. McCormick, 18 Ore. 301, 22 Pac. 1062; Watts v. Witt, 39 S. C. 356, 17 S. E. 822; Central Pac. Ry. Co. v. Tarpey,—Utah—, 168 Pac. 554; Adams v. Fullam, 43 Vt. 592; Furlong v. Garrett, 44 Wis. 111; See Endicott v. Haviland, 220 Mass. 48, 107 N. E. 394.

24. Zeller v. Eckert, 4 How. 295; Sample v. Reeder, 107 Ala. 227, 18 So. 214; Pope v. Brass-

It is not entirely clear why the performance of the vendee's part of the contract should be regarded as *ipso facto* giving to his possession an adverse character, but it is perhaps based on the view that the vendee is then entitled to possession,²⁵ and that consequently, while previously his possession could be explained only on the theory that he was the tenant of the vendor,²⁶ such tenancy might be regarded as automatically ended by reason of complete performance of the contract by him. There are decisions, however, that even in the case of such complete performance by the vendee, a repudiation of the vendor's title is necessary to start the running of the statute.²⁷ And in support of this view it may be suggested that, whatever change in the relations of the parties may be made by the vendee's performance, in the view of a court of equity, it does not change their relations at law.

Where the vendee under an executory contract of sale transfers his interest to another, who takes possession, the possession of the latter is ordinarily, like that of the original vendee, not adverse to the vendor,²⁸ provided at least he has notice that his vendor, the

field, 110 Ky. 128, 61 S. W. 461; *Burke v. Douglass*, 115 Mich. 197, 73 N. W. 133; *Lanham v. Bowlby* 86 Neb. 148, 125 N. W. 149; *Cook v. Knott*, 28 Tex. 85; *Chapman v. Chapman*, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813.

25. See cases cited, 19 Am. & Eng. Encyc. Law (2d Ed.) 704; 39 Cyclopedic Law & Proc. 1621.

26. See 1 *Tiffany, Landl'd & Ten.* § 43a.

27. *Pope v. Brassfield*, 110 Ky. 128, 61 S. W. 5; *Roxbury v. Hutson*, 37 Me. 42 (*semble*); *Rodgers v. Beckel*, 172 Mich. 544, 138 N. W. 202 (*semble*); *Chap-*

man v. Chapman, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813; *Core v. Faupel*, 24 W. Va. 238.

In *Briggs v. Prosser*, 14 Wend. 227, whether the possession after performance is adverse, was regarded as a question to be determined with reference to the facts.

28. *Lewis v. Hawkins*, 23 Wall. 119; *Hannibal, etc., R. Co. v. Miller*, 115 Mo. 158, 21 S. W. 915; *Jackson v. Bard*, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; *Gillison v. Savannah, etc., R. Co.*, 7 S. C. 173. Compare *Hunter v. Parsons*, 2 Bailey (S. C.) 59.

original vendee, claims under an executory contract.²⁹ It has been decided, however, that if the original vendee make a conveyance to another, who takes without notice that his grantor is holding merely under an executory contract of sale, the possession of the grantee is adverse to the original vendor.³⁰ And there are occasional decisions that the mere fact that a purchaser from the original vendee has made full payment to the latter suffices in itself to make such purchaser's possession adverse to the original vendor.³¹ In any case, the possession of one claiming under the original vendee, like that of the original vendee himself, may become adverse by reason of his repudiation of the claim of the vendor.³²

— (g) **Life tenant and remainderman.** The statute of limitation does not operate in favor of a tenant for his own or another's life, so long as the life endures, as against the remainderman or reversioner.³³ The life tenant is rightfully in possession and the theory of adverse possession operates only when there is a wrongful possession,³⁴ and it is consequently

29. *Little Rock etc. R. Co. v. Rankin*, 107 Ark. 487, 156 S. W. 431 (grantee by quitclaim charged with notice). *Brown v. Huey*, 103 Ga. 448, 30 S. E. 429; *Keys v. Mason*, 44 Tex. 144.

30. *Wingfield v. Davis*, 53 Ga. 655; *Ripley v. Miller*, 165 Mich. 470, 130 N. W. 345 Ann. Cas. 1912C 952; *Snow v. Rich*, 22 Utah 123, 61 Pac. 336.

31. *Tayloe v. Dugger*, 66 Ala. 444; *Beard v. Ryan*, 78 Ala. 37.

32. *Robertson v. Wood*, 15 Tex. 1, 65 Am. Dec. 140.

33. *Washington v. Norwood*, 128 Ala. 391, 30 So. 405; *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151, 28 S. W. 796; *Meacham v. Bunting*, 156 Ill. 586, 28 L. R.

A. 618, 47 Am. St. Rep. 239, 41 N. E. 175; *Haskett v. Maxey*, 134 Ind. 182, 19 L. R. A. 379; *Mixer v. Woodcock*, 154 Mass. 535, 28 N. E. 907; *Stevens v. Winship*, 1 Pick. 318, 11 Am. Dec. 178; *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 364, 68 N. W. 243; *Pinckney v. Burrage*, 31 N. J. L. 21; *Clute v. New York Cent. & H. R. Co.*, 120 N. Y. 267, 24 N. E. 317; *Ladd v. Byrd*, 113 N. Car. 466, 18 S. E. 666; *McCorry v. King*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157; *Titchenell v. Titchenell*, 74 W. Va. 237, 81 S. E. 978.

34. See *Pickett v. Doe*, 74 Ala. 131; *Hanson v. Ingwaldson*,

immaterial that the life tenant asserts a claim to the fee, since this gives the remainderman no right of entry or action.³⁵ Even though the remainderman might, if he chose, assert a forfeiture of the life estate by reason of wrongful acts upon the part of the life tenant, he is, it seems, under no obligation so to do, in order to prevent the running of the statute.³⁶ In one or two states, however, it has been decided that, in view of a statute giving to a reversioner or remainderman the right to institute a proceeding to quiet title, it is incumbent upon the remainderman so to do in case a tenant in life makes a conveyance in fee, and that the statute runs against the remainderman from the time of such conveyance.³⁷

One to whom a tenant for life transfers his estate, whether the conveyance purports to convey a life estate or a fee simple estate, acquires the estate of his grantor, with a like right of possession, and consequently the statute does not run in his favor as against the remainderman, until after the termination of the life.³⁸

77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702.

35. Keith v. Keith, 80 Mo. 125, 125.

36. Wallingford v. Hearl, 15 Mass. 471; Mixer v. Woodcock, 154 Mass. 535, 28 N. E. 907; Moore v. Luce, 29 Pa. 260, 72 Am. Dec. 629; But in Green v. Horn, 207 N. Y. 489, 101 N. E. 430 it is intimated that a "positive act of disclaimer" might render the life tenant's possession adverse.

37. Murray v. Quigley, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869; Garrett v. Olford, 152 Iowa, 265, 132 N. W. 379; Maurer v. Reifschneider, 89 Neb. 673, Ann. Cas. 1912C, 643, 132 N. W. 197; Criswell v. Criswell,

101 Neb. 349, 163 N. W. 197; *Contra*, Armor v. Frey, 253 Mo. 447, 161 S. W. 829; Dallas Compress Co. v. Smith, 190 Ala. 423, 67 So. 289.

38. Winters v. Powell, 180 Ala. 425, 61 So. 96; Edwards v. Bender, 121 Ala. 77, 25 So. 1010; Moore v. Childress, 58 Ark. 510, 25 S. W. 833; Luquire v. Lee, 121 Ga. 624, 49 S. E. 834; Howard v. Henderson, 142 Ga. 1, 82 S. E. 292; Maring v. Meeker, 263 Ill. 136, 105 N. E. 31; Schroeder v. Bozarth, 224 Ill. 310, 79 N. E. 583; Gates v. Colfax Northern Ry. Co., 177 Iowa, 690, 159 N. W. 456; Carpenter v. Moorelock, 151 Ky. 506, 152 S. W. 575; Mixer v. Woodcock, 154 Mass. 535, 28 N. E.

If a tenant *pur autre vie* retains possession after the death of the *cestui que vie*, his possession is usually regarded as adverse to the remainderman from that time.³⁹ as would be, it seems, the possession of the representatives of a tenant for life who hold over after the death of the latter.

— (h) **Cotenants.** As between cotenants, the fact that A is in possession,⁴⁰ or takes all the rents and profits,⁴¹ while B is not in possession and receives none

907; *Hauser v. Murray*, 256 Mo. 58, 165 S. W. 376; *Westmeyer v. Gallenkamp*, 154 Mo. 28, 77 Am. St. Rep. 747, 55 S. W. 231; *Green v. Horn*, 207 N. Y. 489, 101 N. E. 430; *Thompson v. Simpson*, 128 N. Y. 270, 28 N. E. 627; *Smith v. Proctor*, 139 N. C. 314, 2 L. R. A. N. S. 172, 51 S. E. 889; *Cooley v. Lee*, 170 N. C. 18, 86 N. E. 720; *Carpenter v. Denoon*, 29 Ohio St. 379; *Rawls v. Johns*, 54 S. C. 394, 32 S. E. 451; *Chambers v. Chattanooga Union R. Co.*, 130 Tenn. 459, 171 S. W. 84; *Davis v. Tebbs*, 81 Va. 600; *McDowell v. Beckham*, 72 Wash. 224, 130 Pac. 350.

39. *Mann v. Mann*, 141 Cal. 326, 74 Pac. 995; *Jones v. Johnson*, 81 Ga. 293, 6 S. E. 181; *Turner v. Hause*, 199 Ill. 464, 65 N. E. 445; *Miller v. Ewing*, 6 Cush. (Mass.) 34; *Hall v. French*, 165 Mo. 430; *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795, 41 N. W. 439. In *Day v. Cochran*, 24 Miss. 261 the possession of a tenant *pur autre vie* holding over is stated not to be adverse.

Occasionally the cases suggest a distinction between the holding over of one who had never asserted a claim to more than a life estate, and that of one who

entered under a conveyance from a life tenant which purported to give him a fee simple estate, the former possession not being regarded as adverse. See *Irvine v. Silbetts*, 26 Pa. 477; *Bannon v. Brandon*, 34 Pa. St. 263, 75 Am. Dec. 655; *Gernet v. Lynn*, 31 Pa. St. 94; *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795, 41 N. W. 439.

That if one has a life estate merely by reason of the omission of words of inheritance, the possession of one to whom he undertakes to convey in fee is adverse to the reversioner after the life tenant's death, see *Jackson v. Harsen*, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517; *Henley v. Wilson*, 77 N. Car. 216.

40. *McClung v. Ross*, 5 Wheat. (U. S.) 116; *Wheat v. Wheat*, 190 Ala. 461, 67 So. 417; *Ashley v. Rector*, 20 Ark. 375; *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146; *Russell v. Stickney*, 62 Fla. 569, 56 So. 691; *Blackaby v. Blackaby*, 185 Ill. 94, 56 N. E. 1053; *Stowell v. Lynch*, 269 Ill. 437, 110 N. E. 51; *Pedin v. Cavins*, 134 Ind. 494, 39 Am. St. Rep. 276, 34 N. E. 7; *Bader v. Dyer*, 106 Iowa, 715, 68 Am. St. Rep. 332, 77 N. W. 469; *John-*

of the rents and profits, is not of itself sufficient to start the running of the statute in favor of A. B has a right to assume that A holds possession, or otherwise utilizes the property, with a full recognition of the right of B to do the same if he so chooses, and B is guilty of no laches in failing to assert his rights. But though the exclusive possession of one cotenant, or his exclusive receipt of the profits, does not of itself serve to show that his possession is adverse to the other or, as it is frequently expressed, that there is an ouster by him of such other, it has been quite occasionally asserted that the sole and uninterrupted possession and receipt of profits by one cotenant, continued for a long series of years, without any interruption or claim on the part of the cotenant, will justify a jury in inferring an actual ouster and adverse possession.⁴² The distinction appears to be in effect, that

son v. Myer, 168 Ky. 430, 182 S. W. 190; Mansfield v. McGinnis, 86 Me. 118, 41 Am. St. Rep. 532, 29 Atl. 956; Donohue v. Vosper, 189 Mich. 78, 155 N. W. 407; Also-brook v. Eggleston, 69 Miss. 833, 13 So. 850; Warfield v. Lindell, 30 Mo. 272, 77 Am. Dec. 614; Collier v. Gault, 234 Mo. 457, 137 S. W. 884; Carson v. Broady, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; Jackson v. Tibbitts, 9 Cow, (N. Y.) 241; Youngs v. Heffner, 36 Ohio St. 232; Tulloch v. Worrall, 49 Pa. St. 133; Odom v. Weathersbee, 26 S. C. 244, 1 S. E. 890; Hubbard v. Wood's Lessee 1 Sneed (Tenn.) 279; Gilkey v. Peeler, 22 Tex. 663; Holley v. Hawley, 39 Vt. 525; Clark v. Beard, 59 W. Va. 669, 53 S. E. 597; Lagorio v. Dozier, 91 Va. 492, 22 S. E. 239.

41. McKneely v. Terry, 61 Ark. 527, 33 S. W. 953; Hill v. Cher-

okee Const. Co., 99 Ark. 84, 137 S. W. 553; Morgan v. Mitchell, 104 Ga. 596, 30 S. E. 792; Todd v. Todd, 117 Ill. 92, 7 N. E. 583; Hudson v. Coe, 79 Me. 83, 1 Am. St. Rep. 288, 8 Atl. 249; Warfield v. Lindell, 30 Mo. 272, 77 Am. Dec. 121 (*dictum*); Rodney v. McLaughlin, 97 Mo. 426, 9 S. W. 726; Velott v. Lewis, 102 Pa. St. 327.

42. Johnson v. Toulmin, 18 Ala. 50; Kidd v. Borum, 181 Ala. 144, Ann. Cas. 1915C, 1226, 61 So. 100; Oglesby v. Hollister, 76 Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146; Burns v. Byrne, 45 Iowa, 287; Chambers v. Pleak, 6 Dana (Ky.) 432; Harrington v. Williams, 173 Ky. 575, 191 S. W. 273 (*semble*); Parker v. Proprietors of Locks & Canals on Merrimack River, 3 Mete. (Mass.) 91, 37 Am. Dec. 121; Lefavour v. Homan, 3 Allen (Mass.) 354; Joyce v. Dyer,

while the exclusive possession of one cotenant does not involve an ouster of the other, so as to start the running of the statute, the fact that one cotenant is in sole possession for twenty, thirty, or forty years, without any claim being made by the other, justifies a finding that an ouster had taken place, "because men do not ordinarily sleep on their rights for so long a period, and a strong presumption arises that actual proof of the original ouster has become lost by lapse of time."⁴³

While the sole possession of one cotenant is *prima facie* not adverse to the other, it may, as has been above indicated, become adverse to him, and whether it has so become adverse is ordinarily a question of fact.⁴⁴ The cotenant in possession may deny the right of the other either by express statement,⁴⁵ or by im-

189 Mass. 64, 109 Am. St. Rep. 603, 75 N. E. 81; Warfield v. Lindell, 38 Mo. 561, 90 Am. Dec. 443; Lund v. Nelson, 89 Neb. 449, 131 N. W. 919; Jackson v. Whitbeck, 6 Cow. (N. Y.) 632, 16 Am. Dec. 454; Dobbins v. Dobbins, 141 N. Car. 210, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682, 53 S. E. 270; Bolton v. Hamilton, 2 Watts & S. (Pa.) 294, 37 Am. Dec. 509; Rider v. Maul, 46 Pa. St. 376 (*semble*); Rohrbach v. Sanders, 212 Pa. 636, 62 Atl. 27; Hubbard v. Wood, 1 Sneed (Tenn.) 279; Drewery v. Nelms, 132 Tenn. 254, 177 S. W. 946; Baber v. Baber, 121 Va. 740, 94 S. E. 209; Doe v. Prosser, Cowp. 217; See Sagen & Nelson v. Gudmanson, 164 Iowa, 440, 145 N. W. 954.

43. Lefavour v. Homan, 3 Allen (Mass.) 354.

44. Carpentier v. Mendenhall, 28 Cal. 484, 87 Am. Dec. 135; Oglesby v. Hollister, 76 Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146; Gill v. Fauntleroy, 8 B. Mon.

(Ky.) 177; La Fountain v. Dee, 110 Mich. 347, 68 N. W. 220; Harmon v. James, 7 Sm. & M. (Miss.) 111, 45 Am. Dec. 296; Warfield v. Lindell, 38 Mo. 581, 90 Am. Dec. 443; Golden v. Tyer, 180 Mo. 196, 79 S. W. 143; Beall v. McMenemy, 63 Neb. 70, 93 Am. St. Rep. 427, 88 N. W. 134; Clark v. Crego, 47 Barb. (N. Y.) 599; Bolton v. Hamilton, 2 Walls & S. (Pa.) 294, 37 Am. Dec. 509; Keyser v. Evans, 30 Pa. St. 509; Workman v. Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Purcell v. Wilson, 4 Gratt. (Va.) 16.

45. Brady v. Huff, 75 Ala. 80; Ashley v. Rector, 20 Ark. 359; Oglesby v. Hollister, 76 Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146; Coogler v. Rogers, 25 Fla. 853, 7 So. 391; King v. Carmichael, 136 Ind. 20, 43 Am. St. Rep. 303, 35 N. E. 509; Gill v. Fauntleroy, 8 B. Mon. (Ky.) 177; Fenton v. Miller, 108 Mich. 246, 65 N. W. 966; Thornton v. York Bank, 45 Me. 158. Phillips v. Gregg, 10

plication, as, for instance, by his actual exclusion of the other,⁴⁶ or by utilizing all or part of the property in such a way as to show an intention to make a permanent appropriation thereof to his own use.⁴⁷ But the statute does not begin to run in his favor unless the other acquires actual notice of the adverse character of his possession, or unless his assertion of an exclusive claim, however made, is so open and notorious that the other, exercising reasonable diligence, would necessarily learn thereof.⁴⁸

Watts, (Pa.) 158, 36 Am. Dec. 158; Hubbard v. Wood, 1 Sneed (Tenn.) 279; Church v. Waggoner, 78 Tex. 200, 14 S. W. 581.

46. Carpenter v. Webster, 27 Cal. 524; Norris v. Sullivan, 47 Conn. 474; Goodwin v. Bragaw, 87 Conn. 31, 86 Atl. 668; Hudson v. Coe, 79 Me. 83, 1 Am. St. Rep. 288, 8 Atl. 249; Jordan v. Surghnor, 107 Mo. 520, 17 S. W. 1009; Humbert v. Trinity Church, 24 Wend. (N. Y.) 587; Forward v. Deetz, 32 Pa. St. 69; Jefcoat v. Knotts, 13 Rich. L. (S. C.) 50. Hubbard v. Wood's Lessee 1 Sneed (Tenn.) 279.

47. Roumillot v. Gardner, 113 Ga. 60, 53 L. R. A. 729, 38 S. E. 365; Laraway v. Larue, 63 Iowa, 407, 19 S. W. 242; Bennett v. Clemence, 6 Allen (Mass.) 10; Capen v. Leach, 182 Mass. 175, 65 N. E. 63; Warfield v. Lindell, 38 Mo. 561, 90 Am. Dec. 443; Dunlap v. Griffith, 146 Mo. 283, 47 S. W. 917; Childs v. Kansas City, St. J. & C. B. R. Co.—(Mo.)—, 17 S. W. 954; Zapf v. Carter, 70 N. Y. App. Div. 395, 75 N. Y. Supp. 197; Annely v. De Saussure, 26 S. C. 497, 40 Am. St. Rep. 725, 2 S. E. 490. Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005; Cochran v.

Cochran, 55 W. Va. 178, 46 S. E. 924.

48. Barr v. Gratz, 4 Wheat. (U. S.) 213, 4 L. Ed. 553; McClung v. Ross, 5 Wheat. (U. S.) 116, 5 L. Ed. 46; Packard v. Johnson, 57 Cal. 180; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Stokely v. Conner, 69 Fla. 412, 68 So. 452; Christopher v. Mungen, 71 Fla. 545, 71 So. 625; Grand Tower Min., Mfg. & Transp. Co. v. Gill, 111 Ill. 541; Stowell v. Lynch, 269 Ill. 437, 110 N. E. 51; Warfield v. Lindell, 30 Mo. 272, 77 Am. Dec. 614, 38 Mo. 581, 90 Am. Dec. 443. Hynds v. Hynds, 253 Mo. 20, 161 S. W. 812; Culver v. Rhodes, 87 N. Y. 348; Lodge v. Patterson, 3 Watts (Pa.) 74, 27 Am. Dec. 335; Saunders v. Terry, 116 Va. 495, 82 S. E. 68; Vermont Marble Co. v. Eastman, 91 Vt. 425, 101 Atl. 151.

That actual notice to the cotenant not in possession is unnecessary, see Van Gunden v. Virginia Coal & Iron Co., 52 Fed. 838, 3 C. C. A. 294; Elder v. McClaskey, 70 Fed. 529, 17 C. C. A. 251; Kidd v. Borum, 181 Ala. 144, Ann. Cas. 1915C 1226, 61 So. 100; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Oglesby v. Hollister, 76

The cotenant out of possession is not charged with notice that the possession of the other is adverse to him, so that the statute will run in favor of such other, by the mere fact that the other has taken from a third person a conveyance which purports to transfer the whole property.⁴⁹ And, accepting the view which is usually approved, that the purpose of the recording acts is merely to afford protection to subsequent purchasers,⁵⁰ the record of such a conveyance to one cotenant is not sufficient to charge the other with notice of the former's adverse claim. But while there are at least two decisions to this effect,⁵¹ there are others which give to such record the effect of charging with

Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146; *Roberts v. Cox*, 259 Ill. 322, 102 N. E. 204; *Knowles v. Brown*, 69 Iowa, 11, 28 N. W. 409; *Wilson v. Hoover*, 154 Ky. 1, 156 S. W. 880; *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579, 2 S. W. 774; *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463; *Peck v. Lockridge*, 97 Mo. 549, 11 S. W. 246; *Dunlap v. Griffith*, 146 Mo. 283, 47 S. W. 917; *Culver v. Rhodes*, 87 N. Y. 348; *Zapf v. Carter*, 70 N. Y. App. Div. 395, 75 N. Y. Supp. 197; *Lodge v. Patterson*, 3 Watts (Pa.) 74, 27 Am. Dec. 335. *Miller v. Cramer*, 48 S. C. 282, 26 S. E. 657; *Humphreys v. Edwards*, 89 Tex. 512, 36 S. W. 333, 434; *Mathews v. Baker*, 47 Utah, 532, 155 Pac. 427; *Baber v. Baber*, 121 Va. 740, 94 S. E. 209; *Cox v. Tomkinson*, 39 Wash. 70, 80 Pac. 1005; *Clark v. Beard*, 59 W. Va. 669, 53 S. E. 597; *Roberts v. Decker*, 120 Wis. 102 (*semble*). Compare *Gracy v. Fielding*, 71 Fla. 1, 70 So. 625; *Kidd v.*

Borum, 181 Ala. 144, Ann. Cas. 1915C 1226, 61 So. 100; *Custer v. Hall*, 71 W. Va. 119, 76 S. E. 183.

It has been decided in a recent case that if cotenants in possession have no knowledge of the fact that there are other cotenants, their possession is to be regarded as adverse to the latter apart from any question of notice, actual or constructive. *Bourne v. Wiele*, 159 Wis. 340, 150 N. W. 420.

49. *Inglis v. Webb*, 117 Ala. 387, 23 So. 125; *Donason v. Barbero*, 230 Ill. 138, 82 N. E. 620. *Craig v. Cox*, 255 Ill. 564, 99 N. E. 647; *Hignite v. Hignite*, 65 Miss. 447, 4 So. 345; *Culver v. Rhodes*, 87 N. Y. 348; *Barrett v. McCarty*, 20 S. D. 75, 104 N. W. 907; *Holley v. Hawley*, 39 Vt. 532, 94 Am. Dec. 350.

50. *Post* § 567(a).

51. *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28, 17 S. W. 594; *Holley v. Hawley*, 39 Vt. 525.

notice thereof the tenant out of possession.⁵² Under these latter decisions, a cotenant who refrains from taking possession is bound to inspect the records in order to ascertain whether the possession of the other has become adverse to him.

If a cotenant makes a conveyance which purports to convey not merely his undivided interest in the land, but the entire interest therein, or in a part thereof, and the grantee in the conveyance takes possession accordingly, without any recognition of the rights of the other cotenant, out of possession, the possession of the grantee is regarded as adverse to the latter, and the latter is charged with notice to this effect. He is charged with notice of the fact that a person other than his original cotenant is in possession of the land, and he is also charged with notice of the character of the claim of such person, and cannot assume that it is other than such as is indicated by the conveyance under which he holds.⁵³ If, however, the

52. *Ames v. Howes*, 13 Idaho, 756, 93 Pac. 35; *Puckett v. McDaniel*, 8 Tex. Civ. App. 630, 28 S. W. 360; *Morgan v. White*, 50 Tex. Civ. App. 318, 110 S. W. 491; *Craven v. Craven*, 68 Neb. 459, 94 N. W. 604; *McCann v. Welch*, 106 Wis. 142, 81 N. W. 996.

53. *Jackson v. Huntington*, 5 Pet. 402, 8 L. Ed. 170; *Elder v. McClaskey*, 70 Fed. 529, 17 C. C. A. 251; *Fielder v. Childs*, 73 Ala. 567; *Brown v. Bocquin*, 57 Ark. 97, 20 S. W. 813; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658; *McDowell v. Sutlive*, 78 Ga. 142, 2 S. E. 937; *Bowman v. Owens*, 133 Ga. 49, 65 S. E. 156; *Waterman Hall v. Waterman*, 220 Ill. 569, 77 N. E. 142; *King v. Carmichael*, 136 Ind. 20, 43 Am. St. Rep. 303, 35 N. E. 509; *Blank-*

enhorn v. Lenox, 123 Iowa, 67, 98 N. W. 556; *Clarke v. Dirks*, 178 Iowa, 335, 160 N. W. 31; *Rose v. Ware*, 115 Ky. 420, 74 S. W. 188; *Segelbohm v. Waldner*, 101 Kan. 156, 165 Pac. 649. *Soper v. Lawrence Bros. Co.*, 98 Me. 268, 99 Am. St. Rep. 397, 56 Atl. 908; *Merryman v. Cumberland Paper Co.*, 98 Md. 223, 56 Atl. 364; *Parker v. Proprietors of Locks & Canals on Merrimack River*, 3 Mete. (Mass.) 91, 37 Am. Dec. 121; *Joyce v. Dyer*, 189 Mass. 64, 109 Am. St. Rep. 603, 75 N. E. 81; *Phipps v. Crowell*, 224 Mass. 342, 112 N. E. 648; *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463; *Brigham v. Reau*, 139 Mich. 256, 102 N. W. 845; *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702; *Sanford v.*

conveyance purports to be, not of the entire interest in the property, but of the interest of the grantor merely, the possession of the grantee is *prima facie* like that of his grantor, that of a cotenant only, and not adverse to the other cotenant, and the latter is justified in assuming this to be the case.⁵⁴

— (i) **Mortgagor and mortgagee.** Even in those states in which the mortgagee is regarded as having the legal title, so that there might otherwise be room for the application of the doctrine of adverse possession as between the mortgagor and mortgagee,

Safford, 99 Minn. 380, 109 N. W. 819; Eastman v. Hinton, 86 Miss. 604, 109 Am. St. Rep. 726, 38 So. 779; Foulke v. Bond, 41 N. J. L. 527; Baker v. Trujillo De Armijo, 17 N. M. 383, 128 Pac. 73; Sweetland v. Buell, 164 N. Y. 541, 79 Am. St. Rep. 676, 58 N. E. 663; Wheeler v. Taylor, 32 Ore. 421, 67 Am. St. Rep. 540, 52 Pac. 183; Culler v. Motzer, 13 Serg. & R. (Pa.) 356, 15 Am. Dec. 604; Suduth v. Sumeral, 61 S. C. 276, 85 Am. St. Rep. 83, 39 S. E. 534; Weisinger v. Murphy, 2 Head (Tenn.) 679; Virginia Coal & Iron Co. v. Hylton, 115 Va. 418, Ann. Cas. 1915A 741, 79 S. E. 337; Church v. State, 65 Wash. 50, 117 Pac. 711; Roberts v. Decker, 120 Wis. 102, 97 N. W. 519. In North Carolina a different view has apparently been taken. Hardee v. Weathington, 130 N. C. 91, 40 S. E. 855; Bullin v. Hancock, 138 N. C. 198, 50 S. E. 621; Roscoe v. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389.

If there is no change of possession after the conveyance, as when the person who held as tenant under the grantor con-

tinues to hold under the grantee, the other cotenant is not chargeable with notice that the possessions has become adverse. Pickens v. Stout, 67 W. Va. 422, 68 S. E. 354; Long v. Morrison, 251 Ill. 143, 95 N. E. 1075. And so when a cotenant makes a conveyance of the whole, even though this be recorded, but he retains the exclusive possession. Brasher v. Taylor, 109 Ark. 281, 159 S. W. 1120.

54. Bath v. Valdez, 70 Cal. 350, 7 Pac. 487; Gracy v. Fielding, 71 Fla. 1, 70 So. 625; Grand Tower Min., Mfg. & Transp. Co. v. Gill, 111 Ill. 541; Stevens v. Wait, 112 Ill. 544; Moore v. Antill, 53 Iowa, 612, 6 N. W. 14; Curtis v. Barber, 131 Iowa, 400, 117 Am. St. Rep. 425, 108 N. W. 755; Lefavour v. Haman, 3 Allen (Mass.) 356; See McQuiddy v. Ware, 67 Mo. 74; Woods v. Banks, 14 N. H. 111; Foulke v. Bond, 41 N. J. L. 547; Sharp v. Brandow, 15 Wend. (N. Y.) 597; Edwards v. Bishop, 4 N. Y. 64. So in the case of a conveyance in terms of an undivided interest. Wilson v. Storthz, 177 Ark. 418, 175 S. W. 45.

it is recognized that the possession of the mortgagor is not adverse to the mortgagee unless he denies the latter's rights in an open and notorious manner,⁵⁵ and the possession of the mortgagor's transferee is likewise not adverse to the mortgagee.

The possession of the mortgagee before default is regarded as in behalf of the mortgagor, to whom he must account for the rents and profits,⁵⁶ and is consequently not adverse, in the absence of a denial of the mortgagor's rights.⁵⁷ But if the mortgagee takes possession after condition broken, for the purpose of realizing his security, his possession is presumed to be adverse, or, as it is ordinarily expressed in jurisdictions where the legal title is in the mortgagee, a court of equity will, in such case, apply the analogy of the statute of limitations as against the right of the mortgagor to redeem, in the absence of any recognition by him of the mortgagor's title.⁵⁸

55. *Gafford v. Strauss*, 89 Ala. 282, 7 L. R. A. 568, 18 Am. St. Rep. 111, 7 So. 248. *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762; *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305; *Chouteau v. Riddle*, 110 Mo. 366, 19 S. W. 814; *Tripe v. Marcy*, 39 N. H. 439; *Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489; *Creigh's Heirs v. Henson*, 10 Gratt. (Va.) 231; *Flynn v. Lee*, 31 W. Va. 487, 7 S. E. 430.

56. See *post* § 613(c).

57. *Warder v. Enslin*, 73 Cal. 291, 14 Pac. 874; *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862; *Green v. Turner*, 38 Iowa, 112; *McPherson v. Hayward*, 81 Me. 329, 17 Atl. 164; *Holmes v. Tur-*

ner's Falls Co., 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305; *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 658; *Kip v. Hirsh*, 53 N. Y. Super. Ct. 1; *Robinson v. Fife*, 3 Ohio St. 551; *West v. Middlesex Banking Co.*, 33 S. D. 465, 146 N. W. 598.

58. *Hughes v. Edwards*, 9 Wheat (U. S.) 489, 6 L. Ed. 142; *Byrd v. McDaniel*, 33 Ala. 18; *Tibbs v. Reed*, 105 Ky. 331, 49 S. W. 6, (*semble*); *Munro v. Barton*, 98 Me. 250, 56 Atl. 844; *Ayres v. Waite*, 10 Cush. (Mass.) 72; *Stephens v. Dedham Institution*, 129 Mass. 547; *Nelson v. Ratliff*, 72 Miss. 656, 18 So. 487; *Essex v. Smith*, 97 Neb. 649, 150 N. W. 1022; *Hall v. Hooper*, 47 Neb. 111, 66 N. W. 33; *Clark v. Clough*, 65 N. H. 43, 23 Atl. 521; *Hubbell v. Sibley*, 50 N. Y. 468; *Knowlton v. Walker*, 13 Wis. 295.

— (j) **Mortgagor and foreclosure purchaser.**

There are decisions that the possession of the mortgagor is not adverse as against the purchaser at foreclosure sale,⁵⁹ a view which appears to harmonize with the like view which has been taken with reference to the possession of a judgment debtor after sale under execution on the judgment.⁶⁰

The possession of the purchaser under an invalid foreclosure sale being in effect that of an assignee of the mortgage,⁶¹ the right of redemption as against him will also ordinarily be barred after the statutory period.⁶²

— (k) **Surviving spouse and heirs.** If, upon the death of a tenant in fee simple, his widow has, by the law of that jurisdiction, the right to hold possession of the land until the assignment of her dower, the statute of limitations cannot run in her favor as against the heirs or devisees, since they have no right of entry or action,⁶³ and it is immaterial that they might, if they

59. *Bosley v. Stewart*, 140 Iowa, 117 N. W. 1103; *Elsworth v. Eslick*, 91 Kan. 287, 137 Pac. 973; *Cook v. Travis*, 20 N. Y. 400; *Neilson v. Grignon*, 85 Wis. 550, 55 N. W. 890. *Contra*, *Garren v. Fields*, 131 Ala. 304, 30 So. 775.

60. *Bradford v. Russell*, 79 Ind. 64; *Jones v. Licklitter*, 154 Ky. 848, 159 S. W. 652; *Snowden v. McKinney*, 7 B. Mon. 258; *Jackson v. Sternbergh*, 1 Johns. Cas. 153; *Swift v. Agnes*, 33 Wis. 228.

61. *Post* § 654.

62. *Chickering v. Failes*, 26 Ill. 507; *Jellison v. Halloran*, 44 Minn. 199, 46 N. W. 332; *Miner v. Beekman*, 50 N. Y. 337; *Hamm v. McKenny*, 73 Ore. 347, 144 Pac. 435; *Houts v. Hoyne*, 14 S. Dak. 176; *West v. Middlesex Banking*

Co., 33 S. D. 465, 146 N. W. 598.

63. *Robinson v. Allison*, 124 Ala. 325, 27 So. 461; *Padgett v. Norman*, 44 Ark. 490; *Jarrett v. Jarrett*, 113 Ark. 134, 167 S. W. 482; *Riggs v. Girard*, 133 Ill. 619, 24 N. E. 1031; *Reuter v. Stuckart*, 181 Ill. 529, 54 N. E. 1014; *Westmeyer v. Gallenkamp*, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747; *Meddis v. Kenney*, 176 Mo. 200, 98 Am. St. Rep. 496; *Wofford v. Martin*,—Mo.—, 183 S. W. 603; *Larson v. Anderson*, 74 Neb. 361, 104 N. W. 925; *Reed v. Hackney*, 69 N. J. L. 27, 54 Atl. 229; *Perkins v. Perkins*,—Tex. Civ. App.—, 166 S. W. 915; *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233. See editorial note 14 *Harvard Law Review*, 149.

choose, have her dower assigned.⁶⁴ And the case is the same after dower is assigned. She is in the position of a life tenant, and the statute cannot run during her life as against the reversioners or remainderman.⁶⁵

Even though the widow's possession is otherwise without right, it is, apparently, regarded *prima facie* as by permission of, or in behalf of, the heirs, and so not adverse to them,⁶⁶ but it may become adverse by reason of her repudiation of the rights of the heirs.⁶⁷

If a widow marries again, and the second husband lives with her on the land of her first husband, the possession, even if conceded to be in the second husband, is *prima facie* not adverse to the children of the first marriage, so as to cause the statute of limitations to run in his favor.⁶⁸ He may, however, it has been decided, so assert a right of possession, under particular circumstances, that the statute will so run.⁶⁹

64. See *Foy v. Wellborn*, 112 Ala. 160, 20 So. 604.

65. *Neely v. Martin*, 126 Ark. 1, 189 S. W. 182; *Green v. Ellis*, 145 Ga. 241, 88 S. E. 976; *Swearingin v. Stafford*,—Mo.—, 188 S. W. 97; *Graves v. Causey*, 170 N. C. 175, 86 S. E. 1030; *Cockrell v. Curtis*, 83 Tex. 105, 18 S. W. 436.

66. *Brinkley v. Taylor*, 111 Ark. 305, 163 S. W. 521; *Sloss-Sheffield Steel & Iron Co. v. McCullough*, 177 Ala. 272, 59 So. 658; *Frazer v. Frazer*, 1 Metc. (Ky.) 593; *Moore v. Gulley*, 30 Ky. L. Rep. 442, 98 S. W. 1011. (See *Bush v. Fitzgeralds*,—Ky.—125 S. W. 716); *Shoultz v. Lee*, 260 Mo. 719, 168 S. W. 1146; *Reed v. Hackney*, 69 N. J. L. 27, 54 Atl. 229; *Larson v. Anderson*, 74 Neb. 361, 104 N. W. 925; *Hall v. Mathias*, 4 Watts & S. 331. *Contra*,

Givens v. Ott, 222 Mo. 395, 121 S. W. 23.

67. *Hays v. Lemoine*, 156 Ala. 465, 47 So. 97; *Brinkley v. Taylor*, 111 Ark. 305, 163 S. W. 521; *Hogan v. Kurtz*, 1 MacArth. C.)135; *Williams v. Thomas*, 65 Iowa, 183, 21 N. W. 509; *Munroe v. Wilson*, 68 N. H. 580, 41 Atl. 240; *Colgan v. Pellens*, 48 N. J. L. 27, 2 Atl. 633; *Davis v. Dickson*, 92 Pa. St. 365; *Humphreys v. Edwards*, 89 Tex. 512, 36 S. W. 333.

68. *Johnson v. Oldham*, 126 Ala. 309, 28 So. 487, 85 Am. St. Rep. 30; *Dewitt v. Shea*, 203 Ill. 923, 67 N. E. 761, 96 Am. St. Rep. 311; *Livingston v. Pendergast*, 34 N. H. 544.

69. *Munroe v. Wilson*, 68 N. H. 580, 41 Atl. 240.

If, upon the death of a tenant in fee simple, her surviving husband has a life estate in the land, the statute cannot run in his favor as against the heirs or devisees, since they have no right of entry or action.⁷⁰ If the surviving husband has no estate in the land, whether the statute of limitations will run in his favor depends on whether his possession is to be regarded as adverse to the heirs. There are decisions to the effect that it is *prima facie* adverse,⁷¹ and also decisions to the contrary.⁷²

— (1) **Parent and child.** A child who is upon the land of his parent may be there, and frequently is there, as a licensee merely, in which case he is not in possession.⁷³ And if he is in possession his possession is apt to be permissive merely, the possession of a tenant, and so not adverse to the parent.⁷⁴ The child may, however, be in possession purely in his own right, and not as the licensee or tenant of the parent,⁷⁵ as for instance when he holds under an oral gift,⁷⁶ and in such case the statute will ordinarily run in his favor.

It has been judicially stated that the relationship of parent and child raises a presumption that the parent's possession of land belonging to the child is

70. *Ante*, § 506.

71. *Pattison v. Dryer*, 98 Mich. 564, 57 N. W. 814; *Norwood v. Totten*, 166 N. C. 648, 82 S. E. 951.

72. *Marshall v. Pierce*, 12 N. H. 127; *Jackson v. Cairns*, 20 Johns. (N. Y.) 301.

73. See *Butler v. Butler*, 133 Ala. 377, 32 So. 579; *Wyatt v. Elam*, 23 Ga. 201; *Hume v. Hopkins*, 140 Mo. 65, 41 S. W. 784.

74. See *Ellsworth v. Hale*, 33 Ark. 633; *Brettman v. Fischer*, 216 Ill. 142, 74 N. E. 777; *Wells v. Head*, 12 B. Mon. (Ky.) 170;

Hunt v. Hunt, 3 Metc. (Mass.) 175, 37 Am. Dec. 130; *O'Bryan v. Allen*, 108 Mo. 227, 32 Am. St. Rep. 595, 18 S. W. 892; *Haggard v. Martin*,—Tex. Civ. App.—, 34 S. W. 660.

75. *Lane v. Copley*, 1 Root (Conn.) 68; *New Haven Trust Co. v. Camp*, 81 Conn. 539, 71 Atl. 788; *Roberts v. Roberts*, 2 McCord L. (S. C.) 268, 13 Am. Dec. 721.

76. *Wilson v. Campbell*, 119 Ind. 286, 21 N. E. 893. *Cyrus v. Holbrook*, 32 Ky. L. Rep. 466, 106 S. W. 300; *Malone v. Malone*, 88

not adverse to the latter.⁷⁷ But it may be questioned whether there is properly any such presumption. The relationship is merely one of the considerations tending to show that the possession is permissive, and the weight to be imputed to this consideration would vary with the age of the child and the other circumstances of the case.⁷⁸ The courts, however, while recognizing that the parent's possession may be adverse to the children,⁷⁹ have occasionally tended to give considerable weight to the relationship as showing the contrary.⁸⁰ And they ordinarily hold that the statute does not run in favor of a surviving parent as against his children, some or all of whom are minors at the time of his entry, he being in such case regarded as upon the land in the capacity of natural guardian or bailiff.⁸¹

— (m) **Husband and wife.** At common law, as between husband and wife, even though one were in the

Minn. 418, 93 N. W. 605; Grimes v. Bryan, 149 N. C. 248, 63 S. E. 106. *Contra*, Boykin v. Smith, 65 Ala. 294.

77. O'Boyle v. McHugh, 66 Minn. 390, 69 N. W. 37; Collins v. Colleran, 86 Minn. 199, 90 N. W. 390; Roberts v. Roberts, 2 McCord L. (S. Car.) 268, 13 Am. Dec. 721.

78. See Silva v. Winpenny, 136 Mass. 253; Gifford v. Gifford, 100 Mich. 258, 58 N. W. 1000; Allen v. Allen, 58 Wis. 202, 210, 16 N. W. 610; Dunham v. Townshend, 118 N. Y. 281, 23 N. E. 367; 10 Harv. Law Rev. 376; 24 Harv. Law Rev. 495.

79. McCarty v. Colton, 134 Iowa, 658, 108 N. W. 217; Fox v. Windes, 127 Mo. 502, 48 Am. St. Rep. 648, 30 S. W. 323; Clark v. Lane, 2 N. J. L. 417; Livingston v. Pendergast, 34 N. H. 544; Scarboro v. Scarboro, 122 N. C.

234, 29 S. E. 352; Douglas v. Irvine, 126 Pa. 643, 17 Atl. 802.

80. White v. White, 52 Ark. 188, 12 S. W. 201; Reed v. Smith, 125 Cal. 491, 58 Pac. 139; Tully v. Tully, 137 Cal. 60, 69 Pac. 700; Parker v. Salmons, 101 Ga. 160, 65 Am. St. Rep. 291, 28 S. E. 681; Horn v. Metzger, 234 Ill. 240, 84 N. E. 893; Kirby v. Kirby, 236 Ill. 255, 86 N. E. 259; Nugent v. Peterman, 137 Mich. 646, 100 N. W. 895; Allen v. Allen, 58 Wis. 202, 16 N. W. 610.

81. McQueen v. Fletcher, 77 Ga. 444; Wilson v. Sutton,—Ky. —, 154 S. W. 394; Carpenter v. Carpenter, 126 Mich. 217, 85 N. W. 576; Livingston v. Pendergast, 34 N. H. 544; Lawrence v. Lawrence, 14 Ore. 77, 12 Pac. 307; Cook v. Nicholas, 4 Watts & S. (Pa.) 331; Hall & Mathias, 4 Watts & S. (Pa.) 331; Clark v. Trindle, 52 Pa. St. 492; Searle v. Laraway,

exclusive occupation of the other's land, the statute could not run, since they were regarded as constituting but one person.⁸² But in so far as this common-law doctrine has been altered by modern legislation, there seems to be no reason why the statute should not run in favor of one as against the other, provided the former is in exclusive possession of the other's land, and his possession is hostile or adverse to the other.⁸³ And there is obviously, after a divorce has taken place, no such identity of persons as can prevent the running of the statute.⁸⁴

When the husband and wife live together on land belonging to the one or the other of them, the possession is ordinarily in the one who has the legal title, and the other is in the position of a licensee, and the statute will consequently not run in favor of the latter as against the former.⁸⁵ But there are oc-

27 R. I. 557, 65 Atl. 269; Thomas v. Thomas, 2 Kay & J. 79; Howard v. Shrewsbury, L. R. 17 Eq. 397; *In re* Hobbs, 36 Ch. Div. 553.

82. See Bell v. Bell, 37 Ala. 536; Skinner v. Hale, 76 Conn. 223; McArthur v. Egleson, 3 Ont. App. 577. In *Cervantes v. Cervantes*,—Tex. Civ. App.—, 76 S. W. 790, it was decided that the wife's possession was, under the community system there in force, the possession of the husband, so that she could not acquire his property by adverse possession, even though deserted by him.

83. See Trammel v. Craddock, 93 Ala. 450, 9 So. 815; Lide v. Park, 135 Ala. 131, 93 Am. St. Rep. 17, 33 So. 175; Evans v. Russ, 131 Ark. 335, 198 S. W. 518; Union Oil Co. v. Stewart, 158 Cal. 149, 110 Pac. 313; Warr v. Honeck, 8 Utah, 61, 29 Pac. 1117.

84. Ross v. McCann, 145 Mo. 271, 46 S. W. 955; Ferring v. Fleischman—(Tenn.)—, 39 S. W. 19; Kelly v. Kelly, — Tenn. —, 58 S. W. 870. See House v. Williams, 16 Tex. Civ. App. 122, 40 S. W. 414.

85. Gafford v. Strauss, 89 Ala. 283 7, L. R. A. 568, 18 Am. St. Rep. 111, 7 So. 248; Stiff v. Cobb, 126 Ala. 381, 85 Am. St. Rep. 38, 28 So. 402; Tumlin v. Tumlin, 195 Ala. 457, 70 So. 254; Mauldin v. Cox, 67 Cal. 387, 391, 7 Pac. 264; Blas v. Reed, 169 Cal. 387, 145 Pac. 516; Green v. Jones, 169 Ky. 146, 183 S. W. 488; Cloughton v. Cloughton, 70 Miss. 384, 12 So. 340; Boynton v. Miller, 144 Mo. 681, 46 S. W. 754; Hovorka v. Havlik, 68 Neb. 14, 110 Am. St. Rep. 387, 93 N. W. 990; Springer v. Young, 14 Ore. 280, 12 Pac. 400; Reagle v. Reagle, 179 Pa. St. 89, 36 Atl. 191; Berry v. Wied-

casional decisions to the apparent effect that if the wife has color of title to the land, the statute will run in her favor as against the husband, he not asserting his title.⁸⁶

In so far as the legal identity of husband and wife is still recognized, it does not seem that the mere fact of the husband's wrongful abandonment of the wife should enable the wife to acquire title to his land by the statute of limitations,⁸⁷ but there are occasional suggestions, judicial and extra judicial, that the fact of desertion may have an effect in this regard,⁸⁸ apart from that of giving to the wife the possession which, before the departure of the husband, was presumably in him as having the legal title.

man, 40 W. Va. 36, 52 Am. St. Rep. 866, 20 S. E. 817.

86. Hartman v. Nettles, 64 Miss. 495, 8 So. 234; Massey v. Rimmer, 69 Miss. 667, 13 So. 832; McPherson v. McPherson, 75 Neb. 830, 121 Am. St. Rep. 835, 106 N. W. 991; Potter v. Adams, 125 Mo. 118, 46 Am. St. Rep. 478, 28 S. W. 490 (*semble*). See Mattes v. Hall, 21 Cal. 352, 132 Pac. 295.

87. See McArthur v. Egleson, 3 Ont. App. 577; Cervantes v. Cervantes—(Tex. Civ. App.)—, 76 S. W. 790.

88. Union Oil Co. v. Stewart, 158 Cal. 149, 110 Pac. 313; Warr v. Honeck, 8 Utah, 61, 29 Pac. 1117, (invalid divorce). Editorial notes, 10 Columbia Law Rev. 775; 24 Harvard Law Rev. 316.

CHAPTER XXIV.

PRESCRIPTION FOR INCORPOREAL THINGS.

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§ 514. **General considerations.** Though the Statute of Westminster I., establishing a date back of which the pleader could not go,¹ applied to actions for the recovery of the land only, and not to those for the recovery of incorporeal things, "the judges, with that assumption of legislative authority which has at times

1. *Ante*, § 500.

characterized our judicature, proceeded to apply the rule as to prescription established by the statute to incorporeal hereditaments, and, among others, to easements."² Subsequently, when, by the Statute of 32 Hen. VIII. c. 2, and 21 Jac. I. c. 16, the time for bringing a writ of right or a possessory action to recover land was reduced to sixty and twenty years, respectively, it might have been expected that the judges would as in the case of the earlier act, apply the analogy of these acts to incorporeal things. This, however, it seems, they did not do,³ but they effected the same end by the adoption of the fiction that a grant of the right would be presumed if it had been exercised for a period of twenty years, this doctrine of a lost grant being in reality prescription, under another name, shortened in analogy to the period of limitation fixed by the Statute of James.⁴ In the case of prescription, as it existed by analogy to the early statute, the exercise of the right from the date named conferred an unimpeachable title. Whether this presumption of a lost grant, on the other hand, had a like effect, that is, whether it was a conclusive presumption, or could be rebutted by evidence that there was no such grant, is a question on which there was great doubt. In practice it seems to have been the custom for the court to instruct the jury to find the existence of such a grant, even though there was evidence to show that it did not exist. Eventually the Statute of 2 & 3 Wm. IV. c. 71 (A. D. 1832), termed the "Prescription Act," was

2. Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. Div. 55, 104.

3. Gale, *Easements* (8th Ed.), 191, citing statements to that effect in *Angus v. Dalton*, 4 Q. B. Div. at pages 170, 199, per Thesiger and Brett, L. J., and in 6 App. Cas. at page 788, per Fry, J. But that the periods fixed by these statutes was applied in

determining the period of "immemorial user" for the purpose of prescription, see *Yard v. Ford*, 2 Wms. Saund. 175, note; Gale, *Easements*, 190; *Coolidge v. Learned*, 8 Pick. (Mass.) 504.

4. Gale, *Easements*, 192. See *Coolidge v. Learned*, 8 Pick. (Mass.) 504.

passed, "with the view," it is said, "of putting an end to the scandal on the administration of justice which arose from thus forcing the consciences of juries."⁵

In this country the courts have usually followed the analogy of the statute of limitations applicable to actions for the recovery of land, with the effect that one who has exercised as of right a user in another's land for the statutory period, is regarded as having a right of user to that extent.⁶ And while, quite frequently, it is said that from such user a grant will be presumed, the presumption is in effect a positive rule of law, and evidence that no grant was made would be immaterial.⁷ In other words, it is conclusively presumed from the landowner's acquiescence for the statutory period in the other's user of his land, he having the right and power to stop such user, that the user is a rightful user.⁸

5. Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. 105. And see *Bright v. Walker*, 1 Crompt. Mees. & Ros. 211, per Parke, B., and editorial note 29 Harv. Law Rev. 88.

6. *Legg v. Horn*, 45 Conn. 409; *Coolidge v. Learned*, 8 Pick. (Mass.) 504; *Melvin v. Whiting*, 10 Pick. (Mass.) 295; *Mueller v. Fruen*, 3 Minn. 273; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Cobb v. Davenport*, 32 N. J. L. 369; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Nicholls v. Wentworth*, 100 N. Y. 455, 3 N. E. 482; *Krier's Private Road*, 73 Pa. St. 109.

7. *Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453; *Coolidge v. Learned*, 8 Pick. (Mass.) 504; *Wallace v. Fletcher*, 30 N. H. 434; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605; *Ward v. Warren*, 82 N. Y. 265; *Pavey v. Vance*, 56 Ohio St. 162, 46 N.

E. 898; *Okeson v. Patterson*, 29 Pa. St. 22; *Carter v. Tinicum Fishing Co.* 77 Pa. St. 310;; *Lewis v. San Antonio*, 7 Tex. 288; *Tracy v. Atherton*, 36 Vt. 503; *Cornett v. Rhudy*, 80 Va. 710; *Tyler v. Wilkinson*, 4 Mason 397, Fed Cas. No. 14312. There are suggestions to the contrary in *Lanier v. Booth*, 50 Miss. 410; *Parker v. Foote*, 19 Wend. (N. Y.) 309.

8. See *Sturges v. Bridgman*, 11 Ch. D. 852, 863; *Dalton v. Angus*, 6 App. Cas. 740, 773, 803, 823; *Warren v. Jacksonville*, 15 Ill. 236; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 188; *Cobb v. Davenport*, 32 N. J. L. 369; *Wallace v. Fletcher*, 30 N. H. 434; *Jones v. Crow*, 32 Pa. St. 398; *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536; *Dodge v. Stacy*, 39 Vt. 559.

§ 515. Restrictions on application of the doctrine.

It is generally recognized that no right can be acquired by prescription to maintain a public nuisance.⁹ So it has been decided that there can be no prescriptive right to maintain an obstruction in the highway,¹⁰ or to pollute a stream to the detriment of the public.¹¹ In a number of cases, however, it has been decided that one may acquire by prescription a right to use another's land although such use is incidental to the maintenance of a public nuisance.¹² For instance, a prescriptive right to overflow land has been recognized, although the overflow was effected by the maintenance of a dam in

9. *Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478; *Dygert v. Schenck*, 23 Wend. (N. Y.) 446, 35 Am. Dec. 576; *North Point Consol. Irrigation Co. v. Utah & S. L. Canal Co.*, 16 Utah, 246, 40 L. R. A. 851, 67 Am. St. Rep. 607, 52 Pac. 168. See cases cited in note to *Leahane v. Cochrane*, 53 L. R. A. 891.

10. *Pierson v. Elgar*, 4 Cranch (U. S.) 454; *Harn v. Common Council of Dadeville*, 100 Ala. 199, 14 So. 9; *Blackman v. Mauldin*, 164 Ala. 337, 27 L. R. A. (N. S.) 670, 51 So. 23 (navigable stream); *Fresno v. Fresno Canal & Irrigation Co.*, 98 Cal. 179, 32 Pac. 943; *Wolfe v. Town of Sullivan*, 133 Ind. 331, 32 N. E. 1017; *Lewiston v. Booth*, 3 Idaho, 692, 34 Pac. 809; *Hynes v. Brewer*, 194 Mass. 435, 9 L. R. A. (N. S.) 598, 80 N. E. 503; *Veazie v. Dwinel*, 50 Me. 479 (floatable stream); *Morton v. Moore*, 15 Gray (Mass.) 573; *New Salem v. Eagle Mill Co.*, 138 Mass. 8; *Burbank v. Fay*, 65 N. Y. 57; *Deadwood v. Hursh*, 30 S. D. 450, 138 N. W. 1122.

Contra, semble, *Moon v. Mills*, 119 Mich. 298, 75 Am. St. Rep. 390, 77 N. W. 926; *Chase v. Middleton*, 123 Mich. 647, 82 N. W. 612.

11. *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149; *Platt Bros. v. Waterbury*, 72 Conn. 531, 48 L. R. A. 691, 77 Am. St. Rep. 335, 45 Atl. 154; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Martin v. Gleason*, 139 Mass. 183, 29 N. E. 664; *Attorney General v. Grand Rapids*, 175 Mich. 503, 50 L. R. A. (N. S.) 473, Ann. Cas. 1915A 968, 141 N. W. 890; *Shelby v. Cleveland Mill & Power Co.*, 155 N. C. 196, 71 S. E. 218; *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858; *North Point Consol. Irrigation Co. v. Utah & S. L. Canal*, 16 Utah, 246, 40 L. R. A. 851, 67 Am. St. Rep. 607, 52 Pac. 168.

12. See *Hudson v. Dailey*, 156 Cal. 617, 105 Pac. 748; *Felton v. Wedthoff*, 185 Mich. 72, 151 N. W. 727; *Charnley v. Shawano Water Power & River Improvement Co.*, 109 Wis. 563, 53 L. R. A. 895, 85 N. W. 507.

a highway, a public nuisance,¹³ and even though the collection of such a body of stagnant water constituted a public nuisance by reason of exhalations therefrom.¹⁴ But in so far as the owner of the land suffers a special damage in such case from the condition which gives to the structure the character of a public nuisance, he does not, by lapse of time, lose his right to immunity from the nuisance. So while the owner of the flooded land may, by lapse of time, lose the right to object to the flooding of the land, he does not lose the right, as one of the public, to object to the unhealthy exhalations caused thereby.¹⁵ If what would otherwise be a public nuisance is legalized by the public authorities it loses its character of a public nuisance, and consequently prescription might, it would seem, run as against an individual as regards its maintenance, to the same extent as in the case of any private nuisance.¹⁶

In accordance with the maxim *nullum tempus occurrit regi*, a right of user cannot be acquired by prescription in land belonging to the United States,¹⁷ in the absence at least of an act of Congress establishing a limitation period as against the government. That a right of user may be acquired by prescription against the state, if the statute of limitation is ex-

13. *Borden v. Vincent*, 24 Pick. (Mass.) 301; *Lawrence v. Inhabitants of Fairhaven*, 5 Gray (Mass.) 110; *Inhabitants of New Salem v. Eagle Mill Co.*, 138 Mass. 8; *Perley v. Hilton*, 55 N. H. 444; *Charnley v. Shawano Water Power & River Improvement Co.* 109 Wis. 563, 53 L. R. A. 895, 85 N. W. 507.

14. *Mills v. Hall*, 9 Wend. (N. Y.) 315, 24 Am. Dec. 160; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Green Bay & Mississippi Co. v. Teluah Paper Co.*, 140

Wis. 417, 122 N. W. 1062. See *Comm. v. Upton*, 6 Gray (Mass.) 473.

15. See cases last cited.

16. See editorial note 9 *Columbia Law Rev.* 183; *Lewis v. New York & H. R. Co.*, 162 N. Y. 202 at 223, 56 N. E. 540.

17. *Union Mill & Milling Co. v. Ferris*, Fed Cas. No. 14371, 2 Sawy. 176; *Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453; *Lapique v. Morrison*, 29 Cal. App. 136, 154 Pac. 881.

pressly made operative as against the state, has been occasionally recognized.¹⁸

Since the doctrine of prescription is based in theory upon the presumption of a grant, it can apply only when an actual grant would have been valid.¹⁹ Consequently, it has been held, a right to lateral support from the bed of a street cannot be acquired by prescription, since the municipality has no power to grant such a right,²⁰ and a right to appropriate water from a canal cannot be based on prescription when it could not have been the subject of a grant.²¹

§ 516. Who may acquire right by prescription.

The common law rule is that a prescriptive right appurtenant to land can be asserted only in favor of one who has an estate in fee simple in the land, for the benefit of which the user is made, and that if a tenant for life or years undertakes to assert such a right, he must assert it as having been acquired by the tenant in fee simple, under whom he claims.²² The right is appurtenant to the land rather than to any particular estate in the land. An easement in gross acquired by prescription, on the other hand, belongs to the per-

18. *Nichols v. Boston*, 98 Miss. 39, 93 Am. Dec. 732; *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 605; *People v. Page*, 39 N. Y. App. Div. 110, 56 N. Y. Supp. 834, 58 N. Y. Supp. 239 (*semble*). Compare *Kirschner v. Western & A. R. Co.*, 67 Ga. 760.

19. *Woodworth v. Raymond*, 51 Conn. 70; *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 605; *Brookline v. Mackintosh*, 133 Mass. 215, 225 (pollution of stream); *Felton v. Simpson*, 11 Ired L. (33 N. C.) 84; *Hume v.*

Rogue River Packing Co., 51 Ore. 237, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865; *Goodman v. Saltash Corp.* 7 App. Cas. 633; *Neaverson v. Peterborough Rural Council* (1902) 1 Ch. 557.

20. *Quincy v. Jones*, 75 Ill. 231, 20 Am. Rep. 213.

21. *Burbank v. Fay*, 65 N. Y. 57; *Rockdale Canal Co. v. Radcliffe*, 18 Q. B. 287.

22. 2 Blackst. Comm. 265; *Godard, Easements* (6th Ed.) 218; *Perley v. Hilton*, 55 N. H. 444; *Smith v. Kinard*, 2 Hill L. (S. C.) 642, note. See *Wheaton v.*

son who exercised the user during the prescriptive period, and is ordinarily purely personal to him.^{22a}

That a municipality may acquire by prescription the right to use the land of an individual for a municipal purpose has been recognized,²³ but the user of the land for the prescriptive period by individual inhabitants of the municipality is insufficient to create an easement in favor of the municipality.²⁴

The public cannot, strictly speaking, acquire rights by prescription. Since a grant cannot be made to the public, there is no room for the presumption of a grant in such case. The analogy of prescription has however been freely applied in the case of highways, on the theory that an adverse user of private land by the public for the prescriptive period gives rise to a presumption that the land was dedicated for a highway, and the term prescription is almost invariably used in that connection. The matter of the establishment of a highway by reason of adverse user on the part of the public is discussed at the end of this chapter.

§ 517. What rights may be acquired by prescription. A right of way over another's land may be acquired by prescription,²⁵ and the doctrine is perhaps more frequently applied in this connection than in any other. That there were, during the prescriptive period, gates across the way, does not preclude the acquisition

Maple & Co., (1893) 3 Ch. 48, 63; *Ivimey v. Stocker*, L. R. 1 Ch. App. 396; *Fear v. Morgan*, (1906) 2 Ch. 406.

22a. *Ante*, § 350.

23. *Gordon v. Taunton*, 126 Mass. 349; *Deerfield v. Connecticut R. R.*, 144 Mass. 325, 11 N. E. 105; *Smith v. Sedalia*, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907.

24. *Comm v. Newbury*, 2 Pick. (Mass.) 59; *Sale v. Pratt*, 19

Pick. (Mass.) 191; *Green v. Chelsea*, 24 Pick. (Mass.) 71; *Hill v. Lord*, 48 Me. 83.

25. See, *e. g.* *Cheney v. O'Brien*, 69 Cal. 199, 10 Pac. 479; *Everedge v. Alexander*, 75 Ga. 858; *Talbott v. Thorn*, 91 Ky. 417, 16 S. W. 88; *Jones v. Percival*, 5 Pick. (Mass.) 485, 16 Am. Dec. 415; *Garnett v. Slater*, 56 Mo. App. 207; *Arnold v. Cornman*, 50 Pa. St. 361.

of the right,²⁶ though it may be regarded as tending to show that the user was permissive.²⁷

The right to appropriate the water of a stream in excess of one's natural right may be acquired by prescription as against lower riparian proprietors.²⁸ The right to dam or obstruct the water of a stream so as to flood the land of another may also be thus acquired,²⁹ as may the right to pollute the water,³⁰ or to control or change the flow.³¹ One may also acquire by prescription the right to maintain an aqueduct,³² or a

26. *Johnson v. Stayton*, 5 Harr. (Del.) 448; *Smith v. Roath*, 238 Ill. 247, 87 N. E. 414; *Moll v. Hagerbaumer*, 98 Neb. 555, 153 N. W. 560; *Demuth v. Amweg*, 90 Pa. St. 181.

27. *Post*, § 519, note 80.

28. *Tyler v. Wilkinson*, 4 Mason, 397, Fed., Cas. No. 14312; *Coonradt v. Hill*, 79 Cal. 587, 21 Pac. 1099; *Arroyo Ditch & Water Co. v. Baldwin*, 155 Cal. 280, 100 Pac. 874; *Kuhlman v. Hecht*, 77 Ill. 570; *Fankbouer v. Corder*, 127 Ind. 164, 26 N. E. 766; *Barnes v. Haynes*, 13 Gray (Mass.) 188, 74 Am. Dec. 629; *Whitney v. Wheeler Cotton-Mills*, 151 Mass. 396, 7 L. R. A. 613, 24 N. E. 774; *Smith v. Putnam*, 62 N. H. 369; *Shreve v. Voorhees*, 3 N. J. Eq. 25; *Krier's Private Road*, 73 Pa. St. 109; *Horn v. Miller*, 142 Pa. St. 557, 21 Atl. 994; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Ferrell v. Ferrell*, 1 Baxt. (Tenn.) 329; *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020.

29. *Atlanta & B. Air Line Ry v. Wood*, 160 Ala. 657, 49 So. 426; *Vail v. Mix*, 74 Ill. 127; *Wallace v. Winfield*, 96 Kan. 35, 149 Pac. 693; *Williams v. Nelson*, 23 Pick. (Mass.) 141; *Turner v.*

Hart, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890; *Mueller v. Fruen*, 36 Minn. 273, 30 N. W. 886; *Alcorn v. Sadler*, 71 Miss. 634, 42 Am. St. Rep. 484, 14 So. 444; *Hammond v. Zehner*, 21 N. Y. 118; *Emery v. Raleigh & G. R. Co.*, 102 N. C. 209, 11 Am. St. Rep. 727, 9 S. E. 139; *McGeorge v. Hoffman*, 133 Pa. St. 381, 19 Atl. 413; *Shearer v. Hutterische Bruder Gemeinde*, 28 S. D. 509, 134 N. W. 63; *Haas v. Choussard*, 17 Tex. 588; *Perrin v. Garfield*, 37 Vt. 304.

30. *Crossley v. Lightowler*, 2 Ch. App. 478; *Crosby v. Bessey*, 49 Me. 539; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Gladfelter v. Walker*, 40 Md. 1; *Jones v. Crow*, 32 Pa. St. 398.

31. *Brace v. Yale*, 10 Allen (Mass.) 441; *Dyer v. Cranston Print Works Co.*, 22 R. I. 506, 48 Atl. 791.

32. *Churchill v. Louie*, 135 Cal. 608, 67 Pac. 1052; *Frederick v. Dickey*, 91 Cal. 358, 27 Pac. 742; *Watkins v. Peck*, 13 N. H. 370; *Coventon v. Seufert*, 23 Ore. 548, 32 Pac. 508; *French Hoek v. Hugo*, L. R. 10 App. Cas. 336.

drain,³³ over another's land and likewise the right to discharge drainage thereon.³⁴

One may, it has been held, acquire by prescription a right to take seaweed from another's land,³⁵ or a right to fish thereon.³⁶ Likewise a prescriptive right to take water,³⁷ or ice,³⁸ from another's land has been recognized. A *profit à prendre* can, however, it has been said, be acquired by prescription only as appurtenant to a dominant tenement or, as it is technically expressed, the party must prescribe in a *que* estate.³⁹

Among other prescriptive rights which have been judicially recognized are the right to have a division fence maintained by the owner of adjoining land,⁴⁰ the

33. *Alderman v. New Haven*, 81 Conn. 137, 18 L. R. A. (N. S.) 74, 70 Atl. 626; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Beasley v. Engstrom*, 31 Idaho, 14, 168 Pac. 1145; *Pyott v. State*, 170 Ind. 118, 83 N. E. 737; *Pascal v. Hynes*, 170 Iowa, 121, 152 N. W. 26; *White v. Chapin*, 12 Allen (Mass.) 516; *Shaughnessey v. Leary*, 162 Mass. 108, 38 N. E. 197; *McCracken v. MacNeal*, 169 Mich. 414, 135 N. W. 461; *Ramsdale v. Foote*, 55 Wis. 557, 13 N. W. 557; *Wilkins v. Nicolai*, 99 Wis. 178, 74 N. W. 103.

34. *Cotton v. Pocasset Mfg. Co.*, 13 Metc. (Mass.) 429; *Chapel v. Smith*, 80 Mich. 100, 45 N. W. 69; *Seigmund v. Tyner*, 52 Ind. App. 581, 101 N. E. 20; *Peacock v. Stinchcomb*, 189 Mich. 301, 155 N. W. 349.

35. *Hill v. Lord*, 48 Me. 83.

36. *Turner v. Hebron*, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951; *Melvin v. Whiting*, 10 Pick. (Mass.) 295, 20 Am. Dec. 524, 13 Pick. (Mass.) 188; *McFarlin v.*

Essex Co., 10 Cush. (Mass.) 304; *Cobb v. Davenport*, 32 N. J. L. 369. Compare *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21.

37. *Rollins v. Blackden*, 112 Me. 459, Ann. Cas. 1917A 875, 92 Atl. 521; *Kennedy v. Niles Water Supply Co.*, 173 Mich. 474, 43 L. R. A. (N. S.) 836, 139 N. W. 241; *Fraser v. Nerney*, 89 Vt. 257, 95 Atl. 501; *Mason v. Yearwood*, 58 Wash. 276, 30 L. R. A. (N. S.) 1158, 108 Pac. 608. There may be a prescriptive right to take water from another's aqueduct. *Cole v. Bradbury*, 86 Me. 380, 29 Atl. 1097; *Kearney v. Westchester*, 199 Pa. 392, 49 Atl. 227.

38. *Hoag v. Place*, 93 Mich. 450, 18 L. R. A. 39, 53 N. W. 617; *Hinckel v. Stevens*, 35 N. Y. App. Div. 5, 54 N. Y. Supp. 457.

39. *Grimstead v. Marlowe*, 4 Term Rep. 717; *Merwin v. Wheeler*, 41 Conn. 14; *Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 652, 41 Atl. 349; *Washburn, Easements* (4th Ed.) 18.

40. *Castner v. Riegel*, 54 N.

right to conduct on one's land a business which pollutes the atmosphere, to the injury of the land adjoining,⁴¹ the right to extend eaves of a roof, or a cornice, or other part of a building, over another's land,⁴² the right to maintain gates or other structures on a private way,⁴³ the right to stand horses and carriages on another's land,⁴⁴ the right to turn one's horses on another's land in ploughing,⁴⁵ the right to attach a sign to another's building,⁴⁶ the right to maintain an air shaft through another's property,⁴⁷ the right to use another's property for a ferry landing.⁴⁸

There are, on the other hand, some easements which cannot be acquired by prescription, owing to the fact that the owner of the land is not in a position to prevent the exercise of the user claimed, or to sue on account thereof, and consequently the fact that he does not do so is no evidence of acquiescence on his part. On this principle it has been decided that the appropriation of an excessive quantity of water from a water-

J. L. 498, 24 Atl. 484; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Adams v. Van Alstyne*, 25 N. Y. 232.

41. *Sturges v. Bridgman*, 11 Ch. Div. 852; *Dana v. Valentine*, 5 Metc. (Mass.) 8.

42. *Norwalk Heating & Lighting Co. v. Vernam*, 75 Conn. 662, 96 Am. St. Rep. 246, 55 Atl. 168; *Cherry v. Stein*, 11 Md. 1; *Mathys v. First Swedish Baptist Church of Boston*, 223 Mass. 544, 112 N. E. 228; *Grace Methodist Episcopal Church v. Dobbins*, 153 Pa. St. 294, 34 Am. St. Rep. 706, 25 Atl. 1120; *Sorkin v. Sentman*, 162 Pa. St. 543, 29 Atl. 722. So there may be a prescriptive right to have vessels overlap another's wharf. *Wellington v. Cambridge*, 220 Mass. 312, 107 N. E. 976. But prescription, it

has been decided, can give no right to have branches of trees overhang adjoining land, in view of the constant change incident to growth. *Lemmon v. Webb*, (1894) 3 Ch. 1.

43. *Goodwin v. Bragaw*, 87 Conn. 31, 86 Atl. 668; *Moon v. Mills*, 119 Mich. 298, 75 Am. St. Rep. 390, 77 N. W. 926; *Ailes v. Hallam*, 69 W. Va. 305, 71 S. E. 273.

44. *Trauger v. Sassman*, 14 Pa. St. 514.

45. *Jones v. Percival*, 5 Pick. (Mass.) 485, 16 Am. Dec. 415.

46. *Moody v. Steggles*, 12 Ch. Div. 261.

47. *Bass v. Gregory*, 25 Q. B. D. 481.

48. *Clark v. White*, 5 Bush. 353; *Bird v. Smith*, 8 Watts (Pa.) 434, 34 Am. Dec. 488.

course for the statutory period by a lower riparian proprietor does not give him any right to continue such appropriation as against an upper proprietor who may thereafter desire to use water therefrom, since the latter had no means of preventing such excessive appropriation other than appropriating the water himself.⁴⁹ One cannot acquire by prescription a right to water percolating from other land to his land, since the owner of the land from which it percolates is not in a position to prevent its percolation.⁵⁰ Nor can the owner of a lower tenement acquire by length of user, as against the upper tenement, a right to the flow of surface water.⁵¹ So, the owner of the upper tenement, who has no natural right to have surface water flow from his land on the lower tenement, cannot acquire such right by the fact that the owner of the latter does not prevent such flow until the prescriptive period has elapsed, since such flow gives no right of action.⁵²

49. *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Stockport Waterworks Co. v. Potter*, 3 Hurl & C. 300; *Walker v. Lillingston*, 137 Cal. 401, 70 Pac. 282; *Miller & Lux v. Enterprise Canal & Land Co.*, 169 Cal. 415, 147 Pac. 567; *Parker v. Hotchkiss*, 25 Conn 321; *Thurber v. Martin*, 2 Gray (Mass.) 394; *Pratt v. Lamson*, 2 Allen (Mass.) 275, 288; *Crawford v. Hathaway*, 67 Neb. 325, 60 L. R. A. 889, 108 Am. St. Rep. 647, 93 N. W. 781; *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. 154; *Mud Greek Irr. Agr. & Mfg. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078; *Lawrie v. Silsby*, 76 Vt. 240, 104 Am. St. Rep. 927, 56 Atl. 1106. See note to 93 Am. St. Rep. at p. 717. But one's ability to acquire a prescriptive right to divert water from a stream at a certain point is not affected by

the fact that he owns riparian land lower down on the stream. *Dontanello v. Gust*, 86 Wash. 268, 150 Pac. 420.

50. *Chasemore v. Richards*, 7 H. L. Cas. 349; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Elster v. Francis*, 18 Pick. (Mass.) 117; *Village of Delhi v. Youmans*, 50 Barb. (N. Y.) 316; *Frazier v. Brown*, 12 Ohio St. 294; *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. 274; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Wheelock v. Jacobs*, 70 Vt. 162, 43 L. R. A. (N. S.) 105, 67 Am. St. Rep. 626, 40 Atl. 51.

51. *Wood v. Waud*, 3 Exch. 748; *Greatrex v. Hayward*, 8 Exch. 291; *Broadbent v. Ramsbotham*, 11 Exch. 602.

52. *Parks v. City of Newbury-*

Where the civil-law rule, giving the proprietor of the upper tenement a natural right to have his surface water flow off on the lower tenement, controls, he may lose this right by submitting to the obstruction of such flow for the prescriptive period.⁵³ In case the owner of the upper tenement causes the water to flow on the lower tenement in a particular channel, the lower proprietor can prevent such action, and consequently his failure so to do may be regarded as acquiescence therein, which confers the right if continued for the statutory period.⁵⁴

One cannot, in this country, by the maintenance of windows in one's building overlooking adjacent land for the statutory period, acquire an easement of light and air in such land, since this involves no injury to the land, or diminution of the value of the beneficial interest therein, and consequently gives no right of action to the landowner.⁵⁵ Likewise, the right of support for a building by another building or by adjacent land cannot, by the weight of authority in this country, be acquired by prescription, since not only is the exercise of the right not one which causes injury to the

port, 10 Gray (Mass.) 28; *White v. Chapin*, 12 Allen (Mass.) 516; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. Compare *Ross v. Mackeney*, 46 N. J. Eq. 140, 18 Atl. 685.

53. *Zerban v. Erdman*, 258 Ill. 486, 101 N. E. 925; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Louisville & N. Ry. Co. v. Mossman*, 90 Tenn. 157, 25 Am. St. Rep. 670, 16 S. W. 64.

54. *Moody v. Fremd*, 177 Ky. 5, 197 S. W. 433; *White v. Chapin*, 12 Allen (Mass.) 516; *Schnitzius v. Bailey*, 48 N. J. Eq. 409, 22 Atl. 732; *Glenn v. Line*, 155 Mich. 608, 119 N. W. 1097.

55. *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111, 37 Pac. 192; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Lahere v. Luckey*, 23 Kan. 534; *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 573; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Haverstick v. Sipe*, 33 Pa. St. 368; *Napier v. Bulwinkle*, 5 Rich. Law (S. C.) 311; *Hubbard v. Town*, 33 Vt. 295; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629. *Contra*, *Clawson v. Primrose*, 4 Del. Ch. 643.

supporting land or building, but the dependence of a building on such support is a fact which is in most cases not discoverable until the support is withdrawn.⁵⁶ In England, on the other hand, the right of support may be thus acquired.⁵⁷

There are several decisions in this country that a right in the use of a party wall may be acquired by prescription,⁵⁸ but this view, while clearly correct when it involves the placing of beams or other parts of a building in or on a wall upon adjoining land,⁵⁹ is, it seems, in other cases, not involving any occupation of the space above such land, not reconcilable with the principle that the user, to be adverse, must be actionable,⁶⁰ nor with the decisions above referred to, that a right of support for buildings from adjoining land or buildings cannot be acquired by prescription.

§ 518. **Actual user necessary.** In order that the doctrine of prescription may operate in one's favor he must have actually used the land of another and the mere assertion of a right to use it is insufficient.⁶¹

56. *Richart v. Scott*, 7 Watts (Pa.) 460; *Mitchell v. City of Rome*, 49 Ga. 19, 15 Am. Rep. 669; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Handlan v. McManus*, 42 Mo. App. 551; *Sullivan v. Zeiner*, 98 Cal. 346. See *Gilmore v. Driscoll*, 122 Mass. 199, 207. But see *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524.

57. *Dalton v. Angus*, 6 App. Cas. 740; *Lemaître v. Davis*, 19 Ch. Div. 281.

58. *Bright v. J. Bacon & Sons*, 131 Ky. 848, 20 L. R. A. (N. S.) 386, 116 S. W. 268 (*dictum*); *Dowling v. Hennings*, 20 Md. 179; *Brown v. Werner*, 40 Md. 15; *Schile v. Brokhahus*, 80 N. Y.

614; *Weadock v. Champe*, 193 Mich. 553, Ann. Cas. 1918C 874, 160 N. W. 564; *McVey v. Durkin*, 136 Pa. St. 418, 20 Atl. 541; *First Nat. Bank of Wichita Falls v. Zundelowitz*,—Tex. Civ. App.—, 168 S. W. 40.

59. As in *Barry v. Edlavitch*, 84 Md. 95, 33 L. R. A. 294, 35 Atl. 170; *McLaughlin v. Cecconi*, 141 Mass. 252, 5 N. E. 261.

60. See *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87. 34 Atl. 85.

61. *Peterson v. McCullough*, 50 Ind. 35; *Gibson v. Fischer*, 68 Iowa, 29, 25 N. W. 914; *Fox River Flour & Paper Co. v. Kelley*, 70 Wis. 287, 35 N. W. 744.

It has occasionally been asserted that no right of user can be acquired by prescription unless the user was, during the prescriptive period, actually beneficial to the person exercising it.⁶² In some of these cases the question was as to the acquisition of the right to divert water from a stream, and the assertion of the requirement of beneficial user involved merely the application to the case of prescription of a requirement recognized in those jurisdictions in connection with the law of prior appropriation.⁶³ "Since a right of appropriation cannot be held without beneficial use, one pretending to be an appropriator has no color of title without beneficial use."⁶⁴ However, the propriety of such a requirement of beneficial use as an element of prescription even in those states has been questioned.⁶⁵ And, generally speaking the introduction of any additional requirements as to the characteristics of the user necessary for the purpose of prescription is to be deprecated, as adding to the existing complexity of the subject.

§ 519. Adverse character of user. In order that a right to use another's land be acquired by the user thereof for the statutory period, the user must be hostile or adverse to the owner of the land.⁶⁶

62. *Louisville & N. R. Co. v. Hays*, 11 Lea (Tenn.) 382, 47 Am. Rep. 291; *Simons v. Munch*, 115 Minn. 360, 132 N. W. 321, and cases cited in next note.

63. *Senior v. Anderson*, 115 Cal. 496, 47 Pac. 454; 130 Cal. 290, 62 Pac. 563; *California Pastoral & Agricultural Co. v. Medera Canal & Irrigation Co.*, 167 Cal. 78, 138 Pac. 718; *Lavery v. Arnold*, 36 Ore. 84, 57 Pac. 907; *Oregon, etc. Co. v. Allen*, 41 Ore. 209, 93 Am. St. Rep. 701, 69 Pac. 455; *Cleary v. Daniels*, —Utah, —, 167 Pac. 820.

64. *Wiel, Water Rights in the Western States* (2nd Ed.), § 247.

65. 93 Am. St. Rep. note to *Oregon etc. Co. v. Allen*, at p. 720; *Wiel, Water Rights*, § 247.

66. *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. 804; *Dexter v. Tree*, 117 Ill. 532, 6 N. E. 506; *Cox v. Forrest*, 60 Md. 74; *Chollar Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 93 Am. Dec. 409; *Pavey v. Vance*, 56 Ohio St. 162, 46 N. E. 898; *Pierce v. Cloud*, 42 Pa. St. 102, 82 Am. Dec. 496; *Kearney v. Borough of West*

The courts usually refrain from an explicit statement of what they mean by adverse user in this connection, but it appears reasonably safe to say that a user is adverse if not accompanied by any recognition, in express terms or by implication, of a right in the landowner to stop such user now or at some time in the future. The recognition of the landowner's right to put an end to the user precludes any presumption, from his failure to assert such right, that no such right exists.

That the user of the land is under permission or license from the owner of the land shows, it is generally recognized, that the user is not adverse.⁶⁷ Such a user evidently involves a recognition of the landowner's right to stop it now or in the future, and in view of such recognition, no inference can be drawn from his failure actually to stop it. But a user which

Chester, 199 Pa. St. 392, 49 Atl. 227.

67. *Stewart v. White*, 128 Ala. 202, 55 L. R. A. 211, 30 So. 526; *Medlock v. Owen*, 105 Ark. 460, 151 S. W. 995; *Thomas v. England*, 71 Cal. 456, 12 Pac. 491; *Cassin v. Cole*, 153 Cal. 677, 96 Pac. 277; *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509; *Anchor v. Stewart*, 270 Ill. 57, 110 N. E. 385; *Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. Rep. 568, 25 N. E. 876; *Sexton v. Holt*, 91 Kan. 26, 136 Pac. 934; *Driscoll v. Morehead*, 147 Ky. 107, 143 S. W. 758; *Morse v. Williams*, 62 Me. 445; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Moore v. Bulgreen*, 153 Mich. 261, 116 N. W. 1005; *Lanier v. Booth*, 50 Miss. 410; *Dulce Realty Co. v. Staed Realty Co.*, 245 Mo. 417, 151 S. W. 415; *Crawford v. Minnesota & M. Land & Im-*

provement Co., 15 Mont. 153, 38 Pac. 713; *Bone v. James*, 82 Neb. 442, 118 N. W. 83; *Howard v. Wright*, 38 Nev. 25, 143 Pac. 1184; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Wiseman v. Luck-singer*, 84 N. Y. 31, 38 Am. Rep. 479; *Lincoln v. Great Northern Ry. Co.*, 26 N. D. 504, 144 N. W. 713; *Wimer v. Simmons*, 27 Ore. 1, 50 Am. St. Rep. 685; *Zerbey v. Allan*, 215 Pa. 383, 64 Atl. 587; *Turnbull v. Rivers*, 3 McCord L. (S. C.) 131, 15 Am. Dec. 622; *Turner v. South & West Improve-ment Co.*, 118 Va. 720, 88 S. E. 85; *Whaley v. Jarrett*, 69 Wis. 613, 2 Am. St. Rep. 764, 34 N. W. 727. But *Frederic v. Mayers*, 89 Miss. 127, 43 So. 677 appears to assert, in an obscure way, that a revocable license becomes irrevocable after the prescriptive period has passed.

It has been decided that the

is permissive in its inception may become adverse by the action of the person exercising the user in denying the right of the landowner to interfere with the user, provided notice of such denial is brought home to the landowner.⁶⁸

When the owner undertakes to confer upon another a perpetual right of user in the land, but fails to do so in a valid manner, as when he makes an oral grant of an easement, the user of the land by such other in accordance with the terms of the invalid grant cannot be regarded as permissive and in subordination to the rights of the landowner, but is in effect adverse to such rights.⁶⁹ Such a case is analogous to that of the possession of land under an invalid conveyance

user is not adverse if it was under permission, although the person giving permission was a tenant who had no authority to give permission. *Williamson v. Abbott*, 107 S. C. 397, 93 S. E. 15. This appears to be entirely reasonable.

That payment to the land owner of an annual sum in connection with the user justifies an inference that it is permissive, see *Gardner v. Hodgson's Kingston Breweries Co.* (1903) App. Cas. 229; *O'Brien's Appeal*, 11 Wkly Notes Cas. (Pa.) 229.

68. *Barbour v. Pierce*, 42 Cal. 657; *Hill v. Hagaman*, 84 ind. 287; *McAllister v. Pickup*, 84 Iowa, 65, 50 N. W. 556; *Patterson v. Griffith*,—(Ky.)—, 62 S. W. 884; *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104; *Hurst v. Adams*, 86 Mo. App. 73; *Taylor v. Gerrish*, 59 N. H. 569; *Eckerson v. Crippen*, 110 N. Y. 585, 1 L. R. A. 487, 18 N. E. 443; *Huston v. Bybee*, 17 Ore. 140, 2 L. R. A. 568, 20 Pac.

51; *Thoenke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030; *Weidensteiner v. Mally*, 55 Wash. 79, 104 Pac. 143.

69. *Oneto v. Restano*, 78 Cal. 374, 20 Pac. 743; *Myers v. Berven*, 166 Cal. 484, 137 Pac. 260; *Gyra v. Winler*, 40 Colo. 366, 13 Ann. Cas. 841, 91 Pac. 36; *Legg v. Horn*, 45 Conn. 415; *Alderman v. New Haven*, 81 Conn. 337, 18 L. R. A. (N. S.) 74, 70 Atl. 626; *McKenzie v. Elliott*, 134 Ill. 156, 24 N. E. 965; *Schmidt v. Brown*, 226 Ill. 590, 80 N. E. 1071; *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. 109; *Shimanek v. Chicago, M. & St. P. Ry. Co.*—(Iowa),—152 N. W. 574; *Talbott v. Thorn*, 91 Ky. 417, 16 S. W. 88; *Oak Grove Missionary Baptist Church v. Rice*, 162 Ky. 525, 172 S. W. 927; *Jewett v. Hussey*, 70 Me. 433; *Stearns v. Janes*, 12 Allen (Mass.) 582; *Sanford v. Kern*, 223 Mo. 616, 122 S. W. 1051; *Wells v. Parker*, 74 N. H. 193, 66 Atl. 121. *Heard v. Bowen*,—Tex. Civ. App.—, 184 S. W. 234; *Holm v.*

thereof, which is ordinarily adverse to the grantor.⁷⁰ The user of the land under such circumstances involves no recognition of any right as remaining in the grantor.

The user of one piece of land for the benefit of another piece cannot be adverse so long as both are in the possession of the same person, since in such case whatever user is made of either by the person in possession is to be imputed to the fact of possession.^{70a}

A tenant under a lease cannot, it has been decided, acquire by prescription a right in land, near the demised premises, which also belongs to the landlord, whether this neighboring land is or is not in the possession of a tenant under a lease.⁷¹ Since the right

Davis, 41 Utah, 200, 44 L. R. A. (N. S.) 89, 125 Pac. 403; Lechman v. Mills, 46 Wash. 624, 13 L. R. A. (N. S.) 990, 13 Ann. Cas. 923, 91 Pac. 11. *Contra, semble*, Wiseman v. Lucksinger, 84 N. Y. 31, 38, Am. Rep. 479; Long v. Mayberry, 96 Tenn. 378, 36 S. W. 1040.

70. *Ante* § 513(e), note 20.

70a. Battishill v. Reed, 18 C. B. 696; Onley v. Gardiner, 4 M. & W. 496; Damper v. Bassett (1901) 2 Ch. 350; Outram v. Maude, 17 Ch. Div. 391, 405; Barker v. Mobile Elec. Co., 173 Ala. 28, 55 So. 364; Hickox v. Parmelee, 21 Conn. 86; Broom v. Gizzard, 136 Ga. 297, 71 S. E. 430; Williams v. Deskins, 179 Ky. 61, 200 S. W. 1; Pierce v. Fernald, 26 Me. 436, 46 Am. Dec. 573; Murphy v. Welch, 128 Mass. 489; Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734; Stuyvesant v. Woodruff, 21 N. J. L. 133, 47 Am. Dec. 156; Stevens v. Dennett, 51 N. H. 324; Wells v. Parker, 74 N. H. 193, 66 Atl.

121; Phillips v. Phillips, 48 Pa. St. 178, 86 Am. Dec. 577; Payne v. Williams, 2 Spears L. (S. C.) 15; Crosland v. Rogers, 32 S. C. 130; Sasman v. Collins,—(Tex. Civ. App.), 115 S. W. 337; Mabie v. Matteson, 17 Wis. 1; In Franz v. Mendonca, 131 Cal. 205, 63 Pac. 361, it is said that the user continues to be adverse although the same person is in possession under leases of both properties. This is, it is submitted, erroneous. See also Gerstner v. Payne,—(Mo. App.)—, 142 S. W. 794, and Rogers v. Flick, 144 Ky. 844, 139 S. W. 1098, criticized in editorial note, 10 Mich. Law Rev. 236.

71. Gayford v. Moffatt, 4 Ch. App. 133; Kilgour v. Gaddes, (1904) 1 K. B. 457; Kuhlman v. Hecht, 77 Ill. 570; Brown v. Dickey, 106 Me. 97, 75 Atl. 382; Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734; Stevens v. Dennett, 51 N. H. 324; Phillips v. Phillips, 48 Pa. St. 178, 86 Am. Dec. 577.

would be acquired by the tenant as appurtenant to the land itself, and so for the benefit of his landlord,⁷² it would result that the landlord would acquire a right of user against himself, an easement in his own land, a legal impossibility. And moreover the fact that the user of land is made in connection with other land which he holds under a lease from the person who owns both pieces of land is sufficient in itself to show that the user is permissive merely.

Since it is the recognition of a right in the landowner to put an end to the user which deprives the user of the element of adverseness, and such recognition is in its nature an affirmative fact, the burden of proof in reference thereto is properly on the landowner, that is, in the absence of evidence to the contrary, the user of another's land is ordinarily presumed to be adverse.⁷³ If evidence to the contrary is introduced, the question of the character of the user is obviously one of fact,⁷⁴ and the burden of proof, in the sense of

72. *Ante*, § 516, note 22.

73. *Polly v. McCall*, 37 Ala. 20; *Fleming v. Howard*, 150 Cal. 28, 87 Pac. 908; *Cheda v. Southern Pac. Co.*,—(Cal.)—, 134 Pac. 717; *Mitchell v. Bain* 142 Ind. 604, 42 N. E. 230; *Smith v. Ponsford*, 184 Ind. 53, 110 N. E. 194; *Stewart v. Brumley*,—(Ky.)—, 119 S. W. 798; *Bordes v. Leece*, 179 Ky. 655, 201 S. W. 4; *Cox v. Forrest*, 60 Md. 74; *Barnes v. Haynes*, 13 Gray (Mass.) 188; *White v. Chapin*, 12 Allen (Mass.) 516; *Berkey & Gay Furniture Co. v. Valley City Milling Co.*, 194 Mich. 234, 160 N. W. 648; *Novinger v. Shoop*, — Mo. —, 201 S. W. 64; *Moll v. Hagerbaumer*, 98 Neb. 555, 153 N. W. 560; *Smith v. Putnam*, 62 N. H. 369; *Clement v. Bettie*, 65 N. J. L. 675, 48 Atl. 567; *Ham-*

mond v. Zehner, 21 N. Y. 118; *American Bank-Note Co. v. New York El. R. Co.*, 129 N. Y. 252, 29 N. E. 302; *Pavey v. Vance*, 56 Ohio St. 162, 46 N. E. 898; *Gardner v. Wright*, 49 Ore. 609, 91 Pac. 286; *Steffey v. Carpenter*, 37 Pa. 41; *Slater v. Price*, 96 S. C. 245, 80 S. E. 372; *Dodge v. Stacy*, 39 Vt. 558; *Muncy v. Updyke*, 119 Va. 636, 89 S. E. 884; *Lechman v. Mills*, 46 Wash. 624, 91 Pac. 11, 13 L. R. A. (N. S.) 990, 13 Am. Cas. 923; *Hawkins v. Conner*, 75 W. Va. 220, 83 S. E. 982; *Carmody v. Mulrooney*, 87 Wis. 552, 58 N. W. 1109.

74. *Thomas v. England*, 71 Cal. 456, 12 Pac. 491; *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. 804; *Hill v. Crosby*, 2 Pick. (Mass.) 466, 13 Am. Dec. 448; *Bigelow Carpet Co. v. Wiggin*, 209

risk of non persuasion of the jury,⁷⁵ is, as regards the adverse character of the user as well as the other elements of prescription, upon the person asserting the prescriptive right.⁷⁶

While ordinarily, as above stated, the user of another's land is presumed to be adverse, such a presumption does not exist, it seems, in the case of unenclosed land or, as it may be otherwise expressed, evidence that the land is unenclosed is sufficient to rebut the presumption.⁷⁷ And it has been decided that when one throws his land open to the use of the public, or of his neighbors generally, a user thereof by a neighboring landowner, however frequent, will be presumed to be permissive and not adverse, in the absence of any attendant circumstances indicative of the contrary.⁷⁸ And it has been said that if the proprie-

Mass. 542, 95 N. E. 938; Burnham v. McQuesten, 48 N. H. 446; Iselin v. Starin, 144 N. Y. 453, 39 N. E. 488; Bennett v. Biddle, 140 Pa. 396, 21 Atl. 363.

75. 4 Wigmore, Evidence, § 2485.

76. District of Columbia v. Robinson, 180 U. S. 92, 45 L. Ed. 440; Clarke v. Clarke, 133 Cal. 667, 66 Pac. 10; Barlow v. Frink, 171 Cal. 165, 152 Pac. 290; Shea v. Gavitt, 89 Conn. 359, L. R. A. 1916A, 689, 94 Atl. 360; Rollins v. Blackden, 112 Me. 459, 92 Atl. 521; Smith v. Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907; Barber v. Bailey, 86 Vt. 219, 84 Atl. 608, 44 L. R. A. (N. S.) 98; St. Martin v. Skamania Boom Co., 79 Wash. 393, 140 Pac. 355; Crosier v. Brown, 66 W. Va. 273, 25 L. R. A. N. S. 174, 66 S. E. 326.

77. Card v. Cunningham,—Ala.—, 74 So. 335; Clarke v. Clarke, 133 Cal. 667, 66 Pac. 10; Illinois Cent. R. Co. v. Stewart,

265 Ill. 35, 106 N. E. 512 (unenclosed and unoccupied); Bowman v. Wickliffe, 15 B. Mon. (Ky.) 84; Conyers v. Scott, 94 Ky. 123, 21 S. W. 530, (But see Hansford v. Berry, 95 Ky. 56, 23 S. W. 665); Winlock v. Miller, 167 Ky. 717, 181 S. W. 330 (unenclosed woodland); Downing v. Benedict, 147 Ky. 8, 143 S. W. 756; Donnell v. Clark, 19 Me. 174; Davidson v. Nantz, 177 Ky. 50, 197 S. W. 520; Gibson v. Durham, 3 Rich. L. 85; Hutto v. Tindall, 6 Rich. L. 396; Schulenbarger v. Johnstone, 64 Wash. 202, 116 Pac. 843, 35 L. R. A. (N. S.) 941. *Contra*, in Pennsylvania and West Virginia Worrall v. Rhoads, 2 Whart. (Pa.) 427; Walton v. Knight, 62 W. Va. 223, 58 S. E. 1025. The Pennsylvania act of 1850 provides, however, that no right of way shall be acquired by prescription over unenclosed woodland.

78. Kilburn v. Adams, 7 Met. (Mass.) 33, 39 Am. Dec. 754;

tors of churches, school houses and other *quæ* public buildings enclose their grounds and provide unlocked gates for passage, an adjoining proprietor cannot obtain title to a right of way by occasionally passing through the gates and over the enclosed land to his own premises.⁷⁹

The presumption that the user of another's land was adverse may obviously be rebutted by evidence that the person exercising the user recognized the right of the landowner to stop such user. And so the fact that the former apparently recognizes the latter's right to make the user less convenient, as by failing to object to the erection of a gate or bars over a way, may tend to rebut such presumption.⁸⁰ The presumption that the user was adverse may also be rebutted by evidence that it was under permission or license, this in effect involving a recognition of the landowner's right to stop it. If the user was originally by permission, it is pre-

Burnham v. McQuesten, 48 N. H. 446; Cobb v. Davenport, 32 N. J. L. 369; Howard v. Wright, 38 Nev. 25, 143 Pac. 1184; Plimpton v. Converse, 44 Vt. 158; Cincinnati Southern R. Co. v. Slaughter, 31 Ky. L. 913, 104 S. W. 291; O'Neil v. Blodgett, 53 Vt. 213; Witt v. Creasey, 117 Va. 872, 86 S. E. 128; And see Cook v. Gammon, 93 Ga. 298, 20 S. E. 332; City of Chicago v. Chicago, R. I. & P. Ry. Co. 152 Ill. 561, 38 N. 768.

A like rule appears to be applied in Hunter v. Emerson, 75 Vt. 173, 53 Atl. 1070, with reference to the right to enter on another's land in order to take water from a spring. Compare Gentry v. Piercy, 175 Ky. 174, 193 S. W. 1017.

79. Menter v. First Baptist Church, 159 Mich. 21, 123 N. W.

585. And that this is the rule in the case of grounds attached to such buildings, if they are unenclosed, see Kilburn v. Adams, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; Thompson v. Bowers, 115 Me. 6, 97 Atl. 1.

80. Prewitt v. Hustonville Cemetery Co., 31 Ky. L. Rep. 125, 101 S. W. 892; Downing v. Benedict, 147 Ky. 8, 143 S. W. 756; Cahill v. Mangold, 151 Ky. 156, 151 S. W. 373; Moll v. Hagerbaumer, 98 Neb. 555, 151 N. W. 399; Howard v. Wright, 38 Nev. 25, 143 Pac. 1184; Peters v. Robertson, 73 Ore. 263, 144 Pac. 568; Schulenbarger v. Johnstone, 64 Wash. 202; 116 Pac. 543, 35 L. R. A. (N. S.) 941. Compare Moll v. Hagerbaumer, 97 Neb. 809, 153 N. W. 560; Demuth v. Amweg, 90 Pa. St. 181.

sumed to have so continued, in the absence of affirmative evidence of the assertion of a right to such user or a repudiation of the landowner's right to stop it.⁸¹

The user by another of a way or space laid out or left by the landowner, concurrently with its user by the latter, has occasionally been regarded as presumably by permission of the landowner;⁸² but whether such user is permissive would seem properly to be determinable with reference to all the circumstances of the case, more particularly the character and location of the way or place of passage. The mere fact that the owner of the land also passes in the same place or along the same line would not seem in itself sufficient

81. *Brandon v. Umpqua Lumber & Timber Co.*, 26 Cal. App. 96, 146 Pac. 46; *Fightmaster v. Taylor*, 147 Ky. 469, 144 S. W. 381; *Louisville & N. R. Co. v. Cornelius*, 165 Ky. 132, 176 S. W. 964; *Flagg v. Phillips*, 201 Mass. 216, 87 N. E. 598; *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104; *Howard v. Wright*, 38 Nev. 25, 143 Pac. 1184; *Flora v. Carbean*, 38 N. Y. 111; *Yeager v. Woodruff*, 17 Utah, 361, 53 Pac. 1045; *Witt v. Creasey*, 117 Va. 872, 86 S. E. 128; *Schulenberger v. Johnstone*, 64 Wash. 202, 35 L. R. A. (N. S.) 941, 116 Pac. 843.

That one who purchases land mistakenly supposes that his vendor's user of adjoining land belonging to another was not permissive, has been held not in itself to make the vendee's user of the latter land adverse. *Luce v. Carley*, 24 Wend. (N. Y.) 451. 35 Am. Dec. 637; *Yeager v. Woodruff*, 17 Utah, 361, 53 Pac. 1045. But see *Conaway v. Toogood*, 172

Cal. 706, 158 Pac. 200. In *Toney v. Knapp*, 142 Mich. 652, 106 N. W. 552, it was held that after a license of passage was revoked by the licensor's conveyance of his land, the subsequent user of the land for passage by the licensee and persons claiming under him was adverse. See the discussion in Editorial note, 5 Mich. Law Rev. 545.

82. *Barker v. Mobile Electric Co.*, 173 Ala. 28, 55 So. 364; *Manion v. Creigh*, 37 Conn. 464; *Gascho v. Lennert*, 176 Ind. 677, 97 N. E. 6; *Hall v. McLeod*, 2 Metc. (Ky.) 98; *Anthony v. Kennard Bldg. Co.*, 188 Mo. 704, 87 S. W. 921; *Howard v. Wright*, 38 Nev. 25, 143 Pac. 1184; *Peters v. Robertson*, 73 Ore. 263, 144 Pac. 568; *Sassman v. Collins*, 53 Tex. Civ. App. 71, 115 S. W. 337; *Harkness v. Woodmansee*, 7 Utah, 227, 26 Pac. 291. So it has been said that when a space is designedly left open by the owner for his own convenience the presumption ordinarily is that the user

to show that the user is permissive.⁸³ There are several decisions to the effect that if two adjoining proprietors establish a way, for their mutual accommodation, upon the division line between the two properties, and each uses, for the purpose of passage, the part of the way on the other's land as well as that on his own, such user is to be presumed to be adverse.⁸⁴

That the owner of the dominant tenement joined with the owner of the servient tenement in repairing the appliances by means of which the user was exercised does not show that the user is permissive and not adverse.^{84a}

§ 520. Necessity of claim of right. It is frequently stated that, in order that one may acquire a right by prescription, the user must be under claim of right.⁸⁵ Sometimes this requirement is stated as ad-

of such space by another even for his own purpose is permissive. *Gascho v. Lennert*, 176, Ind. 677, 97 N. E. 6.

83. See *Bennett v. Biddle*, 150 Pa. St. 420, 24 Atl. 738.

84. *Thompson v. Easley*, 87 Ga. 320, 13 S. E. 511; *Clark v. Henckel*,—(Md.)—, 26 Atl. 1039; *Dowling v. Hennings*, 20 Md. 179, 83 Am. Dec. 545; *Barnes v. Haynes*, 13 Gray (Mass.) 188, 74 Am. Dec. 629; *Jensen v. Showalter*, 79 Neb. 544, 113 N. W. 202; *Nicholls v. Wentworth*, 100 N. Y. 455, 3 N. E. 482; *Craven v. Rose*, 3 S. C. 72. See *Scott v. Dishough*, 83 Ark. 369, 103 S. W. 1153. But see *Wilkinson v. Hutzell*, 142 Mich. 674, 106 N. W. 207.

84a. *Watkins v. Peck*, 13 N. H. 360; *Shaughnessey v. Leary*, 162 Mass. 108, 38 N. E. 197.

85. *Union Mill & Mining Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14371; *Trump v. McDonnell*,

120 Ala. 200, 24 So. 353; *Barbour v. Pierce*, 42 Cal. 657; *Brandon v. Umpqua Lumber & Timber Co.*, 26 Cal. App. 96, 146 Pac. 46; *Clarke v. Clarke*, 133 Cal. 667, 66 Pac. 10; *Medlock v. Owen*, 105 Ark. 460, 151 S. W. 995; *Brossard v. Morgan*, 7 Idaho, 215, 61 Pac. 1031; *Dexter v. Tree*, 117 Ill. 532, 6 N. E. 506; *Hill v. Hagaman*, 84 Ind. 287; *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. 109; *Bowman v. Wickliffe*, 15 B. Mon. (Ky.) 84; *Rollins v. Blackden*, 112 Me. 459, Ann. Cas. 1917A 875, 92 Atl. 521; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Brace v. Yale*, 10 Allen (Mass.) 441; *Bigelow Carpet Co. v. Wiggin*, 239 Mass. 542, 95 N. E. 938; *Wallace v. Fletcher*, 30 N. H. 434; *Burnham v. McQuesten*, 48 N. H. 446; *Cobb v. Davenport*, 32 N. J. L. 369; *Felton v. Simpson*, 11 Ired. L. (33 N. C.) 84; *Louisville & N. R. Co. v. Hays*, 11 Lea,

ditional to that of the adverseness of the user, and sometimes as explanatory of what the requirement of adverseness means. In whichever way it be asserted, the recognition of such a requirement, like that of claim of title as a prerequisite to the running of the statute of limitations in favor of one wrongfully in possession of land, involves considerable difficulty. It appears to be conceded that this requirement of claim of right does not involve any necessity of a verbal assertion, during the period of user, of a right to exercise such user, and that it is sufficient if an assertion of such a claim can be inferred from the circumstances of the user itself.⁸⁶ And so it has been stated that, in the absence of evidence to the contrary, the user of another's land without interruption for the prescriptive period will be presumed to have been under claim of right.⁸⁷ This requirement of claim of

(Tenn.) 382, 47 Am. Rep. 291; *Dodge v. Stacy*, 39 Vt. 558; *Wilder v. Wheeldon*, 56 Vt. 344; *Kent v. Dobyns*, 112 Va. 586, 72 S. E. 139; *Bisbee v. Lacky*, 97 Wash. 447, 166 Pac. 638. In *Boyd v. Morris*, 32 Ky. L. Rep. 642, 106 S. W. 867, it is said to be immaterial whether the adverse use of a passway over the land of another is claimed as a matter of right or merely as a matter of convenience.

86. *Deerfield v. Connecticut R. R.*, 144 Mass. 325, 11 N. E. 105; *Smith v. Putnam*, 62 N. H. 369; *Hammond v. Zehner*, 21 N. Y. 118; *Townsend v. Bissell*, 4 Hun (N. Y.) 297; *Snowden v. Bell*, 159 N. C. 497, 75 S. E. 721; *Pavey v. Vance*, 56 Ohio St. 162, 46 N. E. 898; *Hall v. Austin*, 20 Tex. Civ. App. 59, 48 S. W. 53; *Barber v. Bailey*, 86 Vt. 219, 44 L. R. A. (N. S.) 98, 84 Atl. 608; *Dodge v. Stacy*, 39 Vt. 558. An

Iowa statute provides that user shall not be evidence of a claim of right, and that express notice of the claim must be given. See *Gates v. Colax Northern R. Co.*, 177 Iowa, 690, 159 N. W. 456; *McBride v. Bair*, 134 Iowa, 611, 112 N. W. 169.

87. *Smith v. Ponsford*, 184 Ind. 53, 110 N. E. 194; *Mitchell v. Pratt*, 177 Ky. 438, 197 S. W. 961; *Blake v. Everett*, 1 Allen (Mass.) 248; *Miller v. Garlock*, 8 Barb. (N. Y.) 153; *Pavey v. Vance*, 56 Ohio St. 162, 46 N. E. 898; *Barber v. Bailey*, 86 Vt. 219, 44 L. R. A. (N. S.) 98, 84 Atl. 608; *Poronto v. Sinnott*, 89 Vt. 479, 95 Atl. 647; *Muncy v. Updike*, 119 Va. 636, 89 S. E. 884; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632; *Wendler v. Woodward*, 93 Wash. 684, 161 Pac. 1043.

But the burden of proof, in the sense of risk of non persua-

right thus appears to resolve itself into a requirement merely of a user which will justify an inference or presumption of such a claim, and the only user which can possibly satisfy this requirement is obviously a user "as of right," that is, a user unaccompanied by any recognition of a right in the landowner to stop such user. It would be more satisfactory if the courts, instead of asserting that the user must be under claim of right, would assert merely that it must be "as of right,"⁸⁸ or would be satisfied with the statement that it must be adverse, which apparently means the same.

As it is not necessary that the person exercising the wrongful use verbally assert a claim of right to make such use, so, it is conceived, it is not necessary that he believe himself to have such a right, that is, a mental claim of right is no more necessary than a verbal claim of right. It is recognized that good faith is not necessary to entitle one to the benefit of the statute of limitations,⁸⁹ and there is no reason for regarding it as necessary for the application of the doctrine of prescription.⁹⁰

sion of the jury, is necessarily upon the person asserting the prescriptive right. *Shea v. Gavitt*, 89 Conn. 359, L. R. A. 1916A 689, 94 Atl. 360; *Rollins v. Blackden*, 112 Me. 459, Ann. Cas. 1917A 875, 92 Atl. 521; *Smith v. Sedalia*, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907; *St. Martin v. Skamania Boom Co.*, 79 Wash. 393, 140 Pac. 355; *District of Columbia v. Robinson*, 180 U. S. 92, 45 L. Ed. 440 (*dictum*).

88. As in *Polly v. McCall*, 37 Ala. 20; *Stevens v. Dennett*, 51 N. H. 324; *Worrall v. Rhoads*, 2 Whart. (Pa.) 427; *Webster v. Lowell*, 142 Mass. 324, 8 N. E. 54.

In the English Prescription

Act, the two expressions "as of right" and "claiming right" are used, and they are regarded as similar in meaning. *Tickle v. Brown*, 4 Ad. & El. 369, and "as of right," it has been decided, means as a person rightfully entitled would have enjoyed the user. *Bright v. Walker*, 1 Crompt. Mees. & Ros. 211, while the user is not "as of right" if permissive. *International Tea Stores v. Hobbs* (1903) 2 Ch. 165; *Gardner v. Hodgson's Kingston Brewery* (1903) App. Cas. 229.

89. *Ante*, § 504 note 72.

90. The decision in *Wilder v. Wheeldon*, 56 Vt. 344, that the claim of a right of way by prescription was defeated by

§ 521. **Necessity of notice to landowner.** It has been quite frequently stated that the adverse user must be known to the owner of the land in order that the doctrine of prescription may apply as against him.⁹¹ But it appears that actual knowledge on his part need not be shown, it being sufficient that the user is so visible and notorious that, in the exercise of due diligence, he would learn thereof.⁹² Otherwise, as has been remarked "a non resident, or a landowner unusually inattentive to his property and business might escape the operation of the rule of prescription under circumstances which would expose to it a resident or landowner who kept well informed respecting his property,

evidence that the claimant "never entertained any claim of right to use the way," is, it is submitted, erroneous.

91. *Stewart v. White*, 128 Ala. 202, 55 L. R. A. 211, 30 So. 526; *American Co. v. Bradford*, 27 Cal. 360; *Wills v. Babb*, 222 Ill. 95, 6 L. R. A. (N. S.) 136, 78 N. E. 42; *Peterson v. McCullough*, 50 Ind. 35; *Zigefoose, v. Zigefoose*, 69 Iowa, 391, 28 N. W. 654; *George T. Stagg Co. v. Frankfort Modes Glass Works*, 175 Ky. 330, 194 S. W. 333; *Barry v. Edlavitch*, 84 Md. 95, 33 L. R. A. 294, 35 Atl. 170; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Holman v. Richardson*, 112 Miss. 216, 72 So. 921; *Gross v. Jones*, 85 Neb. 77, 122 N. W. 681; *Wallace v. Fletcher*, 30 N. H. 434; *Cobb v. Davenport*, 32 N. J. L. 369; *Woolfridge v. Coughlin*, 46 W. Va. 345, 33 S. E. 233.

92. *Jesse French Piano & Organ Co. v. Forbes*, 129 Ala. 471, 87 Am. St. Rep. 71, 29 So. 683; *Abbott v. Pond*, 142 Cal. 393, 76 Pac. 60; *Lockwood*

v. Lawrence, 77 Me. 297, 52 Am. Rep. 73; *Deerfield v. Connecticut R. R.*, 144 Mass. 325, 11 N. E. 105; *O'Brien v. Goodrich*, 177 Mass. 32, 58 N. E. 151; *McCracken v. MacNeal*, 169 Mich. 414, 135 N. W. 461; *Holman v. Richardson*, 115 Miss. 169, L. R. A. 1917F 942, 76 So. 136; *Wells v. Parker*, 74 N. H. 193, 66 Atl. 121; *Carlisle v. Hooper*, 21 N. J. Eq. 576; *Treadwell v. Inslee*, 120 N. Y. 458, 24 N. E. 651; *Salem Mills Co. v. Lord*, 42 Ore. 82, 69 Pac. 1033, 70 Pac. 832; *Reimer v. Stuber*, 20 Pa. St. 458, 59 Am. Dec. 744; *Hughesville Water Co. v. Person*, 182 Pa. St. 450, 38 Atl. 584; *Perrin v. Garfield*, 37 Vt. 304; *Arbuckle v. Ward*, 29 Vt. 43; *Davison v. Columbia Lodge No. 8, K. P.*, 90 Wash. 461, 156 Pac. 383; *Dalton v. Angus*, 6 App. Cas. 740 at 801, per Selborne, L. C.; *Union Light-erage Co. v. London Graving Dock Co.*, (1901) 2 Ch. 300, (1902) 2 Ch. 557. Compare *Cheda v. Southern Pac. Co.*, 22 Cal. App. 373, 134 Pac. 717.

and thus diligence would be punished and laches rewarded.'⁹³

The owner of the land, having notice, express or implied, of the user, may properly, it would seem, be charged with notice of the adverse character thereof, unless the circumstances are such as to raise a presumption that it is permissive.⁹⁴ It has, however, been occasionally stated in general terms that the landowner must have notice of the adverse character of the user.⁹⁵

§ 522. **Necessity of exclusive user.** It is sometimes said that, in order to acquire a right of user by prescription, the user during the prescriptive must be exclusive,⁹⁶ but this appears to be so in a very limited sense, if at all.⁹⁷ For instance, the user of another's

93. 93 Am. St. Rep. at p 722, note to Oregon, etc., Ditch Co. v. Allen Ditch Co. That if the user is known, it is immaterial whether it is open or notorious, see Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. 570.

94. See Trustees of Cincinnati Southern R. Co. v. Slaughter, 31 Ky. L. Rep. 913, 104 S. W. 291; Wells v. Parker, 74 N. H. 193, 66 Atl. 121; Barber v. Bailey, 86 Vt. 219, 44 L. R. A. (N. S.) 98, 84 Atl. 608.

95. Menter v. First Baptist Church, 159 Mich. 21, 123 N. W. 585; Brandon v. Umpqua Lumber & Timber Co., 26 Cal. App. 96, 146 Pac. 46; Callan v. Walters, —Tex. Civ. App.—, 190 S. W. 829.

In Snowden v. Bell, 159 N. C. 497, 75 S. E. 721, it is said that the user must be such as to give notice of the claim of right. In Barber v. Bailey, 86 Vt. 219, 44 L. R. A. (N. S.) 98, 84 Atl. 608; Poronto v. Sinnott,

89 Vt. 479, 95 Atl. 647, it is said that the fact that the use is notorious raises a presumption that it is under claim of right.

96. Turner v. Selectmen of Hebron, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951; Waters v. Snouffer, 88 Md. 391, 41 Atl. 785; Day v. Allender, 22 Md. 511; Miller v. Gariock, 8 Barb. (N. Y.) 153; Reid v. Garnett, 101 Va. 47, 43 S. E. 182. See 22 Am. & Eng. Encyc. Law (2nd Ed.) 1203.

97. It has been said that "it is not necessary that the one who claims the easement should be the only one who can or may enjoy that or a similar right over the same land, but that his right should not depend for its enjoyment upon a similar right in others, and that he may exercise it under some claim existing in his favor, independent of all others." Washburn, Ease-

land for purposes of passage, if continued for the prescriptive period, may operate to create an easement of a right of way, although the owner of the land also passes upon the same line⁹⁸ or allows others to pass thereon,⁹⁹ nor is it material, in this regard, that an exactly similar easement of passage in favor of another is already existent,¹ or is in course of establishment.² The user of another's land merely as one of the public does not, it is true, although continued for the prescriptive period, ordinarily give an individual right of user,³ but this is either because the circumstances are such as to indicate that the user was permissive,⁴ or because, assuming the user to be adverse, there is then an adverse user by the public, and the user results in the acquisition of a right by the public⁵ and not by an

ments (4th Ed.) 164. See to the same general effect, *McKenzie v. Elliott*, 134 Ill. 156, 24 N. E. 965; *Schmidt v. Brown*, 226 Ill. 590, 80 N. E. 1071; *Reid v. Garnett*, 101 Va. 47, 43 S. E. 182; *Poronto v. Sinnott*, 89 Vt. 479, 95 Atl. 647. In *Davis v. Brigham*, 29 Me. 391, it is said that "the word exclusive in this connection can only mean that the enjoyment of the easement as claimed, whether it be a limited or more general enjoyment, should exclude others from a participation of it."

98. *Bennett v. Biddle*, 150 Pa. St. 420, 24 Atl. 738; *Schmidt v. Brown*, 226 Ill. 590, 80 N. E. 1071.

99. *McKenzie v. Elliott*, 134 Ill. 156, 24 N. E. 965; *Thompson v. Bowes*, 115 Me. 6, 97 Atl. 1; *Cox v. Forest*, 60 Md. 74; *Sanford v. Kern*, 223 Mo. 616, 122 S. W. 1051; *Nash v. Peden*, 1 Speers, 22. So in the case of an irrigation ditch, which was used

by others. *Silva v. Hawn*, 10 Cal. App. 544, 102 Pac. 952.

1. *Webster v. Lowell*, 142 Mass. 324, 8 N. E. 54; *Ballard v. Demmon*, 156 Mass. 449, 31 N. E. 635. So it has been decided that the fact that one person has a right of flowage in certain land does not preclude another from acquiring by prescription a right of flowage therein. *Davis v. Brigham*, 29 Me. 391.

2. *Kent v. Dobyns*, 112 Va. 586, 72 S. E. 139.

3. *Merwin v. Wheeler*, 41 Conn. 14; *Stevens v. Dennett*, 51 N. H. 324; *Day v. Allender*, 22 Md. 511; *Prince v. Welbourn*, 1 Rich. L. (S. C.) 58; *Rowland v. Wolfe*, 1 Bailey L. (S. C.) 56; *Reid v. Garnett*, 101 Va. 47, 43 S. E. 182; *Sassman v. Collins*, 53 Tex. Civ. App. 71, 115 S. W. 337; *Muncy v. Updyke*, 119 Va. 636, 89 S. E. 884.

4. *Ante*, § 519, note 79.

5. *Post*, § 533.

individual. Likewise, although, in order to acquire a prescriptive right to fish in navigable waters, to the exclusion of the public, one's fishing therein during the prescriptive period must be exclusive of the public, in the sense that the public must be prevented by him from fishing at that place,⁶ this is for the reason that otherwise his fishing would be merely the exercise of a right appertaining to him as one of the public.

§ 523. Necessity of peaceable user. The user must it is said, in order to ripen into a prescriptive right, be peaceable.⁷ Just what this means does not clearly appear,⁸ but it may be presumed to mean that the user is ineffectual if its exercise involves the forcible overcoming of resistance interposed by the landowner or forcible removal of physical obstacles interposed by the latter. The requirement finds its justification, it would seem, in the consideration of the impropriety of allowing one to acquire a right by the continuous repetition of forcible acts of aggression, thus placing a premium upon the commission of such acts, and also in the fact that the necessity of resorting to force in order to accomplish the user clearly demonstrates a lack of acquiescence on the part of the landowner.

§ 524. Necessity of right of action. In order that a right of using another's land be acquired by lapse of time, the user must have been such as to give rise to a

6. *Chalker v. Dickinson*, 1 Conn. 384, 6 Am. Dec. 250; *Day v. Day*, 4 Md. 262; *Lakeman v. Burnham*, 7 Gray (Mass.) 437; *Hume v. Rogue River Packing Co.*, 51 Ore. 237, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865; *Sloan v. Biemiller*, 34 Ohio St. 492.

7. *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U.

S.) 538; *Cave v. Crafts*, 53 Cal. 135; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Rhodes v. Whitehead*, 27 Tex. 304.

8. See *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605, 622. In *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113, it is said that peaceable in this connection means uninterrupted.

right of action on the part of the owner, since, if he cannot legally protect himself against the user, no inference can be drawn from his failure to do so.⁹ Provided a right of action exists on account of the user of the land, the fact that there is, by such user, merely an infringement of the right of property, and no actual damage to the land, does not prevent the running of the prescriptive period.¹⁰ And so it has been held that one may acquire by prescription, as against a lower riparian owner, the right to divert water from the stream, although such a lower owner has, during the prescrip-

9. *Stouts Mountain Coal & Coke Co. v. Ballard*, 195 Ala. 283, 70 So. 172; *Miller & Lux v. Enterprise Canal & Land Co.*, 169 Cal. 415, 147 Pac. 567; *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85; *Mitchell v. City of Rome*, 49 Ga. 19; *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890; *Roe v. Howard County*, 75 Neb. 448, 5 L. R. A. N. S. 831, 106 N. W. 587; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Emery v. Raleigh & G. R. Co.*, 102 N. C. 210, 11 Am. St. Rep. 727, 9 S. E. 139; *Wimer v. Simmons*, 27 Ore. 1, 50 Am. St. Rep. 685, 39 Pac. 6; *Williams v. Haile Gold Min. Co.*, 85 S. C. 1, 7, 66 S. E. 117, 1057; *St. Martin v. Skamania Boom Co.*, 79 Wash. 393, 140 Pac. 355; *Eells v. Chesapeake & O. Ry. Co.*, 49 W. Va. 65, 87 Am. St. Rep. 737, 38 S. E. 479.

So it has been held that prescription commenced to run in favor of a right to overflow another's land, not upon the erection of the appliance or struc-

ture, which ultimately caused the overflow, but only when the overflow began. *Galbreath v. Hopkins*, 159 Cal. 297, 113 Pac. 174; *Dutton v. Stoughton*, 79 Vt. 361, 65 Atl. 91; *Hume v. Grand Trunk Western R. Co.*, 192 Mich. 225, 158 N. W. 840.

10. *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; *Mott v. Ewing*, 90 Cal. 231, 27 Pac. 194; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241; *Dana v. Valentine*, 5 Metc. (Mass.) 8; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Mally v. Weidensteiner*, 88 Wash. 398, 153 Pac. 342.

In Maine there is, in the absence of actual damage, no right of action on account of the flowage of land, the common law right of action in this regard being superseded by the flowage statute. *Hathorne v. Stinson*, 12 Me. 183, 28 Am. Dec. 167; *Seidensparger v. Spear*, 17 Me. 123, 35 Am. Dec. 234. And there a perceptible amount of damage

tive period, no need of a quantity of water greater than that which still remains in the stream.¹¹ That there is sufficient water for all would seem to have its chief significance as tending to exclude any inference of notice to the riparian owner of the adverse user of the water.¹²

The question whether a prescriptive right can be acquired as against a reversioner or remainderman would ordinarily depend upon whether the user is such as to give him a right of action in spite of the fact that the

seems to be regarded as necessary even in other cases. *Crosby v. Bessey*, 49 Me. 539, 77 Am. Dec. 271; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763.

11. *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Messinger's Appeal*, 109 Pa. 285; *Cape v. Thompson*, 21 Tex. Civ. App. 681. But occasionally a contrary view appears to have been applied as regards prescription against a riparian owner. See *Anaheim Water Co. v. Semi Tropic Water Co.*, 64 Cal. 185, 30 Pac. 623; *Meng v. Coffey*, 67 Neb. 500, 60 L. R. A. 713, 108 Am. St. Rep. 697, 93 N. W. 713; *Redwater Land & Canal Co. v. Jones*, 27 S. D. 194, 130 N. W. 85; *Martin v. Burr*—Tex. Civ. App.—, 171 S. W. 1044. See the query in this regard in *Wiel Water Rights in the Western States* (2nd Ed.) 380. A like view has been asserted as regards a right to take water from another's spring, to the effect that it was not established by the long continued taking of the water, if the owner of the spring had all the water

which he needed. *Jobling v. Tuttle*, 75 Kan. 351, 9 L. R. A. (N. S.) 960, 89 Pac. 699.

As against a prior appropriator, as distinguished from a riparian owner, prescription runs only when the prescriptive claimant so uses the water as actually to deprive the prior appropriator of some part of the water to which he is entitled under his appropriation and which is needed by him. *Egan v. Estrada*, 6 Ariz. 248, 56 Pac. 721; *Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. 395; *Brossard v. Morgan*, 7 Idaho, 215, 61 Pac. 1031; *Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111; *Smith v. Duff*, 39 Mont. 102, 102 Pac. 381; *Ison v. Sturgill*, 57 Ore. 109, 109 Pac. 579, 110 Pac. 535; *Henderson v. Gaforth*, 34 S. D. 441, 148 N. W. 1045; *Miller v. Wheeler*, 54 Wash. 429, 103 Pac. 641; *Sander v. Bull*, 76 Wash. 1, 135 Pac. 489.

12. So it is said in *Watts v. Spencer*, 51 Ore. 262, 94 Pac. 39 that there is no adverse user until the owner is deprived of the benefits of the use of the water in such a substantial manner as to know that his right is invaded.

possession is in another.¹³ In case he has a right of action, and fails to exercise it,¹⁴ the doctrine of prescription is, it seems, applicable as against him as if he had an estate in possession,¹⁵ unless some special method is provided by statute to prevent the acquisition of such a right by prescription, and he adopts it.¹⁶

In no case, it seems, does the existence of an outstanding particular estate prevent the application of the doctrine as against the reversioner or remainderman, if such particular estate was created after the prescriptive period had commenced to run.¹⁷ And the general doctrine has been regarded as applying in spite of an outstanding tenancy from year to year, it being said that the owner of the fee "had the right to bring suit every year."¹⁸ But as to this last case there might be some question, if the tenancy from year to year was created before the commencement of the prescriptive period, and if the user were not such as to give a right of action to one who has a reversion upon a tenancy for years. The owner of the fee should not be under an obligation to bring suit if this could be done only by terminating the tenancy.¹⁹

If one has a right of user by grant, express or implied, his exercise of such user is to be imputed to such grant,²⁰⁻²¹ and being rightful, no prescriptive right can be acquired thereby. And so one who has a way of

13. See *Phillips v. Phillips*, 186 Ala. 545, 65 So. 49; *Reimer v. Stuber*, 20 Pa. St. 458; *Cunningham v. Dorsey*, 3 W. Va. 293. *Pentland v. Keep*, 41 Wis. 490.

14. The extent to which a reversioner has such a right is discussed in 2 *Tiffany, Landlord & Tenant*, § 353.

15. See *Gale, Easements* (8th Ed.) 215.

16. As in Massachusetts, in the case of a right of way. See *Mass. Rev. Laws* p. 1260; *Ballard v. Demmon*, 156 Mass.

449, 31 N. E. 635.

17. *Cross v. Lewis*, 2 Barn. & Cr. 686; *Ballard v. Demmon*, 156 Mass. 449, 31 N. E. 635; *Ward v. Warren*, 82 N. Y. 265; *Stothart v. Hilliard*, 19 Ont. 542.

18. *Reimer v. Stuber*, 20 Pa. St. 458.

19. See *ante*, § 506, note 99.

20-21. *Atkins v. Boardman*, 2 Metc. (Mass.) 457, 37 Am. Dec. 100; *Smith v. Hope Min. Co.*, 18 Mont. 432, 45 Pac. 632; *Smith v. Wiggin*, 52 N. H. 112. See *Horn v. Miller*, 142 Pa. St. 557.

necessity, on the theory of implied grant,²² cannot acquire, by the user of the way for the prescriptive period before the necessity ceases, a right to the way after the necessity ceases.²³ But even though one has a valid grant of a perpetual right of user in particular land, he may, by a user of the same land in a manner different from that named in the grant, or to a greater extent, acquire an easement by prescription in addition to that named in the grant,²⁴ provided the different or more extended user is known to the landowner.²⁵

The user of a public highway by an individual cannot be effective as against the owner of the land on which the highway is located, so as to create a prescriptive right to a way in an individual using the highway, since the owner of the land cannot, while it is used as a highway, prevent passage thereon by such individual.²⁶ But such user may become adverse upon the abandonment of the highway.²⁷

§ 525. Continuity of user. The user of the land, in order to create a right by prescription, must be continuous for the prescriptive period.²⁸ This requirement

22. *Ante*, § 363(c).

23. *Ann Arbor Fruit & Vinegar Co. v. Ann Arbor R. R. Co.*, 136 Mich. 599, 66 L. R. A. 431, 99 N. W. 869; *Rater v. Shuttlefield*, 146 Iowa, 512, 44 L. R. A. (N. S.) 101, 125 N. W. 235; *Sassman v. Collins*, 53 Tex. Civ. App. 71, 115 S. W. 337. Expressions to the contrary in *Johnson v. Allen*, 33 Ky. L. Rep. 621, 110 S. W. 851, are, it is submitted, erroneous.

24. *Atkins v. Bordman*, 20 Pick. (Mass.) 291; *Hales v. Atlantic Coast Line R. Co.*, 172 N. C. 104, 90 S. E. 11; *Wheatley v. Chrisman*, 24 Pa. St. 298, 64 Am. Dec. 657; *Gehman v. Erdman*,

105 Pa. St. 371; *Ruttan v. Winans*, 5 Up. Can. C. P. 379.

25. *Gross v. Jones*, 85 Neb. 77, 122 N. W. 681.

26. *Webster v. Lowell*, 142 Mass. 324, 8 N. E. 54; *Wheeler v. Clark*, 58 N. Y. 267; *Whaley v. Stevens*, 27 S. C. 549, 4 S. E. 145.

27. *Black v. O'Hara*, 54 Conn. 17, 5 Atl. 598.

28. *Johnson v. Lewis*, 47 Ark. 66, 2 S. W. 329; *Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453; *Peters v. Little*, 95 Ga. 161, 22 S. E. 44; *Bodfish v. Bodfish*, 105 Mass. 317; *Dummer v. U. S. Gypsum Co.*, 153 Mich. 622, 117 N. W. 357; *Bonelli v. Blakemore*,

of continuity does not however involve any necessity that the user be exercised constantly and without intermission,²⁹ and it is sufficiently continuous, it would seem, if it is exercised with such frequency and constancy as to affect the landowner with notice that it is being exercised.³⁰ Occasionally it has been said that the user is sufficiently continuous if use is made of the land whenever there is any necessity for such use on the part of the claimant.³¹

A right of way may be acquired by prescription although the user was exercised at infrequent intervals,³² and a prescriptive right to divert water from a natural watercourse may be acquired although the diversion was not constant.³³ Likewise a right to flood another's land to a certain extent may exist by prescription although the flowage is at times diminished or interrupted by

66 Miss. 136, 14 Am. St. Rep. 550, 5 So. 228; *Nicholls v. Wentworth*, 100 N. Y. 455. 3 N. E. 482; *Geer v. Durham Water Co.*, 127 N. C. 349, 37 S. E. 474; *Watt v. Trapp*, 2 Rich. Law (S. Car.) 136; *Ferrell v. Ferrell*, 1 Baxt. (Tenn.) 329; *Texas Western Ry. Co. v. Wilson*, 83 Tex. 153, 18 S. W. 325; *Plimpton v. Converse*, 42 Vt. 712.

29. See *Kamer v. Bryant*, 103 Ky. 723. 46 S. W. 14; *Dana v. Valentine*, 5 Metc. (Mass.) 8.

30. *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Dummer v. U. S. Gypsum Co.*, 153 Mich. 622. 117 N. W. 317; *Gilford v. Winnipiseogee Lake Co.*, 52 N. H. 262; *Bodfish v. Bodfish*, 105 Mass. 317; *Hollins v. Verney*, 13 Q. B. D. 304; *Gale, Easements* (8th Ed.) 186; editorial note in 11 *Columbia Law Rev.* at p. 674.

31. *Hesperia Land & Water Co. v. Rogers*, 83 Cal. 10, 17 Am.

St. Rep. 209, 23 Pac. 196; *Myers v. Berven*, 166 Cal. 484, 137 Pac. 260; *Cox v. Forrest*, 60 Md. 74; *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503. 50 N. W. 1001; *Dummer v. United States Gypsum Co.*, 153 Mich. 622, 117 N. W. 317; *Swan v. Munch*, 65 Minn. 500, 35 L. R. A. 743, 60 Am. St. Rep. 491, 67 N. W. 1022; *Lake Co. v. Young*, 40 N. H. 420; *Jarman v. Freeman*, 80 N. J. Eq. 81. 83 Atl. 372; *Garrett v. Jackson*, 20 Pa. St. 331; *Messinger's Appeal*, 109 Pa. St. 285. 4 Atl. 162; *Brand v. Lienkaemper*, 72 Wash. 547, 130 Pac. 1147.

32. *Cox v. Forrest*, 60 Md. 74; *Bodfish v. Bodfish*, 105 Mass. 317; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

33. *Lane v. Miller*, 27 Ind. 534; *McDougal v. Lane*, 39 Ore. 212; 64 Pac. 864; *Messinger's Appeal*, 109 Pa. 285. 4 Atl. 162; *Jordan v. Lang*, 22 S. C. 159.

reason of a lack of water, a need of repairing the dam, or other temporary condition.³⁴

— **Diversity of user.** A user of another's land in one mode for part of the prescriptive period can not be added to a user in another mode for the balance of the period, in order to make up the user necessary for the creation of a prescriptive right. For instance, if the course and place of termination of a drain are changed, the user cannot be regarded as being the same user before and after the change, for the purpose of conferring a prescriptive right.³⁵ So it has been decided that an elevated railway structure substituted for another structure of a similar but less burdensome character could not be regarded as involving the same infringement of an abutting owner's rights.³⁶ And the

It has been said that there must at least be an annual flowage of land in order to give a prescriptive right. *Turner v. Hart*, 71 Mich. 128, 15 Am St. Rep. 243, 38 N. W. 890; *Gleason v. Tuttle*, 46 Me. 288. See *Wood v. Kelley*, 30 Me. 47; *Crosby v. Bessey*, 49 Me. 539.

34. *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503, 50 N. W. 1001; *Reason v. Peters*, 148 Mich. 532, 112 N. W. 117; *Swan v. Munch*, 65 Minn. 500, 60 Am. St. Rep. 491, 67 N. W. 1022; *Alcorn v. Sadler*, 71 Miss. 634, 42 Am. Rep. 484, 14 So. 444; *Winnepiseogee Lake Co. v. Young*, 40 N. H. 420; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Ely v. State*, 199 N. Y. 213, 92 N. E. 629; *Gerenger v. Summers*, 24 N. C. 229; *Haag v. De Lorme*, 30 Wis. 591.

35. *Cotton v. Pocasset Mfg. Co.*, 13 Metc. (Mass.) 429; *Totel v. Bonnefoy*, 123 Ill. 653, 5 Am.

St. Rep. 570, 14 N. E. 687. But it has been decided that there is no interruption of the user of water from a stream on another's land by reason of a change, of not more than 200 yards, as regards the point on the stream at which the water is taken. *Malley v. Weidensteiner*, 88 Wash. 398, 153 Pac. 342. This would seem questionable, since the change would involve the location of the aqueduct along an entirely different line. The authorities cited concern merely a right to divert water based on prior appropriation, not on prescription.

36. *American Bank-Note Co. v. New York El. R. Co.*, 129 N. Y. 252, 29 N. E. 302. But a change in the motive power used on the elevated railroad and an increase in the length of the trains was held to be immaterial. *Bremer v. Manhattan Ry. Co.*, 191 N. Y. 333, 84 N. E. 59.

use of an additional track for "drilling" cars was held to involve a user different from that made of the tracks previously existing.³⁷ On the other hand a change in the location of a dam by which land of another is overflowed has been held not to involve a change of user, if the same land is overflowed to the same extent,³⁸ and a change in the mode of utilizing the water which is diverted from a stream has likewise been regarded as immaterial.³⁹ Likewise, as previously indicated,⁴⁰ a change of user does not occur merely because the extent of the flowage of land varies from time to time.

It is generally agreed, at least in this country, that to acquire a right of way by prescription, the passage during the prescriptive period must have been substantially along one line of travel,⁴¹ though it is oc-

37. *Pennsylvania R. Co. v. Thompson*, 45 N. J. Eq. 870, 14 Atl. 897, 19 Atl. 622.

38. *Stackpole v. Curtis*, 32 Me. 383. See *Emery v. Raleigh & G. R. Co.*, 102 N. C. 209, 11 Am. St. Rep. 727, 9 S. E. 129. Compare *Branch v. Doane*, 17 Conn. 402.

39. *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Gallaher v. Montecito Valley Water Co.*, 101 Cal. 242, 35 Pac. 770; *Belknap v. Trimble*, 3 Paige (N. Y.) 577; *Smith v. Adams*, 6 Paige (N. Y.) 435; *Whitehan v. Brown*, 80 Kan. 297, 102 Pac. 783; 3 Kent's Comm. 443.

40. *Ante*, this section, note 34. And it has been held that the right, by prescription, to maintain a dam at its original height is not affected by the fact that the flash boards were sometimes carried away by water and ice, or were removed to prevent them from being carried away, or for other reasons. *Tosini v. Cas-*

cade Milling Co., 22 S. D. 377, 117 N. W. 1037. See also, as to flash boards, *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Hall v. Augsbury*, 46 N. Y. 622; *Ely v. State*, 199 N. Y. 213, 92 N. E. 629.

41. *Johnson v. Lewis*, 47 Ark. 66, 2 S. W. 329; *Peters v. Little*, 95 Ga. 151, 22 S. E. 44; *Poole v. Bacon*, 238 Ill. 305, 87 N. E. 320; *Bowman v. Wickliffe*, 15 B. Mon. (Ky.) 99; *Hoyt v. Kennedy*, 170 Mass. 54, 48 N. E. 1073; *Garnett v. Slater*, 56 Mo. App. 207; *Holmes v. Seeley*, 19 Wend. (N. Y.) 507; *Bushey v. Santiff*, 86 Hun (N. Y.) 384, 33 N. Y. Supp. 473; *Nellis v. Countryman*, 153 N. Y. App. Div. 500, 138 N. Y. Supp. 246; *Arnold v. Cornman*, 50 Pa. St. 361; *Turnbull v. Rivers*, 3 McCord, Law (S. C.) 131, 15 Am. Dec. 622; *Sassman v. Collins*, 53 Tex. Civ. App. 71, 115 S. W. 337; *Lund v. Wilcox*, 34 Utah, 205, 97 Pac. 33; *Plimpton v.*

asionally said that a slight divergence, especially if necessitated by local conditions, is immaterial.⁴²

The fact that the use is increased during the prescription period does not, provided the nature of the user remains unchanged, preclude the establishment of a right corresponding to the original user as it existed before the change was made,⁴³ but there is no prescriptive right corresponding to the increased user,⁴⁴ except in so far as the increased user itself continues for the prescriptive period.⁴⁵

§ 526. Cessation of adverse character. Although the user of another's land in a particular way continues for the whole of the prescriptive period, no right is acquired thereby if the user loses its adverse character before the period expires. This it may do by reason of the fact that the possession of the servient tenement becomes united with that of the dominant tenement.⁴⁶ Or it may occur that the person exercising the user in some way recognizes the right of the owner of the land

Converse, 44 Vt. 158; Crosier v. Brown, 66 W. Va. 273, 66 S. E. 326. But there are in Wimbledon etc. Conservators v. Dixon, 1 Ch. Div. 363 *dicta* to the contrary.

42. Cheney v. O'Brien, 69 Cal. 199, 10 Pac. 479; Gentleman v. Soule, 32 Ill. 271, 83 Am. Dec. 264; Talbott v. Thorn, 91 Ky. 417, 16 S. W. 88; Salmon v. Martin, 156 Ky. 309, 160 S. W. 1058; Moll v. Hagerbaumer, 98 Neb. 555, 153 N. W. 560; Bolton v. Murphy, 41 Utah, 591, 127 Pac. 335; Walton v. Knight, 62 W. Va. 223, 58 S. E. 1025; Warren v. Van Norman, 29 Ont. 84.

43. Shaughnessey v. Leary, 162 Mass. 108, 38 N. E. 197; Baldwin v. Calkins, 10 Wend. (N. Y.) 167; Bremer v. Manhattan R. Co.,

191 N. Y. 333, 84 N. E. 59.

44. Mississippi Mills Co. v. Smith, 69 Miss. 297, 30 Am. St. Rep. 546, 11 So. 26; Matthews v. Stillwater Gas & Electric Light Co., 63 Minn. 493, 65 N. W. 947; Smith v. City of Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907; Prentice v. Geiger, 74 N. Y. 341; Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437; McCallum v. Germantown Water Co., 54 Pa. St. 40, 93 Am. Dec. 656; Shearer v. Hutterische Bruder Gemeinde, 28 S. D. 509, 134 N. W. 63.

45. McDonnell v. Huffine, 44 Mont. 411, 120 Pac. 792; Bolton v. Murphy, 41 Utah, 591, 127 Pac. 335.

46. *Ante*, § 524, note 20.

to stop the user,⁴⁷ as when he asks permission of the latter.⁴⁸ Whether such a recognition is to be regarded as involved in an offer on the part of the person exercising the user to purchase the right of user would appear to be a question of fact in the particular case.⁴⁹

§ 527. **Interruption by landowner.** That the owner of the land interposes physical obstacles to the exercise of the user, to an extent sufficient to render it impossible, has been regarded as precluding the acquisition of a prescriptive right.⁵⁰ So one cannot acquire a right of way by prescription if the landowner places a fence or other structure so as to prevent passage,⁵¹ and it has been decided that no right to divert water accrues by lapse of time if the landowner prevents, even though only temporarily, the diversion of water.⁵² Such action on the part of the landowner necessarily stops the user, the continuity of which is essential to the application of the doctrine of prescrip-

47. *Sumner v. Tileston*, 7 Pick. (Mass.) 198; *Colvin v. Burnet*, 17 Wend. (N. Y.) 569; *Perrin v. Garfield*, 37 Vt. 304; *Wasatch Irrigation Co. v. Fulton*, 23 Utah, 466, 65 Pac. 205; *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. 288.

48. *Weed v. Keenan*, 60 Vt. 74, 6 Am. St. Rep. 93, 13 Atl. 804.

49. See *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156; *Kana v. Bolton*, 36 N. J. Eq. 21.

50. In *Rollins v. Blackden*, 112 Me. 459, Ann Cas. 1917A 875, 92 Atl. 521, it was held that the prescriptive user of the water from a well on another's land was interrupted by the latter's grant to a third person of a right to take water. Why this should be so is not explained.

51. *Pollard v. Rebman*, 162

Cal. 633, 124 Pac. 235; *Sears v. Hayt*, 37 Conn. 406; *Barker v. Clark*, 4 N. H. 380, 17 Am. Dec. 428; *Brayden v. New York, N. H. & H. R. Co.*, 172 Mass. 225. 51 N. E. 1081; *Jackson v. Cody*, (Tex. Ch.), 63 S. W. 302; *Cunningham v. San Saba County*, 11 Tex. Civ. App. 557, 32 S. W. 928, 33 S. W. 892; *Morris v. Blunt*, 49 Utah, 243, 161 Pac. 1127. See *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S. W. 233.

52. *Bree v. Wheeler*, 129 Cal. 145, 61 Pac. 782; *Authors v. Bryant*, 22 Nev. 242, 38 Pac. 439; *Wasatch Irrigation Co. v. Fulton*, 23 Utah, 466, 65 Pac. 205; *Smith v. North Canyon Water Co.*, 16 Utah, 194, 52 Pac. 283. But see, as to the character of the interruption necessary. *Gardner v. Wright*, 49 Ore. 609, 91 Pac. 286.

tion, and even a merely temporary stoppage or suspension, resulting from the act of the landowner, has a legal effect different from a like stoppage or suspension which is purely voluntary, in as much as it indicates a lack of that acquiescence by the landowner in the user, on which acquiescence alone the presumption of a grant can be based.^{52a} It has been said, however, that the occasional interruption of passage across the land by the storage thereon by the landowner of lumber and carriages does not prevent the acquisition of a prescriptive right of passage, if such interruption were merely casual, or accompanied by acts recognizing a right of passage.⁵³

It has been decided that the interruption by the landowner of the user, if secret and by stealth, as when water appliances or structures are secretly destroyed by him, will not prevent the acquisition of the prescriptive right.⁵⁴ This is based on the analogy of the law of adverse possession of land, by which a secret re-entry does not prevent the running of the statute. The analogy is, however, not entirely satisfactory. If the owner of land re-enters on the land by stealth, the possession of the wrongdoer is regarded as continuing, while the mere user of another's land cannot well be regarded as continuing, when it has been actually stopped by the landowner, whether this was done secretly or openly. Moreover the interruption of the user, although originally clandestine, must eventually become known to the other party, except in the rare instance when the landowner voluntarily repairs the injury which he has caused, while the re-entry of the landowner on land in another's wrongful possession may, if temporary merely, continue unknown to the latter.

It has been said that an interruption of the user by a third person is immaterial.^{54a} This is presumably so.

52a. See editorial note 20 54.
Harv. Law Rev. 317.

53. Plimpton v. Converse, 42

Vt. 712. And see Webster v.

Lowell, 142 Mass. 324, 8 N. E.

54. Brattain v. Conn, 50 Ore.

156, 91 Pac. 458.

54a. Gardner v. Wright, 49 Ore.

609, 91 Pac. 286; Dorn tree v.

That is, such interruption does not serve to indicate any lack of acquiescence in the user on the part of the landowner, and does not, for that reason, prevent the establishment of a right by prescription. It is conceivable, however, that the interruption by a third person may be so prolonged as to deprive the user of the element of continuity, or that after an interruption has occurred by reason of a third person's destruction of appliances, no attempt is made to replace the appliances so as to continue the user.

§ 528. Protests and interference by landowner.

Applying the theory that what makes a continued user effective to confer a corresponding right is the acquiescence of the owner in such user, as raising a presumption of a grant, it would seem to be sufficient to exclude such presumption that the owner of the land has protested against the user at any time during the prescriptive period, and some courts have taken this view.⁵⁵ The weight of authority is, however, perhaps the other way, that mere remonstrances or protests by the landowner will not prevent the acquisition of a right by prescription, in the absence of any physical interference with the user, or legal proceedings based thereon.⁵⁶ These

Lyons, 224 Mass. 256, 112 N. E. 610; McIntire v. Talbot, 62 Me. 312. So as to mere efforts by a stranger to interrupt. McIntire v. Talbot, 62 Me. 312.

55. Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 538, Fed. Cas. No. 13446; Chicago & N. W. Ry. Co. v. Hoag, 90 Ill. 339; Dartnell v. Bidwell, 115 Me. 227, 98 Atl. 743; Powell v. Bagg, 8 Gray (Mass.) 441, 69 Am. Dec. 262; Lehigh Valley R. Co. v. McFarlan, 30 N. J. Eq. 180; Workman v. Curran, 89 Pa. St. 226; Nichols v. Aylor, 7 Leigh (Va.)

565; Reed v. Garnett, 101 Va. 47, 43 S. E. 184; Woolridge v. Coughlin, 46 W. Va. 345, 33 S. E. 233; Crosier v. Brown, 66 W. Va. 273, 25 L. R. A. (N. S.) 174, 66 S. E. 326; Gwinn v. Gwinn, 77 W. Va. 281, 87 S. E. 371. See also Conner v. Woodfill, 126 Ind. 85, 22 Am. St. Rep. 568, 25 N. E. 876; Tracy v. Atherton, 36 Vt. 503.

56. Cox v. Clough, 70 Cal. 345, 11 Pac. 732; Connor v. Sullivan, 40 Conn. 26; Lehigh Valley R. Co. v. McFarlan, 43 N.

latter cases follow, in this regard, the analogy of the decisions with reference to the statutes limiting the period for the recovery of land.

That the owner of the land, during the prescriptive period, institutes a legal proceeding on account of the user of the land by another, prevents the latter from acquiring the right by lapse of time,⁵⁷ provided at least the proceeding is conducted by the landowner to a successful conclusion.⁵⁸

§ 529. Tacking. As successive adverse possessions of land by different persons may be tacked in order to make up the statutory period, so successive adverse users by different persons may be tacked for the same purpose,⁵⁹ provided there is a privity or contractual connection between them.⁶⁰ There is sufficient privity for this purpose, it would seem, when the user is exercised, for the benefit of neighboring land, by successive

J. L. 605; *Morris Canal & Banking Co. v. Diamond Mills Paper Co.*, 73 N. J. Eq. 414, 75 Atl. 1101, aff'g 71 N. J. Eq. 481, 64 Atl. 746; *Dickinson v. Delaware, L. & W. R. Co.*, 87 N. J. L. 264, 93 Atl. 703; *Oregon Const. Co. v. Allen Ditch Co.*, 41 Ore. 209, 69 Pac. 455; *Okeson v. Patterson*, 29 Pa. St. 22; *McGeorge v. Hoffman*, 133 Pa. St. 381, 19 Atl. 413; *Jordan v. Lang*, 22 S. C. 159; *Ferrell v. Ferrell*, 1 Baxt. (Tenn.) 329; *Angus v. Dalton*, 3 Q. B. Div. 93, per Lush, J., 4 Q. B. Div., per Thesiger & Cotton, L. J. J. See *Rollins v. Blackden*, 112 Me. 459, Ann. Cas. 1917A 875, 92 Atl. 521.

Temporary cessation of the use, following upon demand that the use be stopped, has been referred to as tending to show that the use was permissive. *St. Martin v. Skamania Boom Co.*,

79 Wash. 393, 140 Pac. 355; *Eaton v. Swansea Water Works Co.*, 17 Q. B. 267.

57. *Alta Land & Water Co. v. Hancock*, 85 Cal., 219, 20 Am. St. Rep. 217, 24 Pac. 645; *Bunten v. Chicago, R. I. & P. Ry. Co.*, 50 Mo. App. 414; *Workman v. Curran*, 89 Pa. St. 226; *Cobb v. Smith*, 38 Wis. 21.

58. *Postlethwaite v. Payne*, 8 Ind. 104; *Harmon v. Carter*, (Tenn.), 59 S. W. 656.

59. *Bradley's Fish Co. v. Dudley*, 37 Conn. 136; *Ross v. Thompson*, 78 Ind. 90; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Matthys v. First Swedish Church of Boston*, 223 Mass. 544, 112 N. E. 228; *Leonard v. Leonard*, 7 Allen (Mass.) 277; *Dodge v. Stacy*, 39 Vt. 558.

60. *Holland v. Long*, 7 Gray (Mass.) 486; *Bryan v. City of East St. Louis*, 12 Ill. App. 390.

owners or possessors of such land, between whom there exists some legal relation other than that of disseisor and disseisee.⁶¹ One decision,⁶² apparently to the effect that a grantee of land cannot tack his grantor's user of neighboring land unless the conveyance to him specifically mentions such inchoate right, is based on a misapplication of authorities to the effect that there is no breach of a covenant of title by reason of the failure of an easement supposed to be appurtenant to the land conveyed unless such easement was specifically mentioned in the conveyance.

§ 530. Personal disabilities. The statutory exceptions in the statutes of limitations in favor of persons under legal disability are applied by analogy, in the case of prescription, when the owner of the land is under disability, and they are usually applied to the same extent, and subject to the same restrictions.⁶³ So, while the statutory period does not begin to run during the disability of the landowner, if this existed when the right of action on account of the user of the land accrued,⁶⁴ a disability thereafter arising will not, by the weight of authority, extend the statutory period,⁶⁵ and one disability cannot be tacked to another.⁶⁶

61. See *ante*, § 508.

62. *Durkee v. Jones*, 27 Cal. 59, 60 Pac. 618.

63. Occasionally the exception in favor of a person under disability is based on the theory that a grant by one who has no power to make a grant can not be presumed. *Watkins v. Peck*, 13 N. H. 360; *McKinney v. Duncan*, 121 Tenn. 265, 118 S. W. 683.

64. *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536; *Melvin v. Whiting*, 13 Pick. (Mass.) 185;

Edson v. Munsell, 10 Allen (Mass.) 557.

65. *Tracy v. Atherton*, 36 Vt. 503; *Mebane v. Patrick*, 46 N. C. 23; *Wallace v. Fletcher*, 30 N. H. 434; *Edson v. Munsell*, 10 Allen (Mass.) 557; *State v. Macy*, 72 Mo. App. 427. *Contra*, *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536; *Thorpe v. Corwin*, 20 N. J. L. 311. See *Melvin v. Whiting*, 13 Pick. (Mass.) 184, 185.

66. *Reimer v. Stuber*, 20 Pa. St. 458, 59 Am. Dec. 744.

§ 531. Nature and extent of prescriptive right.

That the nature and extent of a prescriptive right are measured by the character of the user in which it originated is generally recognized,⁶⁷ but the application of this rule frequently involves considerable practical difficulties. If it were applied with absolute strictness, the right acquired would frequently be of no utility whatsoever. A right of way, for instance, would, as has been judicially remarked,⁶⁸ be available for use only by the people and the vehicles which have passed during the prescriptive period. But the rule is not applied with absolute strictness. "As in the case of a grant the language is to be construed in the light of the circumstances, so in the case of prescription the use is to be looked at in the same way. The nature of the right is not to be determined by the actual proved use alone, but by that in connection with the circumstances."⁶⁹

There is obviously no difficulty when a right of user is asserted entirely different in its nature from the user during the prescriptive period. If, for instance, one has used another's land for purposes of passage only, he can acquire by such user no right to overflow it, and if he has used it merely for the purpose of an aqueduct he can thereby acquire no right to use it for a drain. But if one has used another's land for a drain from a house upon his land, the question whether he may build another house upon his land and discharge sewage from both the houses

67. *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Lawton v. Herrick*, 83 Conn. 417, 76 Atl. 986; *Postlethwaite v. Payne*, 8 Ind. 104; *Middlesex Co. v. City of Lowell*, 149 Mass. 509, 21 N. E. 872; *Harvey v. Illinois Cent. R. Co.*, 111 Miss. 835, 72 So. 723; *American Bank-Note Co. v. New York El. R. Co.*, 129 N. Y. 252, 29 N. E. 302; *Tucker v.*

Salem Flouring Mills Co., 13 Ore. 28, 7 Pac. 53, 15 Ore. 581, 16 Pac. 426; *Elliott v. Rhett*, 5 Rich. L. (S. C.) 405, 57 Am. Dec. 750; *Shrewsbury v. Brown*, 25 Vt. 197.

68. *Cowling v. Higgenson*, 4 Mees. & W. 245 per Parke, B.

69. *Baldwin v. Boston & M. R. R.*, 181 Mass. 166, 63 N. E. 428, per Hammond, J.

through the drain is a more difficult one, and similar questions as to whether the right acquired by a prescriptive user would be, in the particular case, sufficient to justify a slight extension of the user, or a user in a slightly different manner, will readily suggest themselves. The question appears ordinarily to be, what are the nature and extent of the right, the existence of which is to be presumed from the user during the prescription period.⁷⁰ Does it, in the particular case, include a right of user which differs in degree but not in kind from the former user and, conceding that it does, what constitutes a difference in degree merely? Occasionally, when there has been a change or increase of user since the prescriptive period, the court undertakes to determine the permissibility of such new user by the consideration whether it involves an increase in the burden upon the servient tenement.⁷¹ Such a consideration, however, would seem to be material merely in determining the scope of the prescriptive right.⁷² A user which involves a substantial increase of burden upon the servient tenement should not ordinarily be regarded as within the prescriptive right, since such increased burden was not what the landowner acquiesced in. But, as before indicated, the nature or circumstances

70. See *Cowling v. Higgenson*, 4 Mees. & W. 245; *Prentice v. Geiger*, 74 N. Y. 341; *Jones v. Crow*, 32 Pa. 398.

71. *Wimbledon etc. Conservators v. Dixon*, 1 Ch. Div. 362; *Simons v. Munch*, 115 Minn. 360, 132 N. W. 321. This criterion of an increase of burden has been applied in several cases in connection with the pollution of a stream. *McIntyre Bros. v. McGavin*, L. R. (1893) App. Cas. 268; *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 30 Am. St. Rep. 546, 11 So. 26; *Jones v.*

Crow, 32 Pa. 398; *Atty. Gen. v. City of Grand Rapids*, 175 Mich. 503, 50 L. R. A. (N. S.) 473, 141 N. W. 890; *Fansler v. City of Sedalia*,—(Mo.)—176 S. W. 1102.

A prescriptive right to maintain a dam to sluice logs, a temporary use, does not, it has been held, involve a right to maintain it for permanent use in connection with a saw mill. *Simons v. Munch*, 115 Minn. 360, 132 N. W. 321.

72. See the thoughtful discussion in 8 *Columbia Law Review* at p. 402.

of the user may be such that the landowner could have seen that a mere change in details of the user⁷³ would increase the burden upon his land, and he is accordingly to be regarded as having acquiesced in the user as thus subject to possible extension.

It would seem that a user during the prescriptive period which actually burdens but a limited portion of space on another's land gives a right to burden that space only. For instance, a user of land for purposes of passage to a certain width would not, it is conceived, give a prescriptive right to use land to any greater width⁷⁴ and, by the decided weight of authority, the flowage of a certain amount of land for the prescriptive period gives no right, by tightening the dam, or otherwise, to flow a greater amount of land.⁷⁵ So it has been decided that the user of a wall as a party

73. In *Bremer v. Manhattan R. Co.*, 191 N. Y. 333, 334, 84 N. E. 59, it was held that a prescriptive right to maintain and operate an elevated railway track included the right to make a change in the motive power and to increase the length of the trains, since "the operation and length of the trains were mere details of the right, not substantial elements or limitations of it."

74. See *District of Columbia v. Robinson*, 14 App. Cas. D. C. 512; *Dymeak v. Christjensen*, 279 Ill. 242, 116 N. E. 654.

75. *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Savannah etc. Canal Co. v. Bourquin* 51 Ga. 378; *Iowa Power Co. v. Hoover*, 166 Iowa, 415, 147 N. W. 858; *Whitehair v. Brown*, 80 Kan. 297, 18 Ann. Cas. 216, 102 Pac. 783, and note; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243; *Cook v. Beard*, 108 Mich. 17, 65

N. W. 518; *Reason v. Peters*, 148 Mich. 532, 112 N. W. 117; *Gilford v. Winnepesaukee Lake Co.*, 52 N. H. 262; *Griffin v. Bartlett*, 55 N. H. 119; *Carlisle v. Cooper*, 21 N. J. Eq. 571; *Horner v. Stillwell*, 35 N. J. L. 307; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Russell v. Scott*, 9 Cow. (N. Y.) 279; *Morris v. Commander*, 3 Ired L. (25 N. C.) 510; *Tucker v. Salem Flouring Mills Co.*, 13 Ore. 28, 7 Pac. 53; *Mertz v. Dorney*, 25 Pa. 519; *Sabine v. Johns*, 35 Wis. 183.

But in *Maine & Massachusetts* the height of the dam is the criterion, the person asserting the easement having a right to maintain the dam to the height to which it was maintained during the prescriptive period, irrespective of changes in the extent of the flowage by reason of the state of repair of the dam, the extent of the use of the water, the amount of water in the

wall to a certain height gives no right to use it as such to a greater height.⁷⁶

The question of the user which may be made of a prescriptive right of way has been the subject of a number of adjudications. That the way was used for a single purpose will ordinarily support a right of way for that purpose only,⁷⁷ but that the way was used for all purposes for which it was desired to use it justifies, it has been held, a finding of a right of way for all purposes for which it might reasonably be desired for the use of the dominant tenement while substantially in the same condition.⁷⁸ "But if the condition and character of the dominant estate are substantially altered—as in the case of a way to carry off wood from wild land, which is afterwards cultivated and built upon, or of a way for agricultural purposes to a farm, which is afterwards turned into a manufactory or divided into building lots—the right of way cannot be used for new purposes, required by the altered condition of the property, and imposing a greater burden upon the servient estate."⁷⁹ It has been held however that there was no such substantial alteration of the

stream, or other causes. *Voter v. Hobbs*, 69 Me. 19; *Cowell v. Thayer*, 5 Metc. (Mass.) 253, 38 Am. Dec. 400; *Jackson v. Harrington*, 2 Allen (Mass.) 242; *Daniels v. Citizen Sav. Inst.* 127, Mass. 534. Occasionally, without stating that the height of the dam is the criterion, the courts refer to the right to increase the height of the dam as the question at issue. See *Cobia v. Ellis*, 149 Ala. 108, 42 So. 751; *Haigh v. Lenfesty*, 239 Ill. 227, 87 N. E. 962; *Iowa Power Co. v. Hoover*, 166 Iowa, 415, 147 N. W. 858; *McGeorge v. Hoffman*, 133 Pa. St. 381, 19 Atl. 431; *McInnis v. Day Lumber Co.*, 102 Wash. 38, 172 Pac. 844.

76. *Barry v. Eblavitch*, 84 Md. 95, 33 L. R. A. 294, 35 Atl. 170.

77. *Bradburn v. Morris*, 3 Ch. Div. 812; *Wimbledon & Putney Commons Conservators v. Dixon*, 1 Ch. Div. 362; *Atwater v. Bodfish*, 11 Gray (Mass.) 150; *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519.

78. *Cowling v. Higgenson*, 4 Mees. & W. 245; *Dare v. Heathcote*, 25 L. J. (N. S.) Exch. 245; *Williams v. James*, L. R. 2 C. P. 577; *Sloan v. Holliday*, 30 Law Times (N. S.) 757; *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519.

79. *Parks v. Bishop*, 120 Mass. 340, per Gray, C. J. citing *Wimbledon, etc., v. Dixon*, 1 Ch. D.

condition and character of the dominant tenement when, during the prescriptive period, there was one dwelling house thereon, and subsequently two additional buildings were erected, each of which accommodated two families.⁸⁰

After a right of way has been established along a certain line on the basis of prescriptive user of the servient tenement along that line, it cannot be changed by the person entitled thereto to another line,^{80a} though such person may, it has been decided, deviate from the original line, in case of an obstruction by the landowner.^{80b} In the case of a right of way appurtenant to certain land by prescription, as in that of one by grant, the way cannot be used for the purpose of going to or from other land beyond.^{80c}

In the case of an easement to use a wall on another's land as a party wall, based on prescription, it being limited by the extent of the use during the prescriptive period, the one entitled to the easement has no privilege of raising the wall,^{80d} or, if it is raised by its owner, of using the additional part.^{80e} It would seem that when two adjoining owners acquire by prescription mutual party wall rights as regards a wall erected on the division line, the same rule would apply, so that neither could raise the wall as a whole without the other's consent.

362; *Williams v. James*, L. R. 2 C. P. 577; *Atwater v. Bodfish*, 11 Gray 150.

80. *Baldwin v. Boston & M.* R. R. 181 Mass. 166, 63 N. E. 428.

80a. *Nichols v. Peck*, 70 Conn. 439, 66 Am. St. Rep. 122, 40 L. R. A. 81, 39 Atl. 803; *Vance v. Adams* (Ky.) 112 S. W. 927.

80b. *Haley v. Concord*, 59 N. H. 9, 47 Am. Rep. 176.

80c. *Williams v. James*, L. R. 2 C. P. 577. See *ante* § 350.

80d. *Welford v. Gerard*, 108 Ky. 322, 56 S. W. 416; *Bright v. J. Bacon & Sons*, 131 Ky. 848. 116 S. W. 268, 20 L. R. A. (N. S.) 386; *McLaughlin v. Cecconi* 141 Mass. 252, 5 N. E. 261; *Bright v. Alian*, 203 Pa. 294, 93 Am. St. Rep. 769, 53 Atl. 251.

80e. *Barry v. Edlavitch*, 84 Md. 95, 35 Atl. 170; *Bright v. Morgan*, 218 Pa. 178, 11 Ann. Cas. 708, 67 Atl. 210; *Brown & Hamilton Co. v. Johnson*, 251 Pa. 378, 96 Atl. 823.

A right which was regularly, during the prescriptive period, exercised only during a certain season of the year, can, after such period, be exercised only at that season.⁸¹

A prescriptive right to divert water from a stream has been regarded as independent of the use to which the water may be put after diversion,⁸² but a substantial increase in the amount diverted would ordinarily not be permissible.⁸³ A prescriptive right to maintain an aqueduct through another's land has been regarded as limited to the amount of water conducted

81. *Cowell v. Thayer*, 5 Metc. (Mass.) 253, 38 Am. Dec. 400; *Griffin v. Bartlett*, 55 N. H. 119; *Davis v. Brigham*, 29 Me. 391; *Swan v. Munch*, 65 Minn. 500, 67 N. W. 1022, 35 L. R. A. 743; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Hall v. Augsburg*, 46 N. Y. 622; *Gardner v. Wright*, 49 Ore. 609, 91 Pac. 286; *Cleary v. Daniels*,—Utah—, 167 Pac. 820.

82. *Luttrell's Case*, 4 Co. Rep. 86; *Gallaher v. Montecito Valley Water Co.*, 101 Cal. 242, 35 Pac. 770; *Walton Cranberry Co. v. Seamon*, 171 Mich. 98, 137 N. W. 147. Compare *Mastenbrook v. Alger*, 110 Mich. 414, 68 N. W. 213; *Scranton Gas & Water Co. v. Delaware, L. & W. R. Co.*, 240 Pa. 604, 47 L. R. A. (N. S.) 710, 88 Atl. 24.

83. *S. O. & C. Co. v. Ansonia Water Co.*, 83 Conn. 611, 78 Atl. 432; *Stock v. Hillsdale*, 155 Mich. 375, 119 N. W. 435; *Irring v. Borough of Media*, 194 Pa. 648, 45 Atl. 482.

In Michigan while it was decided that a prescriptive right to take water from a lake was limited to the amount diverted during the prescriptive period (*Stock*

v. Hillsdale, 155 Mich. 375, 119 N. W. 435) it was later decided by a majority of four judges to three, that the extent of such a right was to be measured not by the amount taken, but the level resulting from the taking, and that consequently the pipe could not be lowered as the level became lower. (*Kennedy v. Niles Water Supply Co.*, 173 Mich. 474, 43 L. R. A. (N. S.) 836, 149 N. W. 241.

In *Mally v. Weidensteiner*, 88 Wash. 398, 153 Pac. 342, it was decided that a non riparian owner who diverted one third of the total flow of the stream during the prescriptive period, had no right to claim, upon a diminution of the total flow, a right to more than one third, that is, a right to the same number of cubic feet per second as he enjoyed during the prescriptive period.

In *Tinker v. Bessel*, 213 Mass. 74, 99 N. E. 946, it appears to be held that a prescriptive right to take water from a spring is to be measured by the user which was apparent to the landowner.

It has been said, as regards

through it during the prescriptive period.⁸⁴ And it has been decided that one who has, during the prescriptive period, conducted water through an open ditch on another's land, does not thereby acquire the right to conduct water through covered pipes.⁸⁵

§ 532. **Reciprocal prescriptive easements.** The question has occasionally arisen whether, when one has acquired by prescription an easement in another's land or in diminution of another's natural rights, such other has a right to insist upon the continued exercise of the easement. The question has arisen ordinarily, if not exclusively, in connection with water rights. There are a number of decisions adverse to any such "reciprocal easement" in the owner of the servient tenement,⁸⁶ it having been decided, for instance, that a riparian owner has no right to insist that an upper owner, who has acquired a prescriptive right to maintain a dam in a certain way, shall continue to maintain it in the same way,⁸⁷ and likewise that one whose land has been utilized for the prescriptive period for the

the prescriptive right to take water from a watercourse, that it must appear that a definite amount of water was taken during the prescriptive period. *Custer Consol. Mines Co. v. City of Helena*, 52 Mont. 35, 156 Pac. 1090; *Hayes v. Silver Creek, etc. Co.* 136 Cal. 238, 68 Pac. 704; *Logan Guichard*, 159 Cal. 592, 114 Pac. 989.

84. *Shrewsbury v. Brown*, 25 Vt. 197; *Darlington v. Painter*, 7 Pa. 473; *Osten v. Jerome*, 93 Mich. 196, 53 N. W. 7.

85. *Allen v. San Jose Land & Water Co.*, 92 Cal. 138, 15 L. R. R. 93, 28 Pac. 215.

86. See in addition to the cases cited in the following notes, *Mason v. Shrewsbury & H. R.*

Co. L. R., 6 Q. B. 678; *Arkwright v. Gell*, 5 Mees & W. 203; *Gale, Easements* (8th Ed.) 296. Editorial note 11 *Columbia Law Rev.* at p. 770. The cases bearing on the subject are stated and discussed at length in 3 *Farnham, Waters*, §§ 819, 827b, 828; and in 50 *L. R. A.* at p. 841, note to *Pewaukee v. Savoy*.

87. *Weare v. Chase*, 93 Me. 264, 44 Atl. 900; *Brace v. Yale*, 99 Mass. 488 (*semble*); *Sparks Mfg. Co. v. Town of Newton*, 57 N. J. Eq. 367, 41 Atl. 385; *Felton v. Simpson*, 11 Ired L. (33 N. C.) 84; *Vliet v. Sherwood*, 35 Wis. 229; *Contra*, *Belknap v. Trimble*, 3 Paige, Ch. (N. Y.) 577, 605; *Middleton v. Gregorie*, 2 Rich. L. (S. C.) 638.

discharge of water has no right to demand that the water shall continue to be discharged on or over his land.⁸⁸

So far as the doctrine of prescription is concerned, the decisions above referred to would appear to be absolutely unexceptionable. In order that one may acquire a prescriptive right in another's land his user of such land during the prescriptive period must be actionable,⁸⁸ and the doctrine of reciprocal rights based on prescription would seem to be tenable only on the assumption that, because A has a right of action during the prescriptive period against B by reason of B's infringement of A's rights, B has a right of action during such period against A, an assumption which is evidently unwarranted. It may no doubt occur that coincidently with A's adverse user of B's land, on account of which B has a right of action against A, B makes an adverse user of A's land, on account of which A has a right of action against B, but such a conjunction of circumstances is necessarily of but infrequent occurrence. And as has been judicially remarked, "the enjoyment of the easement is of itself no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbor. A right of way is no evidence that the party entitled thereto is under a duty to walk; nor a right to eavesdropping on the neighbor's land, that the party is bound to send on his rainwater to that land."⁸⁹ In spite, however, of

88. *Gaved v. Martyn*, 19 C. B. N. S. 732; *Oliver v. Lockie*, 26 Ont. 28; *Lambeye v. Garcia*, 18 Ariz. 178, 157 Pac. 977; *Burkhart v. Meiberg*, 37 Colo. 187, 6 L. R. A. N. S. 1104, 119 Am. St. Rep. 279, 86 Pac. 98; *Mitchell v. Parks*, 26 Ind. 363; *Lake Drummond Canal & Water Co. v. Burnham*, 147 N. C. 41, 17 L. R. A. (N. S.) 945, 125 Am. St. Rep. 527, 60 S. E. 650; *Peter v. Cas-*

well, 38 Ohio St. 518; *Hill v. American Land & Live Stock Co.*, 82 Ore. 202, 161 Pac. 403; *Garns v. Rollins*, 41 Utah, 260, Ann. Cas. 1915C, 1159, 125 Pac. 867; *Roberts v. Gribble*, 43 Utah, 411, 134 Pac. 1014; *Lyons v. Ingle*, 91 Wash. 179, 157 Pac. 460.

88a. *Ante*, § 524.

§9. Per Erle, C. J., in *Gaved v. Martyn*, 19 C. B. N. S. 732.

the valid theoretical objections to such a doctrine of reciprocal rights by prescription, there are a number of judicial expressions in its favor and the tendency of the cases in this country appears to be in that direction, so far as concerns rights as to water. It has, for instance, been said that the rule as to the adverse enjoyment of water must be reciprocal, and one who has taken the water from the original channel, and has continued to divert and enjoy it for a period beyond the time fixed by the statute of limitations as to real actions, cannot afterwards be permitted to restore it to its original state when it will have the effect to destroy or materially injure those through or by which it formerly flowed.⁹⁰ And there are a number of cases in which a like view has been asserted, with more or less distinctness, as regards the right of one who has changed the channel of a stream to restore it to its former channel as against one who has enjoyed it during the prescriptive period in its artificial channel.⁹¹ It has also been asserted that one who has acquired a prescriptive right of flowage on another's land cannot discontinue or lessen the flowage to the detriment of persons whose lands are subjected thereto as well as to others,⁹² and that an upper proprietor who has

90. *Matthewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349, 43 N. W. 879; *Broadwell Special Drainage District v. Lawrence*, 231 Ill. 86, 83 N. E. 104; *Kray v. Muggli*, 84 Minn. 90, 54 L. R. A. 473, 87 Am. St. Rep. 332, 86 N. W. 882.

91. *Delaney v. Boston*, 2 Harr. (Del.) 489; *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698; *Matthewson v. Hoffman*, 77 Mich. 420, 43 N. W. 879, 6 L. R. A. 349; *Smith v. Musgrove*, 32 Mo. App. 241; *Shepardson v. Perkins*, 58 N. H. 354; *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344. See *Tag-*

gart v. Jaffrey, 75 N. H. 473, 28 L. R. A. (N. S.) 1050, 139 Am. St. Rep. 729, 76 Atl. 123. *Contra*, *Peter v. Caswell*, 38 Ohio St. 518. In *North Fork Water Co. v. Edwards*, 121 Cal. 662, 54 Pac. 69, it was held that one who had a prescriptive right to conduct water through a ditch on another's land could not alter the ditch so as to allow storm water, which had previously passed away by the ditch, to run on the land.

92. *Kray v. Muggli*, 84 Minn. 90, 54 L. R. A. 473, 87 Am. St. Rep. 332, 86 N. W. 882; *Fin &*

acquired by prescription the right to change the natural manner of flow of a stream cannot restore the natural manner of flow to the detriment of mills erected with reference to such changed manner of flow.⁹³ In a considerable number of these cases, however, in which such reciprocal rights are recognized, the element of equitable estoppel appears to have had considerable weight, that is, the court considered that, the servient owner having incurred expenditures under the reasonable supposition created by the dominant owner's conduct, that the exercise of the easement would not be discontinued, the dominant owner should not be allowed to discontinue it. The doctrine of estoppel is evidently entirely independent of any doctrine of reciprocal easements by prescription, and if the former doctrine is otherwise applicable in favor of the servient owner, it is difficult to see why its application should be limited to the case in which the user of his land by the dominant owner has ripened into a right by reason of its continuance for the prescriptive period.

So far as concerns the right of one who has, for the prescriptive period, caused the water of a stream to flow through another's land, subsequently to restore the stream to its original channel, to the detriment of such other, the latter might perhaps be protected, in some states,⁹⁴ upon the theory that, after the prescriptive period has elapsed, even if not before, the artificial channel is to be regarded as the natural channel, so far as concerns the rights of those through whose land it passes, and so in the case of a lake or pond created by the flowage of another's land, the person whose land is subjected in part to the flowage might be

Feather Club v. Thomas,—Tex. Civ. App.—, 138 S. W. 150. See also *Smith v. Youmans*, 96 Wis. 103, 37 L. R. A. 285, 65 Am. St. Rep. 30, 70 N. W. 1115; *Pewaukee v. Savoy*, 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859.

93. *Belknap v. Trimble*, 3 Paige 573; *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698. See *Marshall Ice Co. v. La Plant*, 136 Iowa, 621, 12 L. R. A. (N. S.) 1073, 111 N. W. 1016.

94. *Ante*, § 339(h).

regarded as in the position of a riparian owner on a natural lake or pond, and as such entitled to object if the person who created the pond or lake takes active measures to lower its level. With this may be compared the English view, that where an artificial water-course or an artificial diversion of a natural water-course is not in its nature merely temporary, the owner of land by or through which the water flows may have, on the theory of prescription, a right to the uninterrupted flow of the water, or to make a particular use thereof, the question of whether a grant of such a right shall be presumed being determined with reference to the circumstances under which the artificial water-course or diversion was presumably created, and the mode in which it has been in fact used and enjoyed.⁹⁵

§ 533. Prescription for highways. (a) General considerations. A right to use land for highway purposes may usually be acquired by the public by its use for such purposes under a claim of right for the statutory period of limitation as to land. Such mode of acquisition of highway rights is ordinarily referred to as "prescription,"⁹⁶ and is usually based on the theory that such user of the land raises the presumption of a dedication, or of an appropriation of the land by a statutory proceeding.⁹⁷ In some states there are

95. *Arkwright v. Gell*, 5 Mees. & W. 203; *Gaved v. Martyn*, 19 C. B. N. S. 732; *Wood v. Waud*, 3 Exch. 748; *Burrows v. Lang*, (1901), 2 Ch. 508; *Bailey & Co. v. Clark, Son & Morland*, (1902), 1 Ch. 649.

96. If prescription is to be regarded as necessarily based on the presumption of a grant, the term is not accurate as applied to the case of a highway, since highway rights are created, not by grant but by dedication. See *Angell, Highways*, § 131. The

fiction of a grant can, however, hardly be regarded as an integral part of the law of prescription in this country at the present day.

97. *Howard v. State*, 47 Ark. 431, 2 S. W. 331; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448; *Daniels v. People*, 21 Ill. 439; *Pittsburgh, C., C. & St. L. Ry. Co. v. Town of Crown Point*, 150 Ind. 536, 50 N. E. 741; *Onstott v. Murray*, 22 Iowa, 457; *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513; *Reed v.*

statutory provisions in regard to the effect of user by the public as establishing a highway.⁹⁸

Not only may long user by the public operate to establish a highway otherwise non existent, but it may also operate to change the line of the highway.⁹⁹ And if the exact line or limits of the highway are otherwise uncertain, prolonged user will serve to make them certain.¹ Occasional decisions that passage by the public off the actual line of the highway, although continued for the prescriptive period, will establish no right to continue such passage, if such divergence from the true line of the highway is the result of mistake,² are based upon the analogy of the doctrine, asserted in some

Inhabitants of Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; Willey v. Portsmouth, 35 N. H. 303; Comm. v. Cole, 26 Pa. St. 187; note 5 Columbia Law Rev. 608; note 57 Am. St. Rep. 744.

98. See Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87; Chicago v. Galt, 224 Ill. 421, 79 N. E. 701; Strong v. Makeever, 102 Ind. 578, 1 N. E. 502, 4 N. E. 11; Neal v. Gilmore, 141 Mich. 519, 104 N. W. 609; Elfelt v. Stillwater St. Ry. Co., 53 Minn. 68, 55 N. W. 116; Speir v. Town of New Utrecht, 121 N. Y. 420, 24 N. E. 692; Stewart v. Frink, 94 N. C. 487; Walcott Twp. v. Skaugle, 6 N. D. 382, 71 N. W. 544; Comm. v. Kelly, 8 Gratt. (Va.) 632; Dicken v. Liverpool Salt & Coal Co., 41 W. Va. 511, 23 S. E. 582.

99. Patton v. State, 50 Ark. 53, 6 S. W. 227; Patterson v. Munyan, 93 Cal. 128, 129, 29 Pac. 250; Landers v. Town of Whitefield, 154 Ill. 630, 39 N. E. 656; Strong v. Makeever, 102 Ind. 578

1 N. E. 502, 4 N. E. 11; Joseph v. Sharp, 172 Iowa, 254, 154 N. W. 469; Stockwell v. Fitchburg, 110 Mass. 305; Meyer v. Petersburg, 99 Minn. 450, 109 N. W. 840; Zimmerman v. Snowden, 88 Mo. 218 (*semble*); Brandt v. Olson, 79 Neb. 612, 113 N. W. 151, 114 N. W. 587; Comm. v. Marshall, 137 Pa. 170, 20 Atl. 580; Almy v. Church, 18 R. I. 182, 26 Atl. 58; State v. Lloyd, 133 Wis. 408, 133 N. W. 964; Christianson v. Caldwell, 152 Wis. 135, 139 N. W. 751.

1. Taeger v. Riepe, 90 Iowa, 484, 57 N. W. 1125; Comm. v. Logan, 5 Litt. (Ky.) 286; Marlboro Twp. v. Van Derveer, 47 N. J. L. 259; Western Railway of Ala. v. Alabama G. T. R. Co., 96 Ala. 272, 17 L. R. A. 474, 11 So. 483.

2. Bolton v. McShane, 79 Iowa, 26; State v. Welpton, 34 Iowa, 144; Hamilton County v. Garrett, 62 Tex. 602; Shanline v. Wiltsie, 70 Kan. 177, 78 Pac. 436.

states, that possession beyond one's boundary line, which is the result of mistake, is not adverse.³

— (b) **User by public necessary.** The user by the public of private land for purposes of passage, in order to establish a highway by prescription, must be along substantially one line,⁴ as must a prescriptive private way.⁵ A slight divergence is, however, it seems, permissible, especially when caused by the physical condition of the road.⁶

As to what constitutes a user by the public, it has been said that the public means, in this connection, all those who have occasion for the user,⁷ and that the amount of travel is immaterial.⁸ On the other hand it appears that user by a few individuals,⁹ or by the residents in the neighborhood¹⁰ is not sufficient. The

3. *Ante*, § 505.

4. *Sprague v. Stead*, 56 Colo. 538, 139 Pac. 544; *O'Connell v. Chicago Terminal Transfer R. Co.*, 184 Ill. 308, 56 N. E. 355; *Hougham v. Harvey*, 40 Iowa, 634; *Schroeder v. Village of Onekama*, 95 Mich. 25, 54 N. W. 642; *Montana Ore Purchasing Co. v. Butte & B. Consol. Min. Co.*, 25 Mont. 427, 65 Pac. 420; *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489 5 Atl. 641; *Montgomery v. Somers*, 50 Ore. 259, 90 Pac. 674; *Brake v. Crider* 107 Pa. St. 210. *Sample v. Harter*, 37 S. D. 150, 156 N. W. 1016; *Hart v. Town of Red Cedar*, 63 Wis. 634, 24 N. W. 410.

5. *Ante*, § 525, note 41.

6. *Vance v. Adams*,—(Ky.)—, 112 S. W. 927; *City of Beatrice v. Black*, 28 Neb. 263, 44 N. W. 189; *Kendall Smith Co. v. Lancaster County*, 84 Neb. 654, 121 N. W. 960; *Kurtz v. Hoke*, 172 Pa. St. 165, 33 Atl. 549.

7. *Louisville, etc., R. Co. v. Etzler*, 3 Ind. App. 562; *Village of Grandville v. Jenison*, 84 Mich. 54, 47 N. W. 600; *Easter v. Overlea Land Co.*, 129 Md. 627, 99 Atl. 893; *Jones v. Davis*, 35 Wis. 376.

8. *Louisville, etc R. Co. v. Etzler*, 3 Ind. App. 562; *Baldwin v. Herbst*, 54 Iowa, 168, 6 N. W. 257; *Village of Grandville v. Jenison*, 84 Mich. 54, 47 N. W. 600.

9. *Harper v. State*, 109 Ala. 66, 19 So. 901; *Martin v. People*, 23 Ill. 395; *O'Connell v. Chicago Terminal Transfer Co.*, 184 Ill. 308; *State v. Tucker*, 36 Iowa, 485; *Eddy v. Clarke*, 38 R. I. 371, 95 Atl. 851. See *State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Rice v. Pershall*, 41 Wash. 73, 82 Pac. 1038; *O'Connell v. Chicago Terminal Transfer R. Co.*, 184 Ill. 308, 56 N. E. 355.

10. *Easter v. Overlea Land Co. of Baltimore County*, 129 Md. 627, 99 Atl. 893; *State v.*

result of the cases would seem to be that, while travel over the land need not be frequent, it must not be confined to persons who can be identified or segregated from the members of the community as a whole, that is, user by the public does not mean user by certain specific members of the public.

— (c) **Adverseness of user.** In order to establish a highway by prolonged user of the land for highway purposes, the user must be adverse,¹¹ and the expression "adverse" in this connection presumably means the same as in connection with the doctrines of adverse possession and prescription for private rights of user, a lack of recognition of any right in the landowner ever to put an end to it. When the user is not adverse, that is, when the user is accompanied by recognition of such right in the landowner, the latter has no reason to interfere with the user, and consequently no inference of a right of user should be drawn from his failure to do so. Furthermore, the very idea of a user for highway purposes involves a negation of the right in the landowner to put an end to such user. That the user is by permission shows that the user is not adverse,¹² it

Lucas, 124 N. Car. 804, 32 S. E. 553; Stotts v. Dichdel, 70 Ore. 86, 139 Pac. 932, 933; Witter v. Harvey, 1 McCord, L. (S. C.) 67, 10 Am. Dec. 650.

11. District of Columbia v. Robinson, 180 U. S. 92, 45 L. Ed. 440, 14 App. Cas. (D. C.) 512; City of Chicago v. Borden, 190 Ill. 430, 60 N. E. 915; Ladd v. Osborne, 79 Iowa, 93, 44 N. W. 235; Mayberry v. Standish, 56 Me. 432; Johanson v. Boston & A. R. Co., 153 Mass. 79, 26 N. E. 238; Slater v. Gunn, 170 Mass. 509, 41 L. R. A. 268, 49 N. E. 1017; Pittsburgh, C. C. & St. L. Ry. Co. v. Town of Crown Point, 150 Ind. 536, 50 N. E.

741; Stickley v. Sedus Tp., 131 Mich. 510, 59 L. R. A. 287, 91 N. W. 745; Hamilton v. Village of Owego, 42 N. Y. App. Div. 312, 59 N. Y. Supp. 103; Stewart v. Frink, 94 N. C. 487, 55 Am. Rep. 618.

That, under certain statutory provisions as to highways by user, the user need not be adverse, see Strong v. McKeever, 102 Ind. 578, 1 N. E. 502, 4 N. E. 11; Wellsville v. Hallock, (N. Y. Misc.), 139 N. Y. Supp. 961; Bolger v. Foss, 65 Cal. 250, 3 Pac. 871 (*semble*).

12. Jones v. Bright, 140 Ala. 268, 37 So. 79; Olson v. People, 56 Colo. 199, 138 Pac. 21; Chi-

necessarily involving a recognition of such right in the landowner.

The recognition of the landowner's right to stop the user being an affirmative fact, it is, it seems, for him to show it, that is, the user of land by the public may, in the ordinary case, be presumed to be adverse,¹³ in the absence of circumstances tending to show the contrary. A contrary presumption, however, that the user is permissive, is generally recognized in the case of wild or unoccupied land, especially if unenclosed.¹⁴

cago v. Chicago, R. I. & P. Ry. Co., 152 Ill. 561, 38 N. E. 768; Baltimore & O. S. W. Ry. Co. v. City of Seymour, 154 Ind. 17, 55 N. E. 953; Moffatt v. Kenny, 174 Mass. 311, 54 N. E. 850; Weihe v. Macatawa Resort Co., 198 Mich. 334, 164 N. W. 510; State v. Fisher, 117 N. C. 733, 23 S. E. 158; Bayard v. Standard Oil Co., 38 Ore. 438, 63 Pac. 614; Ferdinando v. City of Scranton, 190 Pa. St. 321, 42 Atl. 692; Gaines v. Merryman, 95 Va. 660, 29 S. E. 738; Fitts v. County, 78 Wash. 238, 138 Pac. 885.

13. Carter v. Walker, 186 Ala. 140, 65 So. 170, 171 (but see Jones v. Bright, 140 Ala. 268, 37 So. 79; Belleview Cemetery Co. v. McEvers, 168 Ala. 535, 53 So. 272); Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987 (*semble*); Thorworth v. Scheets 269 Ill. 573, 110 N. E. 42; Southern Indiana R. Co. v. Norman, 165 Ind. 126, 74 N. E. 896; Meade v. Topeka, 75 Kan. 61, 88 Pac. 574; Jefferson v. Callahan, 153 Ky. 38, 154 S. W. 898; Canton Co. of Baltimore v. Mayor, etc., of City of Baltimore 104 Md. 582, 65 Atl. 324; Brandt v. Olson, 79 Neb. 612, 113 N. W. 151

(*semble*); White v. Town of Edenton, 171 N. C. 21, 86 S. E. 170; Earle v. Poat, 63 S. C. 439, 41 S. E. 525; Hanson v. Taylor, 23 Wis. 547.

14. Brumley v. State, 83 Ark. 236, 103 S. W. 615; Ely v. Parsons, 55 Conn. 83, 10 Atl. 499; O'Connell v. Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; State v. Kansas City, etc., R. Co., 45 Iowa, 139; State v. Horn, 35 Kan. 717, 12 Pac. 148; Potter v. Magruder, 30 Ky. L. Rep. 76, 97 S. W. 732; Mayberry v. Standish, 56 Me. 342; Engle v. Hunt, 50 Neb. 358, 69 N. W. 970; Hutto v. Tindall, 6 Rich. Law, 396; State v. Rodman, 86 S. Car. 154, 68 S. E. 343; McKinney v. Duncan, 121 Tenn. 265, 118 S. W. 683; Cunningham v. San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941; Watson v. Board of Com'rs of Adams County, 38 Wash. 662, 80 Pac. 201; Board of Com'rs of Sheridan County v. Patrick, 18 Wyo. 130, 104 Pac. 531, 107 Pac. 748. So, it seems, in the case of an open common in a town. McKay v. Reading, 184 Mass. 140, 68 N. E. 43; Langley v. Gallipolis, 2 Ohio St. 107.

And if there is already a private way, which is open to the use of the public, the public use thereof, to a limited extent at least, cannot be presumed to be adverse, in the absence of anything to show that it is so.¹⁵

The fact that there was an ineffectual attempt to dedicate does not make the user by the public permissive,¹⁶ the case being analogous to that of an individual claiming under an invalid grant of an easement.¹⁷ And likewise the public user is adverse if based on a defective proceeding for the establishment of a highway.¹⁸

— (d) **Necessity of claim of right.** It is frequently said that the user must be under a claim of right in the public,¹⁹ but it may be questioned whether this means anything more than that it must be ad-

15. *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484; *Sprow v. Boston & A. R. Co.*, 163 Mass. 330, 39 N. E. 1024; *Aikens v. New York, N. H. & H. R. Co.*, 188 Mass. 547, 74 N. E. 929; *Stickley v. Sodus, T. P.*, 131 Mich. 510, 59 L. R. A. 287, 91 N. W. 745; *Speir v. Town of Utrecht*, 121 N. Y. 420, 24 N. E. 692; *Cincinnati & M. V. R. Co. v. Roseville*, 76 Ohio St. 108, 81 N. E. 178; *Bohrnstedt Co. v. Scharen*, 60 Ore. 349, 119 Pac. 337; *Root v. Comm.* 98 Pa. St. 170, 42 Am. Rep. 614; *Frye v. Village of Highland*, 109 Wis. 292, 85 N. W. 351.

16. *Bassett v. Harwich*, 180 Mass. 585, 62 N. E. 974.

17. *Ante*, § 519, note 69.

18. *Emira Highway Com'rs. v. Osceola Highway Com's*, 74 Ill. App. 185; *Richards v. Bristol County Com'rs*, 120 Mass. 401; *Neal v. Gilmore*, 141 Mich. 519, 104 N. W. 609; *Rogers v. Town*

of Aitkin, 77 Minn. 539, 80 N. W. 702; *State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Lydick v. State*, 61 Neb. 309, 85 N. W. 70; *Bryant v. Tamworth*, 68 N. H. 483, 39 Atl. 431; *Bayard v. Standard Oil Co.*, 38 Ore. 438, 63 Pac. 614; *Village of West Bend v. Mann*, 59 Wis. 69, 17 N. W. 972.

19. *Jones v. Bright*, 140 Ala. 268, 37 So. 79; *Lieber v. People*, 33 Colo. 493, 81 Pac. 270; *City of Chicago v. Wildman*, 240 Ill. 215, 88 N. E. 559; *Southern Indiana R. Co. v. Norman*, 165 Ind. 126, 74 N. E. 896; *Fairchild v. Stewart*, 117 Iowa, 734, 89 N. W. 1075; *May v. Blackburn*, — Ky. —, 25 S. W. 112; *Slater v. Gunn*, 170 Mass. 509, 41 L. R. A. 268, 49 N. E. 1017; *Wills v. Reed*, 86 Miss. 446, 38 So. 793; *Quinn v. St. Louis & S. F. R. Co.*, 253 Mo. 48, 161 S. W. 820; *Nelson v. Sneed*, 76 Neb. 201, 107 N. W. 255; *White v. Wiley*, 59 Hun (N. Y.) 618, 13 N. Y. Supp. 205;

verse,²⁰ that is, must be "as of right," and it must necessarily be "as of right in the public," if it is by the public and adverse. It is recognized that this requirement of claim of right involves no necessity that each member of the public, in passing over the land, shall state that he claims the right to do so as one of the public,²¹ and the requirement of claim of right appears ordinarily to be satisfied by acts and circumstances of a character which serve to show that the user is adverse.

— (e) **Necessity of notice of user.** The public user must be with the knowledge of the owner of the land,²² or the circumstances must be such that he can be charged with notice.²³

It has been said that the owner must be chargeable with notice that the user is under claim of right in the public,²⁴ and in at least two states it is laid down that there must be acts on the part of the municipal authorities sufficient to show notice that

State v. Fisher, 117 N. C. 733, 23 S. E. 158; Root v. Comm. 98 Pa. 170, .42 Am. Rep. 614; Sharp v. Mynatt, 1 Lea (Tenn.) 375. Occasional decisions to the effect that a user by the public is presumed not to be under claim of right (Merchant v. Markham, 170 Ala. 278, 54 So. 236; Gulf & S. I. R. Co. v. Adkinson, 117 Miss. 118, 77 So. 954) do not appear to harmonize with the decisions (*ante*, this section, note 14) that such user in the case of enclosed land at least, is presumed to be adverse.

20. See Palmer v. Chicago, 248 Ill. 201, 93 N. E. 765.

21. Hansen v. Green, 275 Ill. 221, 113 N. E. 982; Shellhouse v. State, 110 Ind. 509, 11 N. E. 484; State v. Green, 41 Iowa, 693;

Sprow v. Boston & A. R. Co., 163 Mass. 330, 39 N. E. 1024.

22. Falter v. Packard, 219 Ill. 356, 76 N. E. 495; State v. Green, 41 Iowa, 693; State v. Teeters, 97 Iowa, 458, 66 N. W. 754; Graham v. Hartnett, 10 Neb. 518; Rice v. Pershall, 41 Wash. 73, 82 Pac. 1038.

23. Patton v. State, 50 Ark. 53, 6 S. W. 227; State v. Kansas City, etc. R. Co., 45 Iowa, 139; O'Connell v. Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Village of Manchester v. Clarkson, 195 Mich. 354, 162 N. W. 115.

24. O'Connell v. Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Sprow v. Boston & A. R. Co., 163 Mass. 330, 39 N. E. 1024.

the user is of that character.²⁵ If, however, the landowner is chargeable with notice of the user in the particular case, he might, it would seem, be charged with notice of the character of the user, except when the circumstances are such that the user is presumed to be permissive, rather than adverse or under claim of right, as when it is of wild and unoccupied land,²⁶ or is upon the line of a private way which is open to the public.²⁷

—(f) **Continuity of user.** The user of the land by the public must be substantially continuous throughout the prescriptive period, in order to create a public right,²⁸ and consequently, if the landowner, during such period, erects a fence or other structure which prevents a continuance of the user, no right is acquired.²⁹

25. *Frink v. Stewart*, 94 N. C. 484; *Stickley v. Sodus Tp.*, 131 Mich. 510, 59 L. R. A. 287, 91 N. W. 745; See *Rice v. Pershall*, 41 Wash. 73, 82 Pac. 1038.

26. See *Watson v. Board of Com'rs of Adams County*, 38 Wash. 662, 80 Pac. 201; and *ante*, this section, note 14.

27. See *Sprow v. Boston & A. R. Co.*, 163 Mass. 330, 39 N. E. 1024 and *ante*, § 533(c), note 15.

28. *State v. Green*, 41 Iowa, 693; *City of Topeka v. Cowee*, 48 Kan. 345, 29 Pac. 560; *Jennings v. Tisbury*, 5 Gray, 73; *Hodges v. West Bloomfield*, 186 Mich. 259, 152 N. W. 1056; *State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Bleck v. Keller*, 73 Neb. 826, 103 N. W. 674; *Bayard v. Standard Oil Co.*, 38 Ore. 438, 63 Pac. 614; *In re Twenty-second Ave. Southwest*, 72 Wash. 99, 129 Pac. 884; *Town of Rolling v. Emrich*, 122 Wis. 134, 99 N. W. 464.

29. See *Jones v. Phillips*, 59 Ark. 35, 26 S. W. 386; *O'Connell*

v. Bowman, 45 Ill. App. 654; *Weld v. Brooks*, 152 Mass. 297, 25 N. E. 719; *Jones v. New York, N. H. & H. R. Co.*, 211 Mass. 521, 98 N. E. 607; *Rolling v. Emrich*, 122 Wis. 134, 99 N. W. 464.

It is occasionally said that the placing of such an obstacle to travel prevents a prescriptive highway because it shows an intention on the part of the landowner to exclude the public user. *Harper v. State*, 109 Ala. 66 19 So. 901; *Whaley v. Wilson* 120 Ala. 992, 24 So. 855; *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484; *Village of Peotone v. Illinois Cent. R. Co.*, 224 Ill. 101 79 N. E. 678; *Campau v. City of Detroit*, 104 Mich. 560, 62 N. W. 718; *Shell v. Poulson*, 23 Wash. 535, 63 Pac. 204; *Megrath v. Nickerson*, 24 Wash. 235, 64 Pac. 163. *In re Twenty-Second Ave. Southwest*, 72 Wash. 99, 129 Pac. 884; *Jones v. Davis*, 35 Wis. 376. This means, it appears, that such action on the part of the landlord

The fact, however, that he makes the exercise of the user more difficult, as by erecting a fence with a gate or bars therein, does not of itself interrupt the user,³⁰ though its erection, coupled with the fact that it is allowed by the public to remain, would seem to be evidence tending to show that the user is not adverse.³¹

It has been said that the public user is not sufficient if it is always contested by the owner.³² Just what this means does not clearly appear. As is remarked above, the fact that the owner erects gates or bars, which operate to some extent to interfere with travel, and which nevertheless are allowed by the public to remain, tends to show that the user by the public is not "as of right," but is permissive only, and the fact that the owner places notices to that effect on the gates, which are also allowed to remain³³

excludes any inference of acquiescence in the user as a basis for prescription. In *Chicago v. Galt*, 224 Ill. 421, 79 N. E. 701, verbal protests appear to be regarded as sufficient for this purpose.

30. *Mills & Allen v. Evans*, 100 Iowa, 712, 69 N. W. 1043; *Hinks v. Hinks*, 46 Me. 423; *Weld v. Brooks*, 152 Mass. 297, 25 N. E. 719; *Cunningham v. San Saba County*, 11 Tex. Civ. App. 557, 32 S. W. 928, 33 S. W. 892. But see *Berry v. St. Louis & S. F. R. Co.*, 124 Mo. App. 436, 101 S. W. 714.

31. See *Jones v. Phillips*, 59 Ark. 35, 26 S. W. 386; *Huffman v. Hall*, 102 Cal. 26, 36 Pac. 417; *Township of Madison v. Gallagher*, 159 Ill. 105, 113 Ill. 105, 42 N. E. 316; *State v. Cipra*, 71 Kan. 714, 81 Pac. 488 (*semble*); *Louisville & I. R. Co. v. Bailey*, 33 Ky. L. Rep. 179, 109 S. W. 336 (locked

gates opened on request); *Easter v. Overlea Land Co. of Baltimore*, 129 Md. 627, 99 Atl. 893; *Lewis v. City of Portland*, 25 Ore. 133, 22 L. R. A. 736, 42 Am. St. Rep. 772, 35 Pac. 256; *Goelet v. Board of Aldermen*, 14 R. I. 295. But see, apparently to the contrary, *Weld v. Brooks*, 152 Mass. 297, 25 N. E. 719; *Webster v. Lowell*, 142 Mass. 234, 8 N. E. 54. Compare *Pitser v. McCreery*, 172 Ind. 663, 88 N. E. 303, 89 N. E. 317. That a gate to keep in cattle does not prevent prescription for a highway, see *Clark v. Hull*, 184 Mass. 164.

32. *Moragne v. City of Gadsden*, 170 Ala. 124, 54 So. 518. And see *City of Chicago v. Galt*, 224 Ill. 421, 79 N. E. 701.

33. See *Megrath v. Nickerson*, 24 Wash. 235, 64 Pac. 163; *In re Southwest Twenty Second Ave.* 72 Wash. 99, 129 Pac. 884.

is perhaps additional evidence to the same effect.³⁴ But whether the action of the owner in contesting the public user merely by posting warnings not to trespass would be sufficient to prevent the acquisition of the right by the public, would seem to be open to question. If it is impossible to prevent the public travel without interfering with travel by those rightfully entitled, the safer course for him to adopt would seem to be the construction of gates.

— (f) **Recognition by municipal authorities.** In connection with the question of the establishment of a highway by length of user, reference is frequently made to the consideration whether the existence of such a highway has been recognized by the municipal authorities, by the making of repairs or otherwise, and the cases appear to be in a state of considerable confusion in this regard. Some cases assert the view that such recognition is not necessary to the existence of a prescriptive highway.³⁵ In so far as such recognition may be regarded as a prerequisite to the imposition of a liability upon the municipality for physical defects in the highway,³⁶ such a view appears to accord with the rule that an acceptance of the dedication of land as a highway cannot be inferred merely from public user, for the purpose of imposing a liability upon the municipality.³⁷ But in so far as public user is, for other

34. *Tarpey v. Veith*, 22 Cal. App. 289, 134 Pac. 367.

35. *Carter v. Walker*, 186 Ala. 140, 65 So. 170; *Madison Tp. v. Gallagher*, 159 Ill. 105, 42 N. E. 316; *Menard County Road District v. Berbe*, 231 Ill. 147, 83 N. E. 131; *Jennings v. Tisbury*, 5 Gray (Mass.) 73; *Bassett v. Harwich*, 180 Mass. 585, 62 N. E. 974; *Smith v. Nofsinger*, 86 Neb. 834, 126 N. W. 659 (*semble*); *Stevens v. Nashua*, 46 N. H. 193; *Harriman v. Moore*, 74 N. H. 277,

67 Atl. 225; *Porter v. Johnson*,—Tex. Civ App—, 151 S. W. 599; *Seattle v. Smither's* 37 Wash. 119, 79 Pac. 615; *Mason County v. McReavy*, 84 Wash. 9, 145 Pac. 993.

36. See *State v. Kent County Com'rs*, 83 Md. 377, 33 L. R. A. 291, 35 Atl. 62; *Downend v. City of Kansas City*, 156 Mo. 60, 51 L. R. A. 170, 56 S. W. 902; *State v. Dry Fork R. Co.*, 50 W. Va. 235, 40 S. E. 447.

37. *Ante*, § 483, note 81.

purposes, ordinarily regarded as sufficient evidence of acceptance of a dedication,³⁸ it would seem that, for such other purposes, any acceptance or recognition by the municipal authorities might be dispensed with when there has been a public user for the prescriptive period. Nevertheless the recognition of the highway by the municipal authorities is, in a number of jurisdictions, regarded as necessary in any case to make a highway by prescription.³⁹ In some of the cases in which this necessity is asserted, no reason is stated, while in some it is said or intimated that this is necessary in order to show a claim of right in the public.⁴⁰ Adopting the latter view, the recognition would have to take place at the commencement of the prescription period and continue throughout such period. Conceding, as

38. *Ante*, § 483, note 80.

39. For statements or suggestions that such recognition is necessary, see *Southern R. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508; *Louisville & N. R. Co. v. Hames*, 135 Ga. 67, 68 S. E. 805; *Nichols v. State*, 89 Ind. 298; *State v. Horn*, 35 Kan. 717, 12 Pac. 148; *Stickley v. Sodus Tp.*, 131 Mich. 510, 59 L. R. A. 287, 91 N. W. 745; *State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Speir v. Town of Utrecht*, 121 N. Y. 420, 24 N. E. 692; *Smith v. Smythe*, 197 N. Y. 457, 35 L. R. A. (N. S.) 524, 90 N. E. 1121; *Boyden v. Achenbech*, 79 N. C. 539; *State v. Lucas*, 124 N. C. 804, 32 S. E. 553; *Ridings v. Marion County*, 50 Ore. 30, 91 Pac. 22; *Gaines v. Merryman*, 95 Va. 660, 29 S. E. 738; *Way v. Fellows*, 91 Vt. 326, 100 Atl. 682; *State v. Dry Fork R. Co.*, 50 W. Va. 235, 40 S. E. 447.

Occasionally the statute requires that the road be worked

by the county authorities. See *Rose v. Nolen*, 166 Ky. 336, 179 S. W. 229; *Rauch Co. v. Emery*, 191 Mich. 188, 157 N. W. 419; *Town of Nells v. Sullivan*, 125 Minn. 353, 147 N. W. 244; *Barnard Realty Co. v. City of Butte*, 48 Mont. 102, 136 Pac. 1064; *Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780.

40. *State v. Green*, 41 Iowa, 693; *Stickley v. Sodus Tp.* 131 Mich. 510, 515, 59 L. R. A. 287, 91 N. W. 745; *Wills v. Reid*, 86 Miss. 446, 38 So. 792; *Hill v. McGinnis*, 64 Neb. 187, 89 N. W. 783; *People v. Osborn*, 84 Hun. 441, 32 N. Y. Supp. 358; *Stewart v. Frink*, 94 N. Car. 487; *Blute v. Scribner*, 23 Wis. 357; *Marshfield Land & Lumber Co. v. John Week Lumber Co.*, 108 Wis. 268, 84 N. W. 434; *Parrott v. Stewart*, 65 Ore. 254, 132 Pac. 523; *Board of Com'rs Sheridan County v. Patrick*, 18 Wyo. 130, 104 Pac. 531, 107 Pac. 748.

suggested above, that user under claim of right means merely adverse user,⁴¹ and that user is ordinarily to be presumed to be adverse in the absence of evidence to the contrary,⁴² it does not seem that recognition by the municipal authorities should be regarded as essential, though the fact of such recognition throughout the prescriptive period is the strongest sort of evidence that the user is not permissive merely.⁴³

—(g) **Width of highway.** Ordinarily the width of a highway based upon prescription is determined by the extent of the user during the prescriptive period.⁴⁴ Other considerations, however, are frequently effective to extend the exterior limits of the highway beyond the line of actual travel.⁴⁵ If the user is based upon invalid proceedings for the location of a highway, the width named in such invalid location will ordinarily control⁴⁶ and enclosures, such as fences or buildings, along the

41. *Ante*, § 533(d), note 20.

42. *Ante*, § 504.

43. *Smith v. Nofsinger*, 86 Neb. 834, 126 N. W. 659; *Wecker v. Dommer*, 97 Neb. 728, 151 N. W. 157; *O'Connell v. Chicago Terminal Transfer R. Co.*, 184 Ill. 308, 56 N. E. 355; *Parrott v. Stewart*, 65 Ore. 254, 132 Pac. 523; *Sharp v. Mynatt*, 1 Lea. (Tenn.) 375.

44. *District of Columbia v. Robinson*, 180 U. S. 92, 45 L. Ed. 440; *Goerke v. Town of Manitou*, 25 Colo. App. 482, 139 Pac. 1049; *Evans v. Bowman*, 183 Ind. 264, 108 N. E. 956; *Anderson v. City of Huntington*, 40 Ind. App. 130, 81 N. E. 223; *Meade v. City of Topeka*, 75 Kan. 61, 88 Pac. 574; *Scheimer v. Price*, 65 Mich. 638, 32 N. W. 873; *Wayne County Sav. Bank v. Stockwell*, 84 Mich. 586, 22 Am. St. Rep. 708, 48 N. W. 174; *Arndt v. Thomas*, 93

Minn. 1, 100 Am. St. Rep. 378, 106 Am. St. Rep. 418; *State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Talmage v. Hunting*, 29 N. Y. 447; *Silverton v. Brown*, 63 Ore. 418, 128 Pac. 45; *Morse v. Ranno*, 32 Vt. 600; *Prince William County v. Manuel*, 118 Va. 716, 88 S. E. 54; *Upper v. Lowell*, 7 Wash. 460, 35 Pac. 363.

45. See *Bayard v. Standard Oil Co.*, 38 Ore. 438, 63 Pac. 614.

46. *Pillsbury v. Brown*, 82 Me. 450, 19 At. 858, 9 L. R. A. 44; *Marchand v. Maple Grove*, 48 Minn. 271, 51 N. W. 606; *State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Bayard v. Standard Oil Co.*, 38 Ore. 438, 63 Pac. 614; *Upper v. Lowell*, 7 Wash. 460, 35 Pac. 363; *Konkel v. Pella*, 122 Wis. 143, 99 N. W. 453. But the width named in the invalid location will not control as against

line of the highway, maintained by the owners of the land, will be given very great weight in determining the limits of the highway.⁴⁷ Even where the width is regarded as measured by the user, it is not necessarily to be confined to the beaten track or thread of actual travel, it being essential that those using the road have sufficient room to pass and repass,⁴⁸ and occasionally a greater width being required for the purpose of properly improving the road.⁴⁹ The question of width is usually regarded as one of fact for the jury,⁵⁰ and statutory provisions as to the width of highways are not ordinarily regarded as controlling.⁵¹ Occasionally it has been said that the public user is to be regarded as evidence

one whose fences blocked part of such width. *Samuel v. Sherman*, 170 Ill. 265, 48 N. E. 576.

47. *Middletown v. Glenn*, 278 Ill. 149, 115 N. E. 847; *Evans v. Bowman*, 183 Ind. 264, 108 N. E. 956; *Tilton v. Wenham*, 172 Mass. 407, 52 N. E. 514; *Washington Borough v. Steiner*, 25 Pa. Super. Ct. 392; *Whitesides v. Green*, 13 Utah. 341, 57 Am. St. Rep. 740, 44 Pac. 1032. See *Watz v. Sunderland*, 147 Mich. 96, 110 N. W. 507; *Kendall Smith Co. v. Lancaster Co.*, 84 Neb. 654, 121 N. W. 960.

48. *Davis v. City of Clinton*, 58 Iowa, 389, 10 N. W. 768; *Tilton v. Wenham*, 172 Mass. 407, 52 N. E. 514; *Arndt v. Thomas*, 93 Minn. 1, 106 Am. St. Rep. 418, 100 N. W. 378; *State v. Morse*, 50 N. H. 9; *Whitesides v. Green*, 13 Utah, 341, 57 Am. St. Rep. 740, 44 Pac. 1032; *Bartlett v. Beardmore*, 77 Wis. 356, 46 N. W. 494.

49. *Marchand v. Town of Maple Grove*, 48 Minn. 271, 51 N. W. 606; *Whitesides v. Green*,

13 Utah, 341, 57 Am. St. Rep. 740, 44 Pac. 1032.

50. *Meservey v. Gulliford*, 14 Idaho, 133, 93 Pac. 780; *Davis v. City of Clinton*, 58 Iowa, 389, 10 N. W. 768; *Lawrence v. Mt. Vernon*, 35 Me. 100; *Arndt v. Thomas*, 93 Minn. 1, 106 Am. St. Rep. 418, 100 N. W. 378; *State v. Morse*, 50 N. H. 9; *Bayard v. Standard Oil Co.*, 38 Ore. 438, 63 Pac. 614; *Burrows v. Guest*, 5 Utah, 91, 12 Pac. 847; *Whitesides v. Green*, 13 Utah, 341, 57 Am. St. Rep. 740, 44 Pac. 1032; *Hamp v. Pend Oreille County*, 102 Wash. 184, 172 Pac. 869.

51. *Goerke v. Town of Manitou*, 25 Colo. App. 482, 139 Pac. 1049; *Davis v. City of Clinton*, 58 Iowa, 389, 10 N. W. 768. Compare *Yakima County v. Conrad* 26 Wash. 155, 66 Pac. 411. Such a statutory provision could not extend the width as against an owner of land adjoining the line of travel, whose land was fenced. *Watz v. Sunderland*, 147 Mich. 96, 110 N. W. 507.

of a right in the public to use the land to the usual width of a highway, by widening the travelled path, or otherwise, as the exigencies of the public may require.⁵²

52. Sprague v. Wait, 17 Pick. 494. See Meservey v. Gulliford, (Mass.) 309; Coffin v. Plymouth, 14 Idaho, 133, 93 Pac. 78; Arndt 49 N. H. 173; Kendall Smith v. Thomas, 93 Minn. 1, 100 N. Co. v. Lancaster Co., 84 Neb. W. 378, 106 Am. St. Rep. 418; 654, 121 N. W. 960; Bartlett v. City of Olympia v. Lemon, — Beardmore, 77 Wis. 356, 46 N. W. Wash. —, 161 Pac. 363.

CHAPTER XXV.

ACCRETION.

- § 534. General considerations.
- 535. As rule of law or rule of construction.
- 536. Applicable only to land above water.
- 537. Sudden and perceptible changes.
- 538. Accretion artificially produced.
- 539. Land appearing in place of land disappearing.
- 540. Accretions subject to existing incumbrances.
- 541. Vested right in future accretions.
- 542. Accretions to island.
- 543. Apportionment of accretions.
- 544. Formation of new islands.

§ 534. **General considerations.** When the line between water and the land bordering thereon is changed by the gradual deposit of alluvial soil upon the margin of the water or by the gradual recession of the water, the owner of the land ordinarily becomes entitled to the new land thus formed;¹ and, conversely, in case land bordering on water is gradually washed away, or the water otherwise gradually encroaches upon the land, the owner ordinarily loses the land which has thus been encroached on by the water, unless he retains its ownership as having previously been entitled

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| 1. Rex v. Yarborough, 3 B. | Iowa, 241, 35 Am. St. Rep. 304, |
| & C. 91; Gifford v. Yarborough, | 50 N. W. 983; Linthicum v. Coan, |
| 5 Bing. 163; Jefferis v. East | 64 Md. 439, 54 Am. St. Rep. |
| Omaha Land Co., 134 U. S. 178, | 775, 2 Atl. 826; Widdecombe v. |
| 33 L. Ed. 872; Hagan v. Campbell, | Chiles, 173 Mo. 195, 61 L. R. A. |
| 8 Port. (Ala.) 9, 33 Am. Dec. 267; | 309, 96 Am. St. Rep. 507, 73 S. |
| St. Louis, I. M. & S. Ry. Co. v. | W. 444; Saunders v. New York |
| Ramsey, 53 Ark. 314, 8 L. R. A. | Cent. & H. R. R. Co, 144 N. Y. |
| 559, 22 Am. St. Rep. 195, 13 S. | 75, 26 L. R. A. 378, 43 Am. |
| W. 931; Fillmore v. Jennings, 78 | St. Rep. 729, 38 N. E. 992; Caul- |
| Cal. 634, 21 Pac. 536; Chicago | field v. Smyth, 69 Ore. 41, 138 |
| Dock & Canal Co. v. Kinzie, 93 | Pac. 227; Fulton v. Frandolig, |
| Ill. 415; Coulthard v. Stevens, 84 | 63 Tex. 330. |

(2093)

to the land under the particular body or stream of water, or that part thereof.²

When one acquires additional land by the deposit of soil, he is said to acquire it by accretion or alluvion, When he acquires it by the recession of the water, he is more properly said to acquire it by reliction (or dereliction), but the expression accretion is not infrequently applied in such a case as well as in that first referred to, and it will, for the sake of convenience, be so applied in the course of the following remarks. The gradual loss of land by the action of the water is occasionally referred to as "erosion," while its sudden and violent removal or separation by such action is spoken of as "avulsion."

§ 535. As rule of law or rule of construction. The legal effect of a change in the line between land and water, such as is above referred to, is frequently regarded as based on positive rules of law, that is, it is said in effect that one acquires land which is added to his land by the gradual action or recession of water, and that likewise one loses land which is gradually washed away or encroached upon by the water. It appears, however, to be open to question whether there are, properly speaking, any such rules of law, and whether, so far as the legal effects of such physical changes are concerned, they are not rather the result of a general rule for the ascertainment of boundaries, a rule of construction, in effect, that if the boundary of land is determinable with reference to the sea or any body or stream of water, the boundary is presumably intended to vary as the particular physical feature referred to may vary, provided the variation

2. *In re Hull & Selby Ry. Co.*, 5 Mees. & W. 327; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 23; *Steele v. Sanchez*, 72 Iowa, 65, 2 Am. St. Rep. 233, 33 N. W. 366; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592; *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550; *Town of East Hampton v. Kirk*, 84 N. Y. 218; *Wilson v. Shiveley*, 11 Ore. 215, 4 Pac. 324.

is gradual. It is ordinarily immaterial, as regards results, which view is adopted, whether, for instance, it is said that one whose land bounds on the sea gains such land as may be left by the gradual recession of the sea and loses such land as may be encroached upon by the sea, or whether it is said that his boundary is presumed to be intended to change as the sea changes. In some cases, however, and for some purposes, it is material.

In the first place, if we recognize a distinct doctrine of accretion, in effect a rule of law that an owner of land shall have whatever adjacent land may be created by the gradual action or change of the water, the intention of the parties interested in the delimitation of the boundaries of the land is immaterial. In the presence of such a doctrine, the fact that, in conveying the property to its present owner, the grantor expressly retained all future accretions, would be immaterial, as would be the fact that the conveyance, in describing the land, made no reference to the body or stream of water, or to any incident or characteristic thereof. We do not find any case which explicitly decides that one can, in conveying property bounding on water, retain any subsequent accretions thereto, but there are *dicta* to that effect.³ The effectiveness of intention in this regard is also indicated by judicial assertions that when the boundary is fixed by the deed at a specified line without reference to the water, the grantee cannot claim accretions beyond such line.⁴ And in accord with this view are occasional decisions denying any right to accretions in favor of land bounded on the edge of an artificial pond, on the ground that

3. *People ex rel. Burnham v. 43, 88 S. W. 832; Bristol v. Car-*
Jones, 112 N. Y. 597, 20 N. E. roll County, 95 Ill. 84; Swerin-
577; Minneapolis Trust Co. v. gen v. St. Louis, 151 Mo. 348,
Eastman, 47 Minn. 301, 50 N. 52 S. W. 346; Frank v. Goddin,
W. 82, 930; Frank v. Goddin, 193 Mo. 395, 112 Am. St. Rep.
193 Mo. 395, 112 Am. St. Rep. 423, 91 S. W. 1057; Volcanic
493, 91 S. W. 1057. Oil and Gas Co. v. Chaplin, 27

4. *Perry v. Sadler, 76 Ark. Ont. L. Rep. 34, 484.*

the intention in naming such boundary was to convey land only extending to the line of such edge as it then existed.^{4a} The question whether there is a distinct doctrine of accretion, or whether the so called doctrine is merely a rule for the ascertainment of boundaries on water, appears to be clearly presented by cases involving the right of one, whose non riparian land has become riparian by the gradual encroachment of the water, to claim land subsequently formed by the action of the water. In such a case, the intention of the grantor of the present proprietor, or of some person anterior to him in the chain of title, was to convey land extending only to a boundary away from the water, and consequently if, because his land has become riparian, he is given the benefit of accretions thereto, he is in effect given what it was never the intention of his predecessor in title to convey. If there is a rule of law that accretions belong to the riparian proprietor, he is entitled to the accretions,⁵ while otherwise he is not so entitled.⁶ The most extreme application of the former view appears to be found in a Connecticut case,⁷ in which it was decided that when the land of A. which was originally on the East side of a river, but was not

4a. *Cook v. McClure*, 58 N. L. 437, 17 Am. Rep. 270; *Eddy v. St. Mars*, 53 Vt. 462, 38 Am. Rep. 395; *Holden v. Chandler*, 61 Vt. 291, 18 Atl. 310.

5. That he is entitled to the accretions in such a case, see *Peuker v. Kanter*, 62 Kan. 363, 63 Pac. 617; *Crandall v. Allen*, 118 Mo. 403, 22 L. R. A. 591, 24 S. W. 172; *Widdecombe v. Chiles*, 173 Mo. 195, 61 L. R. A. 309, 96 Am. St. Rep. 507, 73 S. W. 444; *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565; editorial notes in 16 Harv. Law Rev. 527, 26 Id. 185.

6. That he is not entitled to the accretions in such a case, see *Ocean City Ass'n v. Shriver*, 64 N. J. L. 550, 51 L. R. A. 425, 46 Atl. 690; *Allard v. Curran*, —S. D.—, 168 N. W. 761; *Stockley v. Cissna*, 119 Fed. Rep. 812; 3 *Farnham, Waters* at p. 2498. See also *Gilbert v. Eldridge*, 47 Minn. 210, 13 L. R. A. 511, 49 N. W. 679; *Maw v. Bruneau*, 37 S. D. 75, 156 N. W. 792; *Volcanic Oil & Gas Co. v. Chaplin*, 27 Ont. L. Rep. 34, 484.

7. *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565.

described, in the conveyance to him, with reference to the river, came to lie on the West side, by reason of a gradual Eastward change in the location of the river, the fact that it became, in the course of the change, riparian land on the West side of the river, entitled its owner to claim by way of accretion all the land over which any further Eastward change in the river caused it to pass. Applying such a doctrine, if there were a number of lots, no matter how many, over which a river gradually passed, in the course of a transverse change in its location, the owner of the lot on which the river first impinged, it being made thereby riparian land, would be entitled to all the lots over which the subsequent changes in the river caused it to pass.

The law in regard to the effect on property rights in land of a gradual change in the location of water is adopted by the common-law writers from the civil law,⁸ and that in the latter system the so-called doctrine of accretion or alluvion was, properly considered, a rule for ascertaining the intention as to the boundaries of land, may perhaps be inferred from the fact that it had no application when the limits or boundaries of the lands were fixed, that is, when they were what were known as *agri limitati*.⁹ A like idea, that the doctrine of accretion does not apply if the boundaries of the land are fixed, not with reference to the water on which the land happens to border, but by other objects or by measurements, is occasionally indicated by the common law writers.¹⁰

8. See per Lindley, J., in *Foster v. Wright*, 4 C. P. D. 438 at p. 447.

9. Dig. 41, 1, 16. See *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624; *Smith v. St. Louis Public Schools*, 30 Mo. 290; *Frank v. Godden*, 193 Mo. 395, 112 Am. St. Rep. 443, 1 S. W. 1057; Salkowski's *Private Roman Law*, 399;

Hunt's Boundaries & Fences (6th Ed.) 47.

10. In Britton, Bk. 2, ch. 2, pl. 7, it is said that one is entitled to the increase "if certain bounds are not found." And so it is said in Sir Matthew Hale's *De Jure Maris*, ch. 1, that it is immaterial that the alteration be by insensible degrees, if "there be other known

Adopting the view of the subject of accretion above indicated, that it is, in the last analysis, a rule, or aggregate of rules, of construction rather than of law, it would follow that there exists, in the case of land bounding on water the bed of which is in the state, a presumption that in so far as the original grant from the state, or any subsequent conveyance in the chain of title, bounded the land on the water or on any physical feature incident thereto, it was the intention that the location of the boundary should change as the line of the water, or of the specified physical feature, might gradually change in the future. And so when the line of demarcation between lands belonging to two individuals is some stream or body of water, or a particular feature thereof, such as the edge or the centre of the channel, it is presumed that, in so bounding the land, it was the intention to have the boundary change as the particular feature of the water referred to might thereafter change. That the rules in regard to accretion are rules for the ascertainment of the boundary, rules of construction, in effect, has occasionally been judicially stated.¹¹ A further argument in favor of this view is to be found in the consideration that when land is bounded on the center line of a stream or body of water, the boundary moves as such center line moves, although in such case the doctrine of accretion is apparently inapplicable.^{11a}

The only decisions which appear to be absolutely opposed to the view of the subject as a rule for the determination of boundaries are those above cited, that a non riparian owner becoming a riparian owner is entitled to accretions,¹² and several decisions to the

boundaries as stakes or extent of land."

11. *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 33 L. Ed. 872; *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 425; *Le Beau v. Given*, 37 Mo. 556; *Mey-*

ers v. Mathis, 42 La. Ann. 471, 21 Am. St. Rep. 385, 7 So. 605; *Minto v. Delaney*, 7 Ore. 337; *Camden & Atl. Land Co. v. Lippincott*, 45 N. J. L. 405.

11a. *Post*, § 536, note 21.

12. *Ante*, this section, note 5.

effect that one cannot claim land as an accretion which first formed as a bar in the stream, and subsequently became attached to the mainland by the gradual filling in of the intervening space.¹³ As regards these latter decisions, the view might, it is submitted, more properly be taken, that when land is conveyed as bounding on the edge of a stream, or on the seashore, it is to be regarded as continuing so to bound, irrespective of the direction of the accretion which causes a gradual change in the position of the boundary named.¹⁴ The owner of the mainland is not entitled to the accretions to an island, and there might consequently arise, on occasion, a question of some difficulty whether a particular formation away from the shore could be regarded as an island,¹⁵ but there is quite as considerable difficulty in the practical application of the view that accretions, in order to belong to the owner of the mainland, must commence at the edge of his property and work outwards. In the first case, it is impossible to say in which direction accretions grow, since bars ordinarily form beneath the water, and subsequently become connected with the main land by the filling up of the intervening space, and there is no logical reason for distinguishing in this regard between a bar a few inches below the surface of the water, and one a few inches above it. The question might furthermore be suggested, does the rule that accretions cannot be "saltatory," as it has been expressed, apply to a leap of an inch or two inches, and if not, at what distance does it commence to apply. Finally, it may be remarked, the place of the inception and the direction of

13. *Hammond v. Sheppard*, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867; *Crandall v. Smith*, 134 Mo. 633, 36 S. W. 612; *De Lassus v. Faherty*, 164 Mo. 361, 58 L. R. A. 193, 64 S. W. 183; *Nix v. Pfeifer*, 73 Ark. 201, 83 S. W. 951; *Fowler v. Wood*, 73

Kan. 511, 6 L. R. A. N. S. 162, 117 Am. St. Rep. 534, 85 Pac. 763; *Linthicum v. Coan*, 64 Md. 439, 54 Am. Rep. 75, 2 Atl. 826.

14. It is so decided in *King v. Young*, 76 Me. 76, 49 Am. Rep. 596.

15. *Post*, § 542, note 53.

progress of a gradual alluvial formation are ordinarily at the time matters of negligible importance and interest, and the memory thereof by witnesses, testifying perhaps after an interval of a number of years, is peculiarly apt to be fallacious, even when not intentionally false. It appears to be undesirable to make property rights dependent on testimony of such an ordinarily untrustworthy character.

§ 536. **Applicable only to land above water.** In speaking of the acquisition of land by accretion, the courts evidently have reference to visible land and not to land covered by water.¹⁶ It would never be suggested, for instance, when the bed of a stream or body of water does not originally belong to the owner of the bank or shore, that, because such bed is raised by an alluvial formation gradually extending outwards from his land, but not of such depth as to appear above the water, he is entitled by accretion to that particular stratum beneath the water. On the other hand, if the owner of the bank or shore does own the bed of the stream or body of water, or of part thereof, any vertical addition to the bed, whether or not sufficient in depth to appear above the water, belongs to him, not by reason of the doctrine of accretion, but because his ownership extends upwards as well as downwards, as it does in the case of land absolutely dissociated from water.¹⁷ In other words, such new land belongs to him merely because it is within the boundaries of his land, the limits of his ownership¹⁸

16. *Hess v. Muir*, 65 Md. 586, 5 Atl. 540, 6 Atl. 673. Land cannot be acquired by accretion, it is said, if it appears above the water merely temporarily. *Bennett v. National Starch Mfg. Co.*, 103 Iowa, 207, 72 N. W. 507; *Sapp v. Frazier*, 51 La. Ann. 1718, 72 Am. St. Rep. 493, 26 So. 378; *Anderson v. Ray*, 37 S.

D. 17, 156 N. W. 591.

17. *Ante*, § 251.

18. See *St. Louis v. Rutz*, 138 U. S. 226, 34 L. Ed. 941; *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581; *Hopkins Academy v. Dickson*, 9 Cush. 544; *Bussen v. Dickson*, 97 Ill. App. 310; *Griffin v. Johnson*, 161

As the courts, in recognizing the acquisition of newly formed land, consider only conditions as they appear above the water, so, in recognizing the loss of land by erosion, so called, they consider only conditions so apparent. That is, the fact that, after the disappearance of the strata which previously appeared above the water, the lower strata beneath the water still remain as before, as is usually the case, is not considered. The riparian proprietorship is regarded as ceasing as to the lower strata, so soon as the upper strata disappear.

The consideration above referred to, that the doctrine of accretion has reference to visible land only and not to land covered by water, would seem to show that it is not the governing principle in the following cases. When land is bounded on the centre of a stream as a monument,¹⁹ the centre of the stream is still the boundary, although the location thereof is substantially changed by the gradual change of the bed of the stream.²⁰ And likewise, if one owns the bed of a stream, without any land outside the stream, he continues to own such bed, in spite of any change in the location of the stream.²¹ In both of these cases the person who owns the bed of the stream, or a portion thereof, acquires, as the stream moves in the opposite direction, the bed, or a portion of the bed, of the stream in its new location, but this new acquisition, being of land covered by water, cannot be based upon

Ill. 377, 44 N. E. 206; *Linthicum v. Coan*, 64 Md. 429, 54 Am. Rep. 775; *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S. W. 437.

19. *Ante*, § 445:

20. *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186; *Wallace v. Driver*, 61 Ark. 429, 31 L. R. A. 317, 33 S. W. 641; *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565; *State v. Livingston*, 164 Iowa, 31, 145 N.

W. 91; *Fowler v. Wood*, 73 Kan. 511, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534, 85 Pac. 763; *Cruikshanks v. Wilmer*, 93 Ky. 19, 18 S. W. 1018; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544; *Gerrish v. Clough*, 48 N. H. 9; *Niehaus v. Shepherd*, 26 Ohio St. 40.

21. *Foster v. Wright*, 4 C. P. Div. 438; *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S. W. 437.

any doctrine of accretion. And when, as occurs in the case first referred to, the land which he owns while covered by water, remains his after it is laid bare by the transverse movement of the stream, he cannot be regarded as newly acquiring such land, already owned by him, upon the theory of accretion, or upon any theory whatsoever.

§ 537. **Sudden and perceptible changes.** The rules above stated, to the effect that the ownership follows, or is presumed to follow, changes in the location of the water, do not apply in the case of sudden and perceptible changes, and such changes, whether the land encroaches on the water or the water encroaches on the land, effect no change in the ownership of the *locus in quo*.²² And so, if the middle line of a stream is the boundary line between two owners, the boundary line remains the same, although, owing to a sudden change in the location of the stream, that line ceases to be the middle line of the stream.²³ This distinction, when looked at, not as a rule restrictive of a doctrine of accretion, and of a doctrine of encroachment by water

22. St. Louis v. Rutz, 138 U. S. 26, 34 L. Ed. 941; Nebraska v. Iowa, 143 U. S. 359, 36 L. Ed. 186; Wallace v. Driver, 61 Ark. 429, 31 L. R. A. 317, 33 S. W. 641; Fuller v. Shedd, 161 Ill. 462, 33 L. R. A. 146, 52 Am. St. Rep. 380, 44 N. E. 286; Kitteridge v. Ritter, 172 Iowa. 55, 151 N. W. 1097; Fowler v. Wood, 73 Kan. 511, 6 L. R. A. N. S. 162, 117 Am. St. Rep. 534, 85 Pac. 763; Hahn v. Dawson, 134 Mo. 581, 36 S. W. 233; Iowa Railroad Land Co. v. Coulthard, 96 Neb. 607, 148 N. W. 328; Mulry v. Norton, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581; *In re City of Buffalo*, 206 N. Y. 319, 99 N. E. 850; Den d Lynch v. Allen,

20 N. C. 62, 32 Am. Dec. 672; Spigener v. Cooner, 8 Rich. L. (S. C.) 301, 64 Am. Dec. 755.

23. Bittenuth v. St. Louis Bridge Co., 133 Ill. 535, 5 Am. St. Rep. 545, 17 N. E. 439; Smith v. Miller, 105 Iowa, 688, 70 N. W. 123, 75 N. W. 499; Sweatman v. Holbrook, 18 Ky. L. Rep. 870, 38 S. W. 691, 39 S. W. 258; Rees v. McDaniel, 115 Mo. 145, 21 S. W. 913; Bouvier v. Stricklett, 40 Neb. 792, 59 N. W. 550; Kinkead v. Turgeon, 74 Neb. 573, 580, 1 L. R. A. (N. S.) 762, 7 L. R. A. (N. S.) 316, 121 Am. St. Rep. 740, 13 Ann. Cas. 43, 104 N. W. 1061, 109 N. W. 744; State v. Muncie Pulp Co., 119 Tenn. 47, 104 S.

upon the land, but as a limitation upon a rule of construction as to boundaries on waters, finds its reason in the consideration that, in fixing the boundary with reference to the water or some physical feature thereof, it may be presumed that the parties in interest had in mind the probability of its gradual change with the passage of years, but did not have in mind the possibility of a sudden and perceptible change.

The distinction between a gradual and a sudden change, on which the difference in the resulting rights is based, has usually been viewed as dependent on the question whether, in the particular case, the actual process of change is perceptible, and it has not been regarded as sudden, rather than gradual, merely because, at distinct periods of time, one may be able to see that a change has occurred.²⁴ Occasionally the fact that the change took place as a result of a flood or storm appears to have been regarded as making the change a sudden one for the purpose of the distinction.²⁵

The distinction above referred to, between a gradual and a sudden change in the location of the water, or of some feature thereof, appears to have been to some extent abandoned in connection with the Missouri and other rivers of the middle west, the banks

W. 437; *A. G. Wineman & Sons v. Reeves*, 245 Fed. 254, 157 C. C. A. 446.

24. *King v. Yarborough*, 3 B. & C. 91; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 33 L. Ed. 872; *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 56 L. Ed. 570; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 24; *Coulthard v. Stevens*, 84 Iowa, 241, 35 Am. St. Rep. 304, 50 N. W. 983; *Fowler v. Wood*, 73 Kan. 511, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534, 85 Pac. 763; *Linthicum v.*

Coan, 54 Md. 439, 54 Am. Rep. 775, 2 Atl. 826; *Nix v. Dickerson*, 81 Miss. 632, 33 So. 490; *Camden & Atlantic Ry. Co. v. Lippincott*, 45 N. J. L. 405; *Halsey v. McCormick*, 18 N. Y. 147; *Saunders v. New York Central & Hudson River R. Co.*, 144 N. Y. 75, 26 L. R. A. 378, 43 Am. St. Rep. 729, 38 N. E. 992.

25. *St. Louis v. Rutz*, 138 U. S. 226, 34 L. Ed. 941; *Fowler v. Wood*, 73 Kan. 511, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534, 85 Pac. 763; *Lynch v. Allen*, 20 N. C. 190, 32 Am. Dec. 671.

of which are peculiarly subject to disintegration by the action of the current. Such disintegration of the banks, although ordinarily culminating in a sudden and perceptible disappearance of the stratum of soil above the level of the water, has been regarded as involving a gradual rather than a sudden change, so that the boundary of the land shifts in accordance with the change.²⁶ This view might perhaps have been based on the theory that the disintegration of the bank, which finally culminates in the sudden disappearance of its upper stratum, is itself gradual rather than sudden, but the tendency has been to regard the change as gradual rather than sudden for the reason that the soil, upon its removal by the water, loses all identity, and is gradually and imperceptibly attached by way of accretion to the banks of the river at other points thereon.²⁷ That is, by these decisions, apparently, the continued preservation of the identity of the land or soil separated from the bank is regarded as necessary to render such separation sudden rather than gradual, within the meaning of the rule that the boundary remains unchanged in spite of a sudden change in the stream.

The distinction between a sudden and perceptible change on the one hand and a gradual and imperceptible change on the other, is frequently difficult of application, and it appears questionable whether, as is ordinarily assumed in this connection, in the case of a sudden change the process is necessarily more perceptible than in the case of a gradual change. Perhaps a preferable line of distinction, in so far as concerns land on which the water has encroached, is that suggested in some of the cases,²⁸ and occasionally strongly in-

26. *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; *McCormack v. Miller*, 239 Mo. 463, 144 S. W. 101; *Bouvier v. Strickett*,

40 Neb. 792, 59 N. W. 550; *Denny v. Cotton*, 3 Tex. Civ. App. 634, 22 S. W. 122.

27. See *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186.

28. See cases cited *ante*, this section, note 26.

sisted upon, to the effect that the ownership of particular soil remains unchanged only when it retains its identity, it being said that the distinction is that between "a sudden disruption of a piece of ground from one man's land to another's which may be followed and identified," and "that increment which slowly or rapidly results from floods, but which is utterly beyond the power of identification."²⁹

In case a stream cuts out a new channel through the land, so as to separate parts of the land which were formerly not separated, the ownership of each part remains the same as before, unless at least the separation can be regarded as gradual rather than sudden.³⁰ To what extent the suddenness of the change is controlling in this connection does not clearly appear. The courts ordinarily refer to the change in the channel as being sudden in character, but there is high authority for considering the rule as the same even when the new channel is gradually formed, the decisive consideration being the lack of change in the location and character of the land as to which the question arises.³¹

§ 538. Accretion artificially produced. That the change in the shore or bank is the result, either in

29. *Benson v. Morrow*, 61 Mo. 352, quoted with approval in *Coulthard v. Stevens*, 84 Iowa 241, 35 Am. St. Rep. 304, 50 N. W. 983; *Yuttermann v. Grier*, 112 Ark. 366, 166 S. W. 749. See also *Nix v. Dickerson*, 81 Miss. 632, 33 So. 490.

30. *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186; *Missouri v. Nebraska*, 196 U. S. 23, 49 L. Ed. 372; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; *Bonewitz v. Wygant*, 75 Ind. 41; *Sweatman v. Holbrook*, 18 Ky. L. Rep. 872, 38 S. W. 691, 39 S.

W. 258; *Cooley v. Golden*, 117 Mo. 33, 21 L. R. A. 300, 23 S. W. 100; *Kinkead v. Turgeon*, 74 Neb. 573, 580, 1 L. R. A. (N. S.) 762, 7 L. R. A. (N. S.) 316, 121 Am. St. Rep. 740, 13 Ann. Cas. 43, 104 N. W. 1061, 109 N. W. 744; *McCormack v. Miller*, 239 Mo. 463, 144 S. W. 101.

31. *Trustees of Hopkins Academy v. Dickinson*, 4 Cush. (Mass.) 544, per Shaw, C. J. See *De Lassus v. Faherty*, 164 Mo. 361, 53 L. R. A. 193, 64 S. W. 183; *Grady v. Royar*, — (Mo.) —, 181 S. W. 428.

whole or in part, of human agency, is not ordinarily regarded as affecting the application of the established rules on the subject;³² subject to this limitation, however, that the owner of land abutting on the water cannot himself extend its limits at the expense of adjoining proprietors by producing a condition which causes an accretion to his land.³³ The question of the right of the owner of land thus to extend his land as against the state or a state agency would be determined with reference, not so much to the law of accretion, as to the right of a litoral proprietor, in that jurisdiction, to reclaim land covered by water.³⁴ That the owner of land on tide water does not become the owner of "made" land, which results from filling in in front of his land under authority from the state has been occasionally recognized.³⁵

§ 539. Land appearing in place of land disappearing. It has occasionally been said that if part of one's land disappears by erosion or submergence, and sub-

32. *Lovington v. St. Clair County*, 64 Ill. 56, 16 Am. Rep. 516; *Brundage v. Knox*, 279 Ill. 450, 117 N. E. 123; *Adams v. Roberson*, 97 Kan. 198, 155 Pac. 22; *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *Tatum v. St. Louis*, 125 Mo. 647, 28 S. W. 1002; *Whyte v. City of St. Louis*, 153 Mo. 80, 54 So. 478; *Halsey v. McCormick*, 18 N. Y. 147 (*dictum*); *Steers v. City of Brooklyn*, 101 N. Y. 51, 4 N. E. 7; *Gillihan v. Cieloha*, 74 Ore. 462, 145 Pac. 1061; *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035, 138 Pac. 650; *Standly v. Perry*, 3 Can. Sup. 356. Compare *Dana v. Jackson St. Wharf Co.*, 31 Cal. 118, 89 Am. Dec. 164; *Lewis v. John L. Roper Lumber Co.*, 113 N. C. 55, 18 S. E. 52.

33. *Atty. Gen. of Southern Nigeria v. John Holt & Company, Ltd.*, (1915) App. Cas. 599; *People ex rel. Blakeslee v. Commrs.*, 135 N. Y. 447, 32 N. E. 139; *Saunders v. New York Cent. & H. R. R. Co.*, 144 N. Y. 75, 26 L. R. A. 378, 43 Am. St. Rep. 729, 38 N. E. 992; *Ball v. Stack*, 2 Whart. (Pa.) 508, 30 Am. Dec. 278; *Menominee River Lumber Co. v. Seidl*, 149 Wis. 316, 135 N. W. 854 (as against state).

34. *Ante*, § 305.

35. *Patton v. City of Los Angeles*, 169 Cal. 521, 147 Pac. 141; *Sage v. New York*, 154 N. Y. 61, 61 Am. St. Rep. 592, 58 L. R. A. 606, 47 N. E. 1096. See *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 656, 31 L. Ed. 543.

sequently land forms or reappears in the same place, the latter land belongs to the person who owned the land which disappeared.³⁶ Such a statement, however, does not appear to accord with the authorities to the effect that, by the gradual encroachment of water on one's land, one loses the part encroached on,³⁷ and it would seem to be true only when the encroachment is sudden and perceptible, or there appears an intention that the boundary shall remain in the same location in spite of a gradual change in the location of the water, or for some other reason the locality covered by the land which disappeared remains in the same ownership after the disappearance as before.³⁸

§ 540. Accretions subject to existing incumbrances.

When land is dedicated for a public use of such a character as to render its continued extension to the water desirable, as for instance for a highway leading to the water or for a park, the dedication is presumed to ex-

36. *Chicago v. Ward*, 169 Ill. 392, 38 L. R. A. 849, 61 Am. St. Rep. 185, 48 N. E. 927; *Hughes v. Birney's Heirs*, 107 La. Ann. 664, 32 So. 30; *Mulry v. Norton*, 100 N. Y. 424, 3 N. E. 586, 53 Am. Rep. 206; *State v. Muncie Pulp Co.*, 119 Tenn. 4, 104 S. W. 437; *Stockley v. Cissna*, 119 Fed. 812.

37. *Ante*, § 534, note 2.

38. *Wallace v. Driver*, 61 Ark. 429, 31 L. R. A. 317, 33 S. W. 641; *Holcomb v. Blair*, 25 Ky. L. Rep. 974, 76 S. W. 843; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592; *Vogelsmeier v. Prendergast*, 137 Mo. 271, 39 S. W. 83; *Frank v. Goddin*, 193 Mo. 390, 112 Am. St. Rep. 493, 91 S. W. 1057; *In re City of New York*, 206 N. Y. 319, 99 N. E. 850; editorial notes, 7

Columbia Law Rev. 370; 16 *Harv. Law Rev.* 527.

In *St. Louis v. Rutz*, 138 U. S. 226, 34 L. Ed. 941, in which it was held that one whose land was washed away re-acquired land formed in the same place, it was explicitly stated that such washing away was "rapid and perceptible in its progress." A like statement might be made in regard to the disappearance of the land in *Fowler v. Wood*, 73 Kan. 511, 6 L. R. A. (N. S.) 16, 117 Am. St. Rep. 534, 85 Pac. 763, and such appears to be the meaning of the statement in *Lord Hale's De Jure Maris*, cap. 4. See *Hall, Foreshore* (2nd Ed.) at p. 130, as quoted in *Ocean City Ass'n v. Shriver*, 64 N. J. Law 550, 51 L. R. A. 425, 46 Atl. 690.

tend as far as the water, although this, by reason of accretions to the land, becomes more distant after the dedication is made.³⁹ "The presumption is that the intent was that the way would reach the water so as to enable the public to enjoy the navigation of the stream."⁴⁰ Likewise, it has been decided that when a highway was, by statutory proceedings, laid out extending to the water, or to some particular feature of the water, it continued to extend thereto in spite of any change that might occur in the water.⁴¹ The grant of a private right of way extending to the water would no doubt ordinarily be construed in the same way as is a dedication for highway purposes.⁴² And a restrictive covenant in regard to shore land has been regarded as applying to land added thereto by accretion.⁴³

A lease for years of land, bounding on water, is, like a conveyance in fee simple, presumed to intend the water to remain the boundary, in spite of any gradual change in the location thereof.^{43a} And this is likewise the case when a mortgage is made of such land.⁴⁴

39. *Doe v. Jones*, 11 Ala. 63; *Town of Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869; *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Dec. 476; *Mayor of Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 547; *Hathaway v. City of Milwaukee*, 132 Wis. 249, 9 L. R. A. (N. S.) 778, 122 Am. St. Rep. 975, 111 N. W. 570, 112 N. W. 455. That a contrary intention may be inferred from the circumstances, see *Mark v. West Troy*, 151 N. Y. 453, 45 N. E. 842.

40. *State v. Yates*, 104 Me. 360, 22 L. R. A. (N. S.) 592, 71 Atl. 1018, per *Savage*, J.

41. *Newark Lime & Cement Mfg. Co. v. Newark*, 15 N. J.

Eq. 64; *Hoboken Land & Imp. Co. v. Mayor, etc., of Hoboken*, 36 N. J. L. 540; *State v. Yates*, 104 Me. 360, 22 L. R. A. (N. S.) 592, 71 Atl. 1018; *Dana v. Craddock*, 66 N. H. 593, 32 Atl. 757.

42. See *Lockwood v. New York & N. H. R. Co.*, 37 Conn. 387.

43. *Bridgewater v. Ocean City Ass'n*, 85 N. J. Eq. 379, 96 Atl. 905.

43a. *Cobb v. Lavalley*, 89 Ill. 331, 31 Am. Rep. 91; *Rutz v. Kehr*,—(Ill.)—, 25 N. E. 957; *Williams v. Baker*, 41 Md. 523.

44. *Cobb v. Lavalley*, 89 Ill. 331, 31 Am. Rep. 91; *Cruikshanks v. Wilmer*, 93 Ky. 19, 18 S. W. 1018; *Allen v. St. Louis, I. M. & S. R. Co.*, 137 Mo. 205, 38 S. W. 957.

A lien or incumbrance on the land, which is created by operation of law, such as a right of dower,⁴⁵ binds subsequent accretions to the land, for the reason, it seems, that it is necessarily co-extensive with the ownership of the land, and the latter is presumed to extend to the water without reference to any gradual change which may take place in the location of the water.⁴⁵

It has been decided that if, after the statute of limitations has partially run in favor of one in adverse possession of land bounding on the water, land is added thereto by accretion, he acquires, upon the subsequent running of the balance of the limitation period, the title to the newly formed land as well as to that originally existing. This is for the reason, it is said, that "the indicia of the actual possession of him who held on the main land are extended over the forming accretion and bring it within his actual possession."⁴⁶ Presumably a like view would be taken in the case of adverse user of land by the public or an individual for passage to the water, that is, the user would be regarded as in theory extending over the accretion then forming or liable to form in the future, for the purpose of giving a right by prescription.⁴⁷

§ 541. **Vested right in future accretions.** It has been occasionally stated that a riparian owner has no vested right as to future accretions.⁴⁸ This is pre-

45. *Lombard v. Kinzie*, 73 Ill. 446.

46. *Benne v. Miller*, 149 Mo. 228, 50 S. W. 824, quoted and applied in *Bellefontaine Improvement Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; *Chicago & N. W. Ry. Co. v. Groh*, 85 Wis. 641, 55 N. W. 714.

47. Compare note in 22 Harv. Law Rev. at p. 610.

2 R. P.—58

48. *Western Pac. R. Co. v. Southern Pac. Co.*, 151 Fed. 376, 80 C. C. A. 606, *Cohen v. United States*, 162 Fed. 364; *Eisenbach v. Hatfield*, 2 Wash. 250, 26 Pac. 539. The cases of *Taylor v. Underhill*, 40 Cal. 471; *Chicago, R. I. & P. Ry. Co. v. Porter*, 72 Iowa, 426, 34 N. W. 286, occasionally cited to this effect, do not support the statement.

sumably correct as regards his right to have conditions remain such that accretions may form in the future in front of his land,⁴⁹ but it appears questionable as regards his right to such accretions as do form.⁵⁰ For instance, if the state grants land bounded by the shore, and it is clearly the intention that the grant shall extend to the shore regardless of any change that may take place in the location thereof, the state cannot, it is conceived, make such intention nugatory by enacting that no accretion shall accrue to the benefit of any littoral owner. And in the case of land bounded by the edge of a river, it would hardly be permissible for the legislature to deprive the grantee of such land of the right to future accretions, and to give them to his grantor, by establishing a conclusive presumption that in such a case the boundary line is intended to remain in the same location in spite of any change in the edge of the stream as a result of accretions to the land.

§ 542. Accretions to island. In the case of an island, the same rule applies as in the case of land bounded by water on one side only, that is, the boundaries are presumed to vary with any gradual change in the line between the land and the water or, as it is otherwise expressed, the owner of an island is entitled to land added thereto by accretion to the same extent as the owner of land on the bank or shore of the main-

49. In *Freeland v. Pennsylvania R. Co.*, 197 Pa. 529, 58 L. R. A. 206, 80 Am. St. Rep. 850, 47 Atl. 745, it was decided that a riparian owner could recover damages for the loss of future alluvium by reason of the erection of a railway embankment higher up the stream, but there the alluvium was accustomed to form, not horizontally adjacent to plaintiff's land, but upon it. That is, there was an interference

with the utility of land actually owned by him.

50. There are *dicta* to the effect that one has a vested right to future accretions, in *County of St. Clair v. Lovington*, 23 Wall. (U. S.) 46, 23 L. Ed. 59; *Hohl v. Iowa Cent. R. Co.*, 162 Iowa, 66, 143 N. W. 850; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624; *Meyers v. Mathis*, 42 La. Ann. 471, 21 Am. St. Rep. 385, 7

land.⁵¹ In case accretions to the island and to the mainland eventually meet, the owner of each, it is said, owns the accretions to the line of contact,⁵² or, as we would prefer to express it, the boundary of an island, as that of the mainland, changes as its edge or shore line changes, and when there is no longer any island, owing to the growth of the accretions, he to whom the island belonged owns to where its edge or shore line was last visible.

The question may arise, in this connection, whether a formation of land which appears in the stream is of sufficient size, importance and permanence, to be regarded as an island. It has been said in this connection that not everything which rises above highwater mark can be called an island, that there may be reefs and rocks and other accumulations that are not such in any essential sense, and it may be a question of fact whether sand heaps and bars, separated from the mainland only by narrow channels or sloughs, are islands.⁵³

So. 605. See *Linthicum v. Coan*, 64 Ind. 439, 54 Am. Rep. 775, 2 Atl. 826; *Webber v. Axtell*, 94 Minn. 375, 6 L. R. A. (N. S.) 194, 102 N. W. 915. That after the federal government granted land as bordering on a lake, it could not deprive the grantee of land formed by accretion is decided in *Knudsen v. Omanson*, 10 Utah, 124, 37 Pac. 250.

51. *St. Louis v. Rutz*, 138 U. S. 226, 34 L. Ed. 941; *Fillmore v. Jennings*, 78 Cal. 634, 21 Pac. 536; *Glassell v. Hansen*, 135 Cal. 547, 67 Pac. 964; *Griffin v. Johnson*, 161 Ill. 377, 44 N. E. 206; *Holman v. Hodges*, 112 Iowa, 714, 58 L. R. A. 673, 84 Am. St. Rep. 367, 84 N. W. 950; *Stark v. Meriwether*, 98 Kan. 10, Ann. Cas. 1918E, 993, 157 Pac. 438; *Perks & Higgins v. McCracken*, 169 Ky.

590, 184 S. W. 891; *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589.

52. *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; *Fowler v. Wood*, 73 Kan. 511, 85 Pac. 763, 117 Am. St. Rep. 534, 6 L. R. A. (N. S.) 162; *Bigelow v. Hoover*, 85 Iowa, 161, 19 Am. St. Rep. 296, 52 N. W. 124; *Cooley v. Golden*, 117 Mo. 33, 21 L. R. A. 300, 33 S. W. 100; *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233; *Moore v. Farmer*, 156 Mo. 33, 79 Am. St. Rep. 504, 56 S. W. 493. See *People v. Warner*, 116 Mich. 228, 74 N. W. 705.

53. *Peters, C. J.*, in *Babson v. Tainter*, 79 Me. 368, 10 Atl. 368. It has been decided by the same court that an elevation of muscle bed, occasionally covered by the

§ 543. **Apportionment of accretions.** In making the division between adjoining litoral or riparian owners of the land formed by accretion, the courts have usually adopted the rule of the civil law, by which the new water front is divided between them in the same proportions as the old water front, the side boundary lines being run in a straight course from the points of division on the old frontage to the points of division on the new.⁵⁴ It is generally conceded, however, even by the decisions which adopt this rule of division in the ordinary case, that it is subject to modification under particular circumstances,⁵⁵ and that especially in fixing the extent of the frontage the "general available line" thereof should be taken rather than the actual line as extended by deep indentations or sharp projections. In at least one case the lines were extended from the points of division on the old water front to proportion-

water, is not an island. *Thorn-ton v. Foss*, 26 Me. 402.

54. *Johnston v. Jones*, 1 Black. (U. S.) 210, 17 L. Ed. 117; *Malone v. Mobbs*, 102 Ark. 542, Ann. Cas. 1914A, 479, 145 S. W. 193, 146 S. W. 143; *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866, 2 N. E. 68; *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867; *Berry v. Hoogendoorn*, 133 Iowa, 437, 108 N. W. 333; *Newell v. Leathers*, 50 La. Ann. 162, 69 Am. St. Rep. 395, 23 So. 243; *Deerfield v. Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; *Blodgett & D. Lumber Co. v. Peters*, 87 Mich. 498, 49 N. W. 917, 24 Am. St. Rep. 175; *Smith v. Leavenworth*, 101 Miss. 238, 57 So. 803; *De Lassus v. Faherty*, 164 Mo. 361, 58 L. R. A. 193, 64 S. W. 183; *Batchelder v. Kenniston*, 51 N. H. 496, 12 Am. Rep. 143; *O'Don-*

nell v. Kelsey, 10 N. Y. 415; *Northern Pine Land Co. v. Bigelow*, 84 Wis. 157, 21 L. R. A. 776, 54 N. W. 496; *Hathaway v. City of Milwaukee*, 132 Wis. 249, 9 L. R. A. (N. S.) 778, 122 Am. St. Rep. 975, 112 N. W. 455.

55. *Malone v. Mobbs*, 102 Ark. 542, Ann. Cas. 1914A, 479, 145 S. W. 193, 146 S. W. 143; *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866, 2 N. E. 68; *City of Peoria v. Central Nat. Bank*, 224 Ill. 43, 12 L. R. A. (N. S.) 687, 79 N. E. 296; *Stark v. Meriwether*, 98 Kan. 10, Ann. Cas. 1913E, 993, 157 Pac. 438; *Blodgett & Davis Lumber Co. v. Peters*, 87 Mich. 498, 24 Am. St. Rep. 175, 49 N. W. 917; *Smith v. Leavenworth*, 101 Miss. 238, 57 So. 803; *Batchelder v. Keniston*, 51 N. H. 496, 12 Am. Rep. 143; *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701; *Hubbard v. Manwell*, 60

ate points of division, not on the new front, but on the thread of the stream.⁵⁶

Occasionally the new land formed in a stream has been divided by drawing straight lines from the division points on the old front at right angles to the general course of the stream,⁵⁷ and sometimes the division has been made by continuing the side lines of the properties in exactly the same direction through the newly formed land.⁵⁸ This latter method of apportionment would seem best to accord with the theory of accretion, above advocated,⁵⁹ that one acquires title to the newly formed land merely because the muniment of title is construed as making the water the boundary regardless of change in the location of the water. For instance, if a conveyance describes the side boundary as running in a certain course to the water, it should run in that course regardless of any change in the location of the water. But the courts have not looked at the subject from this point of view, and have occasionally repudiated in express terms the method of apportionment referred to.⁶⁰ They have apparently had in mind chiefly the securing a fair division of the new frontage, a consideration which, it would seem, is of much greater importance in the case of navigable waters than in the case of those not navigable.

This matter of the apportionment of accretions has been occasionally discussed with reference to the analogous case of the apportionment of the "flats" or the shore among the owners of the uplands, in cases in which the state has relinquished the ownership of the

Vt. 235, 6 Am. St. Rep. 110, 14 Atl. 693.

56. *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 886, 2 N. E. 68.

57. *Gorton v. Rice*, 153 Mo. 676, 55 S. W. 241; *Miller v. Hepburn*, 8 Bush (Ky.) 326.

58. *Stockley v. Cissna*, 119 Fed. 812, 56 C. C. A. 324 (*semble*); *McCamon v. Stagg*, 2 Kan.

App. 479, 2 Pac. 86; *Gorton v. Rice*, 153 Mo. 676, 55 S. W. 241;

Hubbard v. Manwell, 60 Vt. 235, 6 Am. St. Rep. 110, 14 Atl. 693,

59. *Ante*, § 535.

60. *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866, 2 N. E. 68; *Berry v. Hoogendoorn*, 123 Iowa, 437, 108 N. W. 923; *Crandall v. Allen*, 118 Mo. 403, 22

flats,⁶¹ and like considerations have been recognized as applicable in the two cases, as they have, in determining the rights of riparian or litoral owners, as against each other, to construct improvements in front of their land.⁶² In all these cases the difficulty of arriving at a just mode of apportionment is particularly emphasized when the lands belonging to the various proprietors are located on a bay or cove, and varying rules have been suggested as to the most desirable method of apportionment in such a case, the underlying idea of all of which, however, is to give to each proprietor the same proportionate access to the water as he previously had.⁶³

When a lake, the bed of which originally belonged to the state, becomes dry, the question as to the ownership of the bed is a difficult one. It appears to depend in the first place upon the direction or directions in which the recession of the water occurred, each owner of abutting land being entitled by "accretion" to land left dry as the water receded from his shore. Frequently, however, it would be impossible to ascertain the direction of the recession of the water, and in such a case the court would presumably have to proceed on the theory that the whole bed of the lake became dry at one time, and fix the lines of division, as between individual proprietors, as if the ownership had not originally been in the state.^{63a} In case it appears that, in the course of the gradual disappearance of the water, islands formed or appeared, these would be-

L. R. A. 591, 24 S. W. 172; *Manchester v. Point Street Iron Works*, 13 R. I. 355.

61. See *Comm. v. City of Roxbury*, 9 Gray (Mass.) 451; *Wonsen v. Wonsen*, 14 Allen (Mass.) 85; *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701; *Lowndes v. Wickes*, 69 Conn. 15, 36 Atl. 1072.

62. See *Blodgett & Davis Lumber Co. v. Peters*, 87 Mich. 498, 24 Am. St. Rep. 175, 49 N. W. 917; *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701.

63. See editorial notes, 122 Am. St. Rep. 986, 21 L. R. A. 776, 25 L. R. A. (N. S.) 257.

63a. *Ante*, § 445.

long to the state,^{63b} and so the state would be entitled to any extensions of such islands caused by the further recession of the water away therefrom.^{63c}

§ 544. **Formation of new islands.** An island, when formed in a stream or body of water by the deposit of alluvial matter therein, belongs to the owner of the land beneath the water, on which the island is formed, whether such owner be the state or an individual.^{63d} So, if the island is on both sides of a line dividing the lands of different owners, the island belongs to both owners.⁶⁴ This is evidently not so much by force of a doctrine of accretion as by reason of the fact that the island is within the limits of the ownership of the particular proprietor. A new formation on his land belongs to him just as much as the old formation.

If an island which first forms opposite the land of one riparian proprietor gradually extends by accretion opposite the land of another proprietor, the island belongs, not exclusively to the former, but in part to the former and in part to the latter.⁶⁵

An island which is formed, not by the deposit or increase of alluvial matter, but by a change in the course of a river, operating to cut off from the mainland a portion of land previously constituting a part of the

63b. *Post*, § 544.

63c. See *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 876.

63d. *St. Louis v. Rutz*, 138 U. S. 226, 34 L. Ed. 941; *Glassell v. Hansen*, 135 Cal. 547, 67 Pac. 964; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *East Omaha Land Co. v. Hansen*, 117 Iowa, 96, 90 N. W. 705; *Wilson v. Watson*, 144 Ky. 352, Ann. Cas. 1913A 774, 138 S. W. 283; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592; *Mulry v. Norton*, 100 N. Y. 424, 426.

53 Am. Rep. 206, 212, 3 N. E. 581; *McCullough v. Wall*, 4 Rich. (S. C.) 68, 53 Am. Dec. 715; *Menominee River Lumber Co. v. Seidl*, 149 Wis. 316, 136 N. W. 854.

64. *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; *Wiggenhorn v. Kountz*, 22 Neb. 690, 8 Am. St. Rep. 150, 37 N. W. 603; *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S. W. 437; 3 Kent's Comm. 428.

65. *Archer v. Southern Ry. Co.*, 114 Miss. 403, 75 So. 251

mainland, continues in the same ownership as before.⁶⁶ provided at least the change in the course of the stream can be regarded as sudden.⁶⁷

66. Trustees of Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 544; De Lassus v. Faherty, 164 Mo. 361, 58 L. R. A. 193,

64 S. W. 183; Grady v. Royar, (Mo) 181 S. W. 428; Bonewitz v. Wygant, 75 Ind. 41.

67 See *ante*, § 537.

CHAPTER XXVI.

ESTOPPEL.

§ 545. Assertion of after acquired title.

- (a) General considerations.
- (b) Character of conveyance.
- (c) Necessity and character of covenants.
- (d) Cases to which doctrine inapplicable.
- (e) Persons bound by the estoppel.

546. Estoppel by representation.

547. Improvements by oral grantee.

§ 545. Assertion of after acquired title— (a) General considerations. At common law, a transfer of land by feoffment, fine, or common recovery operated to transfer any estate or interest which might be subsequently acquired by the transferor, in case he did not, at the time of making the assurance, have such an estate as he purported to transfer.¹ A lease by indenture had a partially similar effect, in that, if the lessor did not have any interest in the land at the time of making the lease, an interest subsequently acquired by him became subject thereto, though this was not always the case if the lessor had some interest at the date of the lease.² Conveyances other than those named had no such effect of passing an after acquired interest or title at common law, nor have they in England at the present day.³

1. Bigelow, Estoppel (6th Ed.) 419, 450-456; Rawle, Covenants for Title (5th Ed.) § 243; Doe d. Christmas v. Oliver, 10 Barn. & C. 181; Sturgeon v. Wingfield, 15 Mees. & W. 224.

2. Co. Litt. 47b; Williams, Real Prop. (21st Ed.) 507; Tiffany, Landlord & Tenant, § 76;

Doe d. Strode v. Seaton, 2 Cromp., M. & R. 728; Trevivan v. Lawrence, 1 Salk. 276.

3. Williams, Real Prop. (21st Ed.) 507; Rawle, Covenants for Title (5th Ed.) §§ 244, 246, 262; Bigelow, Estoppel, 459 et seq; 2 Smith, Lead. Cas. Amer. notes 839; Right v. Bucknell, 2 Barn.

It has been recognized in England,⁴ as it has in numerous jurisdictions in this country,⁵ that if a conveyance purports to transfer a certain estate, whether this appears from recitals, covenants, or any other part of the instrument, the grantor is estopped thereafter to assert that, by reason of lack of title in him at the time, such an estate did not pass by the conveyance, to assert, in other words, that he acquired title after and not before the conveyance. This latter view is ordinarily referred to as involving merely an application of the common law doctrine of estoppel by deed, precluding a party to a deed from contradicting or disproving any declaration or averment therein. Frequently, however, it might as well be regarded as involving an application of the modern doctrine of estoppel by misrepresentation, the grantor, that is, having induced a change of position on the part of the grantee, the payment of purchase money, by his representation that he has an estate of a certain character,

& Adol. 278; General Finance, Mortgage & Discount Co. v. Liberator Permanent Benefit Bldg. Soc. 10 Ch. Div. 15.

4. See *Right v. Bucknell*, 2 B. & Ad. 278; *Heath v. Crealock*, L. R. 10 Ch. 30; *Bensley v. Burdon*, 2 Sim. & S. 524, 8 L. J. Ch. 85; *General Finance, etc., Co. v. Liberator, etc., Society*, 10 Ch. Div. 15; *Poulton v. Moore* (1915), 1 K. B. 400.

5. *Van Rennselaer v. Kearney*, 11 How. (U. S.) 297, 13 L. Ed. 703; *Diaz v. Sanchez*, 226 U. S. 234, 57 L. Ed. 201 (*semble*); *Molina v. Ramirez*, 15 Ariz. 249, 138 Pac. 17; *Clark v. Baker*, 14 Cal. 629, 76 Am. Dec. 449; *Doe dem Potts v. Dowdall*, 3 Houst. (Del.) 369; *Habig v. Dodge*, 127 Ind. 31, 25 N. E. 182; *Pring v. Swarm*, 176 Iowa, 153,

157 N. W. 734; *Fitzhugh v. Tyler*, 9 B. Mon. (Ky.) 561; *Cornelius v. Kinnard*, 157 Ky. 50, 162 S. W. 524 (*semble*); *Wells v. Blackman*, 121 La. 324, 46 So. 437 (*semble*); *Pendill v. Marquette County Agricultural Soc.*, 95 Mich. 491, 55 N. W. 384; *McInnes v. Pickett*, 65 Miss. 354, 3 So. 660; *Hagensick v. Castor*, 53 Neb. 495, 73 N. W. 932; *Hannon v. Christopher*, 34 N. J. Eq. 465; *Northrup v. Ackerman*, 84 N. J. Eq. 117, 92 Atl. 802, 309; *Hallyburton v. Slagle*, 132 N. C. 947, 44 S. E. 655; *Keady v. Martin*, 69 Ore. 299, Ann. Cas. 1916A, 796, 137 Pac. 856; *Root v. Crock*, 7 Pa. 378; *Lindsay v. Freeman*, 83 Tex. 259, 263, 18 S. W. 727; *Breen v. Morehead*, 104 Tex. 254, 126 S. W. 650; *Reynolds v. Cook*, 83 Va. 817, 3

is thereafter estopped to deny that he had such an estate at the time of the payment. Whichever theory be adopted, there is no necessity of regarding the after-acquired title as actually passing to the grantee. In this country, however, there are decisions and numerous *dicta* to the effect, not only that the grantor in a conveyance is estopped to deny that it passed the estate which it purported to pass, but also that the conveyance actually passes, by way of estoppel, any estate or title which the grantor may thereafter acquire in the land, if this is within its apparent scope, and especially if it contains certain covenants of title.⁶ There are, moreover, in a number of states, statutory provisions to this effect.⁷

For most purposes, the question whether there is merely an estoppel on the grantor to assert the after-acquired title, or whether such title actually passes under the conveyance, is immaterial. The distinction between the two views is, however, important in that, as between the grantor and grantee, the effect of the application of the rule, without exception, that a conveyance containing a covenant of title operates to pass an after-acquired estate, would be that the grantee would be compelled to take such an estate, and would not have the option of refusing so to do, and of recovering full damages on the covenant. Recognizing the injustice of such a result, it has occasionally been held that the grantee has such an option, and is not compelled to accept the after-acquired estate in partial or total satisfaction of the covenant.⁸

S. E. 710, 5 Am. St. Rep. 317; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

6. Rawle, *Covenants for Title* (5th Ed.) § 248, and the numerous cases there cited; Bigelow *Estoppel*, 465; 2 Smith, *Lead. Cas. Amer. notes* 838; 11 Am. & Eng. Enc. Law, 418.

7. 1 Stimson, *Am. St. Law*, §

1454; Rawle, *Covenants for Title* (5th Ed.) § 249.

8. *Burton v. Reeds*, 20 Ind. 87; *Blanchard v. Ellis*, 1 Gray (Mass.) 193; *Resser v. Carney*, 52 Minn. 397, 54 N. W. 89; *Tucker v. Clark*, 2 Sandf. Ch. (N. Y.) 96; *Woods v. North*, 6 Humph. (Tenn.) 309; *McInnis v. Lyman*, 62 Wis. 191, 22 N. W.

The view that the conveyance operates to transfer the after-acquired title is frequently based on the theory that circuity of action is thereby avoided, the title being given to the grantee instead of compelling him to sue on the grantor's covenant for the damage caused by the want of such title. But, as before indicated, so far as the estoppel of the grantor is concerned, the presence of a covenant for title is immaterial, it being sufficient if the intention to convey a certain estate appears from any part of the conveyance,⁹⁻¹⁰ and as shown by an able writer, even when there are such covenants, the estoppel frequently operates although there is no right of action on a covenant.¹¹ The theory referred to, of avoidance of circuity of action, however satisfactory it may be in many cases, does not serve to explain the decisions as a whole, and as stated by the same authority,¹² the only satisfactory theory in this connection is that the courts have merely applied, under common law forms, the equitable principle that, where one having no title or an imperfect title, purports to convey

405. *Contra*, King v. Gilson, 32 Ill. 355; Baxter v. Bradbury, 20 Me. 260; Reese v. Smith, 12 Mo. 344; Farmers' Bank v. Glenn, 68 N. C. 35; Knowles v. Kennedy, 82 Pa. 445; Boulter v. Hamilton, 15 U. C. C. P. 125.

9-10. Ante, § 545(a), notes 4, 5.

11. Rawle, Covenants for Title (5th Ed.) § 251, where the following cases in which the estoppel has been held to operate in the absence of any liability on the covenants are enumerated; (1) When the estoppel is sought to be enforced against a purchaser of the subsequently-acquired title, and not against the grantor himself; (2) when a married woman is estopped (in some states) to claim after-acquired property, though not

liable on the covenant; (3) when the state is held to be estopped, though not liable on the covenant; (4) when the grantor is estopped, though exempt from liability on the covenant owing to a discharge in bankruptcy; and (5) when he is estopped, though the claim on the covenant is barred by limitations. See the cases there cited, and also citations in 11 Am. & E. Encyc. Law (2d Ed.) 413. But that there is no estoppel in case there is no liability upon the covenants for title see Smiley v. Fries 104 Ill. 416; Webber v. Webber, 6 Me. 127; Goodell v. Bennett 22 Wis. 565.

12. Rawle Covenants for Title (5th Ed.) § 264.

a good title to another, and afterwards acquires the land under another title, he may be compelled to convey to such other the title so acquired. That is, if an attempted conveyance of a certain estate or interest in land is ineffective by reason of the fact that the grantor has not title to the land at the time of the conveyance, equity will regard the attempted conveyance as a contract to convey, and will compel specific performance thereof upon his subsequent acquisition of title.¹³ And the courts of this country, in so far as they regard the after acquired title as actually passing to the grantee, have merely taken the further step of regarding as done what equity would compel to be done.

— (b) **Character of conveyance.** Since the estoppel of the grantor to assert the after acquired title is based upon the consideration that by his conveyance he purported to convey some certain estate or interest, there can be no such estoppel when the conveyance undertakes to transfer merely such an estate or interest as the grantor has,¹⁴ and the fact that such a convey-

13. *Taylor v. Debar*, 1 Ch. Cas. 274; *Noel v. Bewley*, 3 Simons, 103; *Smith v. Baker*, 1 Y. & Col. C. C. 223; *Jones v. Kearney*, 1 Dru. & W. 134, 159; *In re Bridgewater's Settlement* (1910), 2 Ch. 342; *Holyrood v. Marshall*, 10 H. L. Cas. 191, 211 per Lord Westbury; *Wright v. Shumway*, 1 Biss. 23; *Goodson v. Beacham*, 24 Ga. 150; *Mississippi Sawmill Co. v. Douglas*, 107 Miss. 678, 65 So. 885; *Lewis v. Baird*, Fed. Cas. No. 8,316, 3 McLean, 80; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Buckingham v. Hanna*, 2 Ohio St. 551, 558; *Chew v. Barnet*, 11 Serg. & R. 389; *Jordan v. Chambers*, 226 Pa. 573, 75 Atl. 956; *Taylor v. Swafford*, 122 Tenn. 303,

123 S. W. 350. See Judge Hare's note, 2 Smith's Leading Cas. (8th Am. Ed.) at p. 850.

14. *Vary v. Smith*, 162 Ala. 457, 50 So. 187; *Quivey v. Baker*, 37 Cal. 465; *Dailey v. Springfield*, 144 Ga. 395, 87 S. E. 479; *Benneson v. Aiken*, 102 Ill. 284, 40 Am. Rep. 592; *Harriman v. Gray*, 49 Me. 537; *Fay v. Wood*, 65 Mich. 390, 32 N. W. 614; *Gibson v. Chouteau*, 39 Mo. 536; *Perrin v. Perrin*, 62 Tex. 477; *Jourdain v. Fox*, 90 Wis. 99, 62 N. W. 936. But in South Carolina a conveyance of "all my right title and interest" in certain land has been regarded as creating the estoppel, on the theory, apparently, that such a conveyance is a quitclaim deed,

ance contains covenants for title does not change its character in this respect.¹⁵

Likewise, if the conveyance purports to pass a limited or partial interest only, the estoppel extends only to such interest, even though the grantor subsequently acquires a greater interest.¹⁶ And, if a conveyance is in terms subject to a mortgage, the subsequent acquisition by the grantor of the mortgagee's interest does not enure to the grantee's benefit, provided the covenant for title expressly excepts the mortgage,¹⁷ and, it would seem, even though there is no such express exception, since the covenant may well be regarded as restricted by the character of the interest which the conveyance purports to convey.¹⁸ And so if a married woman joins in her husband's conveyance

and a quitclaim deed is effectual as a conveyance. *Blackwell v. Harrelson*, 99 S. C. 264, 84 S. E. 33. See *post*, this section, notes 20-24.

15. *Hanrick v. Patrick*, 119 U. S. 156, 175, 30 L. Ed. 396; *Kimball v. Semple*, 25 Cal. 440; *Holbrook v. Debo*, 99 Ill. 372; *Stephenson v. Boody*, 139 Ind. 60, 38 N. E. 331; *Bennett v. Davis*, 90 Me. 457, 38 Atl. 372; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Bogy v. Shoab*, 13 Mo. 365; *Bell v. Twilight*, 26 N. H. 401; *Coble v. Barringer*, 171 N. C. 448, L. R. A. 1916E, 901, 88 S. E. 518; *White v. Brocaw*, 14 Ohio St. 339; *Rawle, Covenants for Title*, § 250.

But the presence of a covenant for title may affect the construction of the instrument as showing an intention not to convey merely such estate or interest as the grantor has. *Mills v. Catlin*, 22 Vt. 98; *Jones v. King*, 25 Ill. 383; *Baker v. Aus-*

tin, 174 N. C. 433, 93 S. E. 949; *Bayley v. McCoy*, 8 Ore. 259; *Blackwell v. Harrelson*, 99 S. C. 264, 84 S. E. 233. Compare, as to the North Carolina law, *Coble v. Barringer*, 171 N. C. 448, L. R. A. 1916E, 901, 88 S. E. 518; and see *Rawle, Covenants for Title*, §§ 298, 299.

16. *Wheeler v. Aycock*, 109 Ala. 146, 19 So. 497; *Gill v. Grand Tower Min. Co.*, 92 Ill. 249; *Stoepler v. Silberberg*, 220 Mo. 258, 119 S. W. 418; *McInnis v. Pickett*, 65 Miss. 354, 3 So. 660; *Kent v. Watson*, 22 W. Va. 561; *Simanek v. Nemetz*, 120 Wis. 42, 97 N. W. 508; *Gillen v. Powe*, 219 Fed. 553, 135 C. C. A. 321.

17. *Huzzey v. Heffernan*, 143 Mass. 232, 9 N. E. 570.

18. *Jackson v. Hoffman*, 9 Cow. (N. Y.) 271; *Bricker v. Bricker*, 11 Ohio St. 240. *Contra*, *Ayer v. Philadelphia & B. Face Brick Co.*, 159 Mass. 84, 34 N. E. 177; discussed and

merely to release her dower, a title subsequently acquired by her will not enure to the benefit of the grantee in the conveyance.¹⁹

Not infrequently it is said that the grantor in a quitclaim deed is not estopped to assert an after-acquired title,²⁰ but unfortunately the courts do not always clearly indicate what they mean by a quitclaim deed. Occasionally they use the expression in this connection to describe a conveyance which purports in terms to transfer merely such interest as the grantor

criticized in 7 Harv. Law Rev. at p. 429. And see Rawle, Covenants for Title, § 298.

That an exception of a mortgage in a covenant against incumbrances does not extend to the covenant of warranty in the same instrument, so as to exclude an estoppel, see *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408; *Rooney v. Koenig*, 80 Minn. 483, 83 N. W. 399. See, as to this last case, 14 Harv. Law Rev. 233.

19. *Sanford v. Kane*, 133 Ill. 199, 8 L. R. A. 724, 23 Am. St. Rep. 602, 24 N. E. 414; *Miller v. Miller*, 140 Ind. 174, 39 N. E. 547; *O'Neill v. Vanderburg*, 25 Iowa, 104; *Raymond v. Holden*, 2 Cush. (Mass.) 270; *Griffin v. Sheffield*, 38 Miss. 359.

20. *Quivey v. Baker*, 37 Cal. 465; *Habig v. Dodge*, 127 Ind. 31, 25 N. E. 182; *Haskett v. Maxey*, 134 Ind. 182, 19 L. R. A. 379, 33 N. E. 358; *French v. Bartel & Miller*, 164 Iowa, 677, 146 N. W. 754; *Fisher v. Hallock*, 50 Mich. 465, 15 N. W. 552; *People v. Miller*, 79 Mich. 93, 44 N. W. 172; *Ernst v. Ernst*, 178 Mich. 100, 144 N. W. 513, 51 L. R. A. (N. S.) 317; *Jackson*

v. Winslow, 9 Cow. (N. Y.) 18; *Harden v. Collins*, 8 Nev. 49; *Perrin v. Perrin*, 62 Tex. 477. In Illinois it is so provided by statute. *Wells v. Glos*, 277 Ill. 516, 115 N. E. 658.

In *Hagensick v. Castor*, 53 Neb. 495, 73 N. W. 932, it was held that although an instrument was in the ordinary form of a quitclaim deed, yet since the grantors described themselves as the heirs of A, wrongly believing A to be dead, they in effect purported to convey an estate of inheritance vested in them as heirs at law of A, and could not, on A's actual death, assert the title which then passed to them as A's heirs.

It has been said that the exception to the general rule in the case of a quitclaim deed does not apply when the title subsequently acquired by the grantor is "merely an evidence and fortification of the title" which he previously had. *Ford v. Axelson*, 74 Neb. 92, 103 N. W. 1039; *Johnson v. Johnson*, 173 Ky. 701, 191 S. W. 672. This might mean merely that the effect of the quitclaim as passing what the grantor has at the time of its

may have,²¹ a form of conveyance which, as before stated,²² gives no room for an estoppel. Occasionally the courts apparently regard an instrument as a quitclaim deed for this purpose if the words "release" or "quitclaim," or both, appear as operative words therein,²³ presumably on the theory that the use of such words precludes a construction of the instrument as purporting to pass any certain estate or interest. Occasionally the language used suggests that the court regards as a quitclaim deed any conveyance in which there are no covenants for title.²⁴

The doctrine of estoppel to assert an after acquired title has been applied in the case of a mortgage as well

execution is not affected by the fact that he subsequently obtains a deed purporting to convey what he already has, but the statement has also been applied to a case in which the grantor had an equitable title merely at the time of the execution of the quitclaim deed, and thereafter obtained the legal title. *Johnson v. Johnson*, 173 Ky. 701, 191 S. W. 672.

21. As in *Anderson v. Yoakum*, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500; *Frink v. Darst*, 14 Ill. 308, 58 Am. Dec. 575; *Benneson v. Aiken*, 102 Ill. 289; *Irish v. Steeves*, 154 Iowa, 286, 134 N. W. 634, 157 N. W. 734; *Pring v. Swarm*, 176 Iowa, 153; *Nicholson v. Caress*, 45 Ind. 479; *Carter v. Mosier*, 84 Kan. 361, 114 Pac. 226; *Manson v. Peaks*, 103 Me. 430, 69 Atl. 690; *Butcher v. Rogers*, 60 Mo. 138; *Brawford v. Wolfe*, 103 Mo. 391, 15 S. W. 426; *Taft v. Stevens*, 3 Gray (Mass.) 504; *Bell v. Twilight*, 26 N. H. 401; *Dorris v. Smith*, 7 Ore. 267; *Lindsay v.*

Freeman, 83 Tex. 259, 18 S. W. 727; *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434.

22. *Ante*, this section, notes 14, 15.

23. As in *Avery v. Akins*, 74 Ind. 283; *Bruce v. Luke*, 9 Kan. 201; *Wholey v. Cavanaugh*, 88 Cal. 132, 25 Pac. 1112; *Frost v. Missionary Society*, 56 Mich. 62, 22 N. W. 189. *Contra*, *Ford v. Axelson*, 74 Neb. 92, 103 N. W. 1039. This is presumably the character of instrument intended by the Mississippi statute, which provides that a conveyance of quitclaim and release shall estop the grantor from asserting a subsequently acquired title. It could hardly mean a conveyance of such interest as the grantor may have. See *Bramlett v. Roberts*, 68 Miss. 325, 10 So. 56.

24. *Bohon v. Bohon*, 78 Ky. 408; *Dart v. Dart*, 7 Conn. 256; *Tillotson v. Kennedy*, 5 Ala. 413, 39 Am. Dec. 330; *Cramer v. Benton*, 64 Barb. (N. Y.) 522; *Jackson v. Hubble*, 1 Cow. (N. Y.) 613.

as in that of an absolute conveyance, more particularly when the mortgage instrument contains a covenant of warranty or other covenant.²⁵ And it has been so applied not only in jurisdictions in which the legal title passes to the mortgagee,²⁶ but in other jurisdictions likewise.²⁷ There appears to be no difference, as regards the doctrine of estoppel, between the principles applicable to a mortgage and to an absolute conveyance, and the statements here made in reference to the latter will ordinarily apply as well to the former.^{27a}

If a conveyance is for any reason absolutely invalid, there is no estoppel upon the grantor as to an after-acquired title.²⁸ But that the conveyance is in-

25. *Jones v. Wilson*, 57 Ala. 122; *Curren v. Driver*, 33 Ind. 480; *West Michigan Park Ass'n v. Pere Marquette R. Co.*, 172 Mich. 179, 137 N. W. 799; *Hagensick v. Castor*, 53 Neb. 495, 73 N. W. 932; *Smith v. De Russy*, 29 N. J. Eq. 407; *Jackson v. Littell*, 56 N. Y. 108; *Donovan v. Twist*, 85 N. Y. App. Div. 130, 83 N. Y. Supp. 76; *Jarvis v. Aikens*, 25 Vt. 635; *Doswell v. Buchanan*, 3 Leigh (Va.) 365, 23 Am. Dec. 280.

26. *Howze v. Dew*, 90 Ala. 178, 24 Am. St. Rep. 783, 7 So. 239; *Hoyt v. Dimon*, 5 Day (Conn.) 479; *Gochenour v. Mowry*, 33 Ill. 331; *Lagger v. Mutual Union Loan & Building Ass'n*, 146 Ill. 283, 33 N. E. 946; *Parsons v. Little*, 66 N. H. 339, 20 Atl. 958; *White v. Patten*, 24 Pick. (Mass.) 324; *Cockrill v. Bane*, 94 Mo. 444, 7 S. W. 480; *Northrup v. Ackerman*, 84 N. J. Eq. 117, 92 Atl. 909; *Rauch v. Dech*, 116 Pa. St. 157, 2 Am. St. Rep. 598, 9 Atl. 180.

27. *Clark v. Boyreau*, 14 Cal. 636; *Yerkes v. Hadley*, 5 Dak. 2 R. P.—59

324, 2 L. R. A. 363, 40 N. W. 340; *Hill v. O'Bryan*, 104 Ga. 137, 30 S. E. 996; *Rice v. Kelso*, 57 Iowa, 115, 7 N. W. 3, 10 N. W. 335; *Whitley v. Johnson*, 135 Iowa, 620, 113 N. W. 550; *Thalls v. Smith*, 139 Ind. 496, 39 N. E. 154; *Watkins v. Houck*, 44 Kan. 502, 24 Pac. 361; *Gray v. Franks*, 86 Mich. 382, 49 N. W. 130; *Cable v. Switzer*, 122 Mich. 636, 81 N. W. 560; *Osborn v. Scottish American Co.*, 22 Wash. 83, 60 Pac. 49.

27a. If one who has no title to land undertakes to mortgage the land to one who has a perfect title, and subsequently acquires the land by descent from the latter, he is not estopped, it has been held, to assert such title as against the latter's representative. "Neither the mortgagee nor her representative can deny that her own title was good, because she had taken a conveyance from one having no title." *Harding v. Springer*, 14 Me. 407, 31 Am. Dec. 61.

28. *Kercheval v. Triplett*, 1 A. K. Marsh (Ky.) 493; *Patter-*

valid as to one grantor obviously does not affect the estoppel upon another grantor.²⁹

— (c) **Necessity and character of covenants.**

Applying the view, above referred to, that a conveyance is given the effect of transferring an after-acquired title as a means of avoiding the necessity of suing on the covenant for title, it has frequently been asserted that the presence of such a covenant is necessary in order that an after-acquired title may pass.³⁰ And the cases occasionally distinguish between the different classes of covenants as regards their efficacy in this respect. Thus a covenant of warranty has been referred to in many cases as effective for this purpose,³¹ frequently as the result of a mistaken application of the doctrine of warranty at common law,³² and the same effect has been given to a covenant for quiet enjoyment,³³ while it has, in some states, been denied to a covenant for seisin

son v. Pease, 5 Ohio, 191; Kemery v. Zeigler, 176 Ind. 660, 96 N. E. 950.

29. *Blakeslee v. Mobile Life Ins. Co.*, 57 Ala. 265; *Chapman v. Abrahams*, 61 Ala. 108; *Well-born v. Finley*, 7 Jones L. (N. C.) 228.

30. See cases cited 11 A. & E. Encyc. Law (2nd Ed.) 409.

31. *Schuman v. George*, 110 Ark. 486, 161 S. W. 1038; *Doe d. Potts v. Roe*, 3 Houst. (Del.) 369, 11 Am. Rep. 757; *Oliver v. Holt*, 141 Ga. 126, 80 S. E. 630; *Walton v. Follansbee*, 131 Ill. 147, 23 N. E. 332; *Childs v. McChesney*, 20 Iowa, 431, 89 Am. Dec. 545; *Creekmore v. Bryant*, 158 Ky. 166, 164 S. W. 337; *Bennett v. Davis*, 90 Me. 457, 38 Atl. 372; *Knight v. Thayer*, 125 Mass. 25; *Morris v. Jansen*, 99 Mich. 436, 58 N. W. 365; *Demersee v. Mitchell*, 187 Mich. 683,

164 N. W. 97; *Barron v. H. D. Williams Cooperage Co.*, 185 Mo. App. 625, 171 S. W. 683; *Moore v. Rake*, 26 N. J. L. 574; *Ford v. McBrayer*, 171 N. C. 420, 88 S. E. 736; *Broadwell v. Phillips*, 30 Ohio St. 255; *Blackwell v. Harrelson*, 99 S. C. 264, 84 S. E. 233; *Johnson v. Brauch*, 9 S. D. 116, 62 Am. St. Rep. 857, 68 N. W. 173; *Ferguson v. Prince*, 136 Tenn. 543, 190 S. W. 548; *Raines v. Walker*, 77 Va. 95.

32. 2 *Smith's Leading Cases*, Judge Hare's note (8th Am. Ed.) 841 *et seq*; *Rawle, Covenants for Title*, §§ 252, 254; *Bigelow, Estoppel* (6th Ed.) pp. 453, 463.

33. *Smith v. Williams*, 44 Mich. 240, 6 N. W. 662; *Long Island R. Co. v. Conklin*, 29 N. Y. 572; *Tully v. Taylor*, 84 N. J. Eq. 459, L. R. A. 1918B, 731, 94 Atl. 572. See *Taggart v. Risley*, 4 Ore. 235.

or for good right to convey.³⁴ On the other hand there are numerous decisions and judicial *dicta* that if the conveyance purports to transfer some certain estate, the grantor is estopped, irrespective of the presence of covenants therein, to assert that such an estate did not pass thereby.³⁵

When the conveyance does not purport to convey such interest only as the grantor has, or a limited interest only, the fact that a covenant therein is special, that is, against the acts of the grantor and those claiming under him only, does not appear to affect its operation by way of estoppel.³⁶

— (d) Cases to which doctrine inapplicable.

The doctrine that a grantor is estopped to assert an after-acquired title applies only when such assertion would involve a denial that the conveyance passed the interest or estate which it purported to pass. Consequently the grantor may freely assert a title subsequently acquired by him from the grantee either by voluntary conveyance,³⁷ judicial or execution sale,³⁸

34. *Allen v. Sayward*, 5 Me. 227, 17 Am. Dec. 221; *Doane v. Willcutt*, 5 Gray (Mass.) 333, 66 Am. Dec. 369; *Chauvin v. Wagner*, 18 Mo. 531. Contra, *Wightman v. Reynolds*, 24 Miss. 675. And see *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 19 L. Ed. 800; *Vanderheyden v. Crandall*, 2 Den. (N. Y.) 9.

35. *Ante*, this section, note 5.

36. *Kimball v. Blaisdell*, 5 N. H. 533; *Gibbs v. Thayer*, 6 Cush. (Mass.) 30; *Coal Creek Min. & Mfg. Co. v. Ross*, 12 Lea (Tenn.) 1. Compare, *Bennett v. Davis*, 90 Me. 457, 38 Atl. 372.

37. *Condit v. Bigalow*, 64 N. J. Eq. 504, 54 Atl. 160.

38. *Erwin v. Morris*, 26 Kan. 664; *Rauch v. Dech*, 116 Pa. 157, 2 Am. St. Rep. 593, 9 Atl. 180; *Goode v. Bryant*, 118 Va. 314, 87 S. E. 588.

adverse possession,³⁹ tax sale,⁴⁰ or otherwise.⁴¹ In such a case the grantor asserts, not that the conveyance failed to pass the interest which it purported to pass, but merely that, after such interest had, by the conveyance, become vested in the grantee, it was divested out of him and vested in the grantor. Nor is the grantor estopped to assert that, under the circumstances of the case, while the legal title was by the conveyance vested in the grantee, the beneficial interest was vested in another.⁴²

If one who has conveyed land in his own right subsequently acquires a title thereto, not in his own right but as trustee for another, the doctrine here under discussion does not apply. One cannot thus affect the interest of another by purporting to convey more than he has.⁴³ But one may, it seems, by a conveyance in an official or representative capacity, by which he purports to convey a certain interest or estate, be estopped to assert a title subsequently acquired by him in his

39. *Abbett v. Page*, 92 Ala. 571, 9 So. 332; *Doolittle v. Robertson*, 109 Ala. 412, 19 So. 851; *Garibaldi v. Shattuck*, 70 Cal. 511, 11 Pac. 778; *Berthelemy v. Johnson*, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; *Hines v. Robinson*, 57 Me. 324, 99 Am. Dec. 772; *Stearns v. Hendersass*, 9 Cush. (Mass.) 497, 57 Am. Dec. 65; *Horbach v. Boyd*, 64 Neb. 129, 89 N. W. 644; *Tilton v. Emery*, 17 N. H. 536; *Sherman v. Kane*, 86 N. Y. 57; *Johnson v. Farlow*, 13 Ired. L. (35 N. C.) 84; *Chatham v. Lonsford*, 149 N. C. 363, 63 S. E. 81; *Harn v. Smith*, 79 Tex. 310, 23 Am. St. Rep. 340, 15 S. W. 240.

40. *Erwin v. Morris*, 26 Kan. 664; *Foster v. Johnson*, 89 Tex. 640, 36 S. W. 67. But only if the sale was for taxes which came due after the conveyance.

Hannah v. Collins, 94 Ind. 201; *Porter v. Lafferty*, 33 Iowa, 254; *Gardner v. Gerrish*, 23 Me. 46; *Frank v. Caruthers*, 108 Mo. 569, 18 S. W. 927.

41. *Thielen v. Richardson*, 35 Minn. 509, 29 N. W. 677.

42. *Harrold v. Morgan*, 66 Ga. 398; *Condit v. Bigalow*, 64 N. J. Eq. 504, 54 Atl. 160.

43. *Dewhurst v. Wright*, 29 Fla. 223, 10 So. 682; *Phillippi v. Leet*, 19 Colo. 246, 35 Pac. 540; *Kelley v. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Harlan v. Jordan*, 104 Me. 49, 70 Atl. 1066; *Runlet v. Otis*, 2 N. H. 167; *Wark v. Willard*, 13 N. H. 389; *Jackson v. Mills*, 13 Johns. (N. Y.) 463; *Buckingham v. Hanna*, 2 Ohio St. 551; *Burchard v. Hubbard*, 11 Ohio, 316; *Fretelliere v. Hindes*, 57 Tex. 392; *Newton v. Easterwood*, Tex. Civ.

own right,⁴⁴ particularly if the instrument contains a personal covenant by him for title,⁴⁵ it being recognized that he may by such a conveyance be estopped to assert a title which he actually has at the time thereof.⁴⁶

In the case of a purchase money mortgage, the mortgage is properly to be construed as purporting to convey or charge such interest only as the mortgagor acquired by the conveyance from the mortgagee, and consequently, if he acquired no title or an imperfect title thereby, the mortgagee cannot claim the benefit of a title subsequently acquired by the mortgagor, the purchaser.⁴⁷ And so, it would seem, when cotenants claiming under a single title make voluntary partition, the mutual conveyances executed by them to carry the partition into effect may properly be regarded as purporting to convey only such title as they all have, and if one subsequently acquires a paramount title, he should not be estopped to assert it as against the others,⁴⁸ a result which might also be attained on the theory⁴⁹ that the purpose and effect of such conveyances is not to transfer interests in land but merely to designate the share of each of the parties.⁵⁰

App. —, 154 S. W. 646; Gregory v. Peoples, 80 Va. 355.

44. *Molina v. Ramirez*, 15 Ariz. 249, 138 Pac. 17; *Mountain Home Lumber Co. v. Swartwout*, 30 Idaho, 559, 166 Pac. 271.

45. *Prouty v. Mather*, 49 Vt. 425; See *Morris v. Wheat*, 8 App. D. C. 379; *Hitchcock v. Southern Iron & Timber Co.*, —Tenn.—, 38 S. W. 588; *Vermeule v. Vermeule*, 113 Me. 74, 93 Atl. 37.

46. *Rannels v. Howe*, 145 Fed. 296, 74 C. C. A. 376; *Poor v. Robinson*, 10 Mass. 131; *Wells v. Steckelberg*, 52 Neb. 597, 66 Am. St. Rep. 529, 72 N. W. 865; *Kellerman v. Miller*, 5 Pa. Super. Ct. 443; *Corzine's Heirs v. Wil-*

liams, 85 Tex. 499, 22 S. W. 399; *Carbee v. Hopkins*, 41 Vt. 250.

47. *Randall v. Lower*, 98 Ind. 255; *Brown v. Phillips*, 40 Mich. 264. And see *Butterfield v. Lane*, 114 Me. 333, 96 Atl. 233. *Contra*, *Hitchcock v. Fortier*, 65 Ill. 239. The latter case is disapproved in *Rawle, Covenants for Title*, § 267; *Bigelow, Estoppel* (6th Ed.) 448.

48. See *Rector v. Waugh*, 17 Mo. 26; *Pendill v. Marquette County Agric. Soc.* 95 Mich. 491, 55 N. W. 384; *Carson v. Carson*, 122 N. C. 645, 30 S. E. 4; *Doane v. Willicutt*, 5 Gray (Mass.) 328.

49. *Ante*, § 203.

50. See *Harrison v. Ray*, 108

— (e) **Persons bound by the estoppel.** If, after executing the conveyance, the grantor acquires an estate in the land and then dies, his heir is precluded, to the same extent as was the grantor himself, from asserting that such after-acquired title did not enure to the benefit of the grantee.⁵¹ But while the heir is estopped to assert a title subsequently acquired by the grantor, the heir is not estopped to assert a title subsequently acquired by him from a source other than his ancestor, the grantor.⁵²

The question whether one to whom the grantor, after his subsequent acquisition of title, undertakes to make a conveyance, is estopped, as was the grantor, to assert such subsequently acquired title, is one of considerable difficulty. It has been frequently said that an estoppel by deed binds not only parties but also privies,⁵³ and a like statement is ordinarily made in regard to estoppel by misrepresentation.⁵⁴ Strictly applying such a rule, the estoppel would operate against a subsequent grantee although he is a purchaser for value without notice of the prior conveyance by his grantor. And there are a considerable number of cases which appear to adopt such a view, that the subsequent grantee is estopped to assert the after-

N. Car. 215, 11 L. R. A. 722, 23 Am. St. Rep. 57, 12 S. E. 993; *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520.

51. *French v. Spencer*, 21 How. (U. S.) 228, 16 L. Ed. 97; *Perry v. Kline*, 12 Cush. (Mass.) 118; *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464; *Wark v. Willard*, 13 N. H. 389; *Tefft v. Munson*, 57 N. Y. 97; *Du Bose v. Kell*, 90 S. C. 196, 71 S. E. 371. See *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520.

52. *Zimmerman Mfg. Co. v. Wilson*, 147 Ala. 275, 40 So. 515; *Ebey v. Adams*, 135 Ill. 80, 10 L.

R. A. 162, 25 N. E. 1013; *Galladay v. Knock*, 235 Ill. 412, 85 N. E. 649; *Wilson v. Godfrey*, 145 Iowa, 696, 124 N. W. 875; *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464; *Gorton v. Roach*, 46 Mich. 294, 9 N. W. 422; *Wm. D. Cleveland & Sons v. Smith*,—Tex. Civ. App.—, 113 S. W. 547. See editorial note, 10 *Columbia Law Rev.* 483.

53. See cases cited 16 *Cyclopedia Law & Proc.* 715; *Bigelow, Estoppel* (6th Ed.) 372.

54. See 16 *Cyclopedia Law & Proc.* 778; *Bigelow, Estoppel*, 629.

acquired title of his grantor, as against a prior grantee of the latter, without reference to whether such subsequent grantee has or has not notice of the prior conveyance.⁵⁵ In some cases, however, a contrary view is asserted, expressly or by implication, that the subsequent grantee is not bound by the estoppel unless he had notice of the prior conveyance by his grantor.⁵⁶ In several of these latter cases the question chiefly discussed is whether the subsequent grantee is charged with notice by the record of the prior conveyance, this occurring before his grantor acquired title. This question has ordinarily been answered in the negative, that is, the purchaser was regarded as under no obligation to search the records for conveyances by his

55. *Letson v. Roach*, 5 Kan. App. 57, 47 Pac. 321; *Morrison v. Caldwell*, 5 T. B. Mon. (Ky.) 426, 17 Am. Dec. 84; *Powers v. Patten*, 71 Me. 583; *White v. Patten*, 24 Pick (Mass.) 324; *Knight v. Thayer*, 125 Mass. 25; *Ayer v. Philadelphia & B. Face Brick Co.*, 159 Mass. 84, 34 N. E. 177; *Philly v. Sanders*, 11 Ohio St. 490, 78 Am. Dec. 316; *McCusker v. McEvey*, 9 R. I. 528, 10 R. I. 606, 11 Am. Rep. 295; *Jarvis v. Aikens*, 25 Vt. 635. See *Owen v. Brookfort*, 208 Ill. 35, 69 N. E. 952; *Colonial & U. S. Mtge. Co. v. Lee*, 95 Ark. 253, 129 S. W. 84; *Organ v. Bunnell—Mo.—*, 184 S. W. 102.

A like doctrine has been in one case applied, as against a purchaser of land to which an easement appertained, in favor of one to whom the servient tenement had previously been conveyed, with a covenant of warranty, it being held that the grantor of the servient tenement was estopped to assert

the easement against his grantee, upon acquiring the dominant tenement, and that one to whom he conveyed the latter was also estopped. *Hodges v. Goodspeed*, 20 R. I. 537, 40 Atl. 373. See 12 Harv. Law Rev. at p. 219.

56. *Rozell v. Chicago Mill & Lumber Co.*, 76 Ark. 525, 89 S. W. 469; *Wheeler v. Young*, 76 Conn. 44, 55 Atl. 670; *Way v. Arnold*, 18 Ga. 181; *Donahue v. Vosper*, 189 Mich. 78, 155 N. W. 407; *Ford v. Unity Church Soc.*, 120 Mo. 498, 23 L. R. A. 561. 41 Am. St. Rep. 711, 25 S. W. 394; *Great Falls Co. v. Worster*, 15 N. H. 452 (*dictum*); *Bingham v. Kirkland*, 34 N. J. Eq. 221; *Farmer's Loan & Trust Co. v. Maltby*, 8 Paige (N. Y.) 361; *Doyle v. Petroleum Co.*, 44 Barb. (N. Y.) 240 (*semble*); *Calder v. Chapman*, 52 Pa. St. 359, 91 Am. Dec. 163; *Richardson v. Atlantic Coast Lumber Co.*, 93 S. C. 254, 75 S. E. 371; *Bernardy v. Colonial, etc., Mortgage Co.*, 17 S. D. 637, 98 N. W. 166; *Green*

grantor executed and recorded before the grantor had any title to convey, it being sufficient that he searches the records under his grantor in order to discover any conveyance made by the latter after acquiring title.^{56a} A contrary view would impose on every purchaser the very serious burden of searching the records for conveyances made not only by his vendor, but also by his vendor's predecessors in title, for an indefinite time back of the date of his or their acquisition of title.⁵⁷

The decisions above referred to, that a purchaser without notice of the previous conveyance by his grantor is not estopped to assert the title acquired by his grantor after the previous conveyance, appear ordinarily to be based upon the theory that a contrary view would to that extent defeat the purpose and spirit of the recording laws, in giving priority to a conveyance which, though first executed, was not recorded under such circumstances as to satisfy the statutory requirement of record. Another view which has been suggested in this regard is that, since the claim of a grantee as

v. Morehead, 104 Tex. 254, 136 S. W. 1047, Ann. Cas. 1914A, 1285; See Doswell v. Buchanan, 3 Leigh (Va.) 365; Higgins v. Dennis, 104 Iowa, 605, 74 N. W. 9.

But a purchaser is charged with notice of a conveyance made by his vendor before the latter's acquisition of title, if such conveyance was recorded after such acquisition. Semon v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18.

56a. The impropriety of requiring a search previous to the mortgagor's acquisition of title has in several cases been given as a reason for according priority to a purchase money mortgage as against a mortgage given previously by the same party. Ely v. Pingrey, 56 Kan. 17, 42 Pac. 330; Heffron v. Flanigan, 37

Mich. 274; Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382; Boyd v. Mundorf, 30 N. J. Eq. 545.

57. See 2 Pomeroy Eq. Jur. § 658, p. 1134 note; Rawle, Covenants for Title, §§ 259-261; note in 17 Harv. Law Rev. at 482.

But that the record of the earlier conveyance does in such case affect the subsequent purchaser with notice was decided in Tefft v. Munson, 57 N. Y. 97; (distinguished in Oliphant v. Burns, 146 N. Y. 218, 40 N. E. 980); Bernardy v. Colonial & U. S. Mortg. Co., 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166; Hale v. Hollon, 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288; Balch v. Arnold, 9 Wyo. 17, 59 Pac. 434.

to the subsequently acquired title of his grantor is, properly regarded, equitable in its nature,⁵⁸ it may, like other equitable claims, not be asserted as against subsequent purchasers for value without notice.

As against a subsequent purchaser from the same grantor who took with notice of the conveyance made by the latter before he acquired title,^{59a} or who was not a purchaser for value,^{59b} the prior grantee can no doubt assert the estoppel to the same extent as he could have asserted it against the grantee himself.

As regards the question whether the claim of the person to whom the conveyance is made before the grantor's acquisition of title takes priority over the claim under a judgment against the grantor, the cases are few in number and not entirely in harmony. Taking first the case of a judgment rendered before the making of the conveyance, it has been held in one state that, upon the acquisition of title by the grantor, the land becomes subject to the lien of the judgment, in priority to the grantee's claim by way of estoppel,⁶⁰ and there is also a decision to the contrary.⁶¹ It does not seem that, by reason of the grantor's lack of title at the time of his conveyance, the grantee should profit at the expense of the judgment creditor, and the former decision appears to be preferable. In the case of a judgment rendered against the grantor after the making of the conveyance and before his acquisition of the title, it has been held that the grantee takes free of the lien of the judgment, on the theory, apparently, that the grantor, in view of his conveyance, acquires at

58. *Ante*, § 545(a), note 13.

59. See Editorial note, 22 Harv. Law Rev. 136; also the discussion by Mr. Ewart as to the somewhat analogous question of the incidence of the burden of an estoppel by misrepresentation. Ewart, Estoppel, 199 *et seq.*

59a. *Edwards v. Hillier*, 70 Miss. 803, 13 So. 692; *Barker v.*

Circle, 60 Mo. 258; *Wark v. Willard*, 13 N. H. 389; *Mann v. Young*, 1 Wash. Terr. 454.

59b. *Lindsay v. Freeman*, 83 Tex. 259, 18 S. W. 727; *Mann v. Young*, 1 Wash. Terr. 454.

60. *Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945.

61. *Watkins v. Wassell*, 15 Ark. 73.

most merely a legal title, the beneficial interest vesting immediately in the grantee.⁶² In the case of a judgment rendered against the grantor not only after his conveyance, but also after his acquisition of the title, the judgment creditor can, it would seem, for a like reason, have no lien upon the property, except as he may, in some states, be protected as a *bona fide* purchaser for value.⁶³

§ 546. **Estoppel by representation.** In connection with the law of land there is frequent occasion for the application of the familiar principle that one who, by his words or actions, represents a certain state of facts to be true, and thereby induces another to act to his detriment, is precluded from thereafter denying the existence of such a state of facts. So it has frequently been decided that if one, having title to land, as he knows or has reason to know, disclaims any rights therein,⁶⁴ or fails to assert his rights,⁶⁵ and thereby

62. *Lamprey v. Pike*, 28 Fed. 30; *Brown v. Barker*, 35 Okla. 498, 130 Pac. 155. See also *Watkins v. Wassell*, 15 Ark. 73. Compare *Leslie v. Harrison Nat. Bank*, 97 Kan. 22, 154 Pac. 209.

63. In Pennsylvania a judgment creditor is so protected as against a mortgage made by the debtor before acquiring title. *Calder v. Chapman*, 52 Pa. 559, 91 Am. Dec. 163; *Gallagher v. Stern*, 250 Pa. 292, 95 At. 518. The latter case is criticized in an editorial note in 29 Harv. Law Rev. 457 on the ground that the judgment creditor was chargeable with notice.

64. *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618; *Burleson v. Mays*, 189 Ala. 107, 66 So. 36; *Coogler v. Rogers*, 25 Fla. 853, 7 So. 391; *Whalen v.*

Schneider, 281 Ill. 557, 118 N. E. 41; *Webb v. Hardaway*—(Ky.)—, 121 S. W. 669; *Blodgett v. McMurtry*, 34 Neb. 782, 52 N. W. 706; *Mayer v. Ramsey*, 46 Tex. 371.

65. *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340; *Baillarge v. Clark*, 145 Cal. 589, 79 Pac. 268; *Coram v. Palmer*, 63 Fla. 116, 58 So. 721; *Loughran v. Gorman*, 256 Ill. 46, 99 N. E. 886; *Simpson v. Yocum*, 172 Ky. 449, 189 S. W. 439; *Hatch v. Kimball*, 16 Me. 146; *Brown v. Union Depot St. Ry. & Transfer Co.*, 65 Minn. 508, 68 N. W. 107; *Pabst v. Berch*, 126 Minn. 58, 147 N. W. 714; *Guffey v. O'Reilly*, 88 Mo. 418, 57 Am. Rep. 424; *Thompson v. Sanborn*, 11 N. H. 201, 35 Am. Dec. 490; *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N.

causes one, excusably ignorant of the true state of the title, to purchase the land from a third person, he cannot thereafter assert any claim to the land. Likewise, the true owner of land who stands by and sees another, under the belief that he has the unincumbered title to the land, make expenditures for improvements thereon, may be under such a duty to inform the person in possession of the true state of the title as to be thereafter estopped from asserting any rights in the land.⁶⁶

The mere failure to assert one's title, without any active misrepresentation in regard thereto, will not ordinarily have the effect of an estoppel, if his title appears of record, since one purchasing or improving the land is in such case charged with notice of the true state of the title.⁶⁷ And the result appears to be

Y.) 344; Heckman v. Davis, 56 Okla. 483, 155 Pac. 1170; Gaddes v. Pawtucket Inst. for Savings, 33 R. I. 177, Ann. Cas. 1912B. 407, 80 Atl. 415; Marines v. Goblet, 31 S. C. 153, 17 Am. St. Rep. 22; Grigsby v. Verch, 34 S. D. 39, 146 N. W. 1075.

66. Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79; Hendrix v. Southern Ry. Co., 130 Ala. 205, 80 Am. St. Rep. 27, 30 So. 596; Gibson v. Herriott, 55 Ark. 85, 29 Am. St. Rep. 17; Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175; Holmes v. Brooks, 84 Conn. 512, 80 Atl. 773; Coram v. Palmer, 63 Fla. 116, 58 So. 721; Georgia Pac. Ry. Co. v. Strickland, 80 Ga. 776, 12 Am. St. Rep. 232, 6 S. E. 27; Crumley v. Laurens Banking Co., 141 Ga. 603, 81 S. E. 871; Holcomb v. Independent School Dist., 67 Minn. 321, 69 N. W. 1067; Thomas v. Puliis, 56 Mo. 211; Dellett v. Kemble, 23 N. J. Eq. 58; Marvin v. Tusch, 86 Ohio St. 49, 98 N. E. 860; Prusha v

Board of Education of Oklahoma City 41 Okla. 595, 139 Pac. 298, L. R. A. 1916C, 233; McBroom v. Thompson, 25 Ore. 559, 42 Am. St. Rep. 806, 37 Pac. 57; Wampol v. Kountz, 14 S. D. 334, 56 Am. St. Rep. 765, 85 N. W. 595; Danielson v. Gustafson, 33 S. D. 440, 146 N. W. 562; Clark v. Kirby, 18 Utah, 258, 55 Pac. 372.

67. Wiser v. Lawler, 189 U. S. 260, 271; Porter v. Wheeler, 105 Ala. 451, 47 L. Ed. 802; Waits v. Moore, 89 Ark. 19, 115 S. W. 931; Neal v. Gregory, 19 Fla. 356; Bell v. Nye, 255 Ill. 283, 99 N. E. 610; Farm Land Mfg. & Development Co. v. Hopkins, 63 Kan. 678, 66 Pac. 1015; Mason v. Philbrook, 69 Me. 57; Oberheim v. Reeside, 116 Md. 265, 81 Atl. 590; Gray v. Bartlett, 20 Pick. 186; Boston & A. R. R. v. Rear-don, 226 Mass. 286, 115 N. E. 408; Staton v. Bryant, 55 Miss. 261; Blodgett v. Perry, 97 Mo. 263, 10 Am. St. Rep. 307, 10 S. W. 891; Clark v. Parsons, 69 N. H. 147, 76

the same when the true owner is in possession of the land.⁶⁸

An estoppel of this character, since it is based on a representation that one has not title to land, and not that he has title, has obviously no effect upon a title afterwards acquired by the person making the representation.⁶⁹

This class of estoppel, though frequently spoken of as "equitable" estoppel, is ordinarily recognized and enforced in courts of law as well as in equity. But though the principles governing in this class of cases were not clearly recognized and formulated under that name until well into the nineteenth century,⁷⁰ before this there existed in equity a doctrine which was equivalent to the modern doctrine of estoppel by representation, to the effect that one who knowingly makes a false representation to one who acts on it is bound to make that representation good;⁷¹ and a similar principle was also involved in the equitable rule that the fraudulent failure of one to make known his title to a person about to purchase the land from another would have the effect of changing the ordinary rule of priori-

Am. St. Rep. 157, 39 Atl. 898; Chambers v. Bessent, 17 N. M. 487, 134 Pac. 237; Fisher v. Mossman, 11 Ohio St. 42; Knouff v. Thompson, 16 Pa. 357; Sullivan v. Moore, 84 S. C. 426, 65 S. E. 108; Crabtree v. Winchester Bank, 108 Tenn. 483, 67 S. W. 797; Bigelow v. Tapliff, 25 Vt. 273; Kingman v. Graham, 51 Wis. 232, 8 N. W. 181. *Contra*, Farr v. Semmler, 24 S. D. 290, 123 N. W. 835.

68. Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851; Bliss v. Waterbury, 27 S. D. 429, 131 N. W. 731 (*semble*); Pierce v. Texas Rice De-

velopment Co., 52 Tex. Civ. App. 205, 114 S. W. 857. So it is said that the person asserting the estoppel must have been without a convenient means of ascertaining the truth. Crary v. Dye, 208 U. S. 515, L. Ed.; Stonecipher v. Kear, 131 Ga. 688, 63 S. E. 215; State v. Mutual Life Ins. Co.,—(Ind.)—, 93 N. E. 213.

69. Gluckauf v. Reed, 22 Cal. 468; Davidson v. Dwyer, 62 Iowa, 332, 17 N. W. 575; Donaldson v. Hibner, 55 Mo. 492.

70. Pickard v. Sears, 6 Adol. & E. 469 (A. D. 1837).

71. Evans v. Bicknell, 6 Ves. 174; Bigelow, Estoppel, 603.

ties, and of postponing his claim to that of the purchaser.⁷²

There has been considerable difference of opinion as to whether a misrepresentation, whether by conduct or by express statement, must be fraudulent in order to give rise to an estoppel of this character. The decided weight of authority is to the effect that it need not be such;⁷³ but apart from the question of the existence of such a requirement in other cases, it is by some authorities asserted that, in order that one may, by reason of misrepresentations, be estopped to assert his title to land, he must have been guilty of fraud, on the theory that the application of the doctrine of estoppel by representation in such a case involves in effect a transfer of land, and that is, by the Statute of Frauds, required to be in writing.⁷⁴ Moreover, while, as a general rule, an estoppel by representation is as available at law as in equity, it is, by the decisions of some states, not available at law when the title to land is involved, on the ground that at law the Statute of Frauds must control, and that in equity only can the case be regarded as taken out of the statute by the fraud, actual or constructive, involved in the misrepresentation.⁷⁵ The view is, however, taken in most

72. 2 Pomeroy, Eq. Jur. §§ 686, 731; Ewart, Estoppel, 257.

73. Bigelow, Estoppel, 685 note. 2 Pomeroy, Eq. Jur. §§ 805, 806, 11 Am. & Eng. Enc. Law (2d Ed.) 431; Ewart, Estoppel, 88 *et seq.* But fraud is necessary to the existence of a misrepresentation, on which to base the estoppel, in the case of a mere failure to assert one's rights. Ewart, Estoppel 92. Editorial note, 24 Harv. Law Rev. 494.

74. Trenton Banking Co. v. Duncan, 86 N. Y. 221; Huyck v. Bailey, 100 Mich. 223, 58 N. W. 1002; May v. Hanks, 62 N. C.

310; 2 Pomeroy, Eq. Jur. § 307. *Contra*, McDowell v. McDowell, 141 Iowa, 286, 31 L. R. A. (N. S.) 176, 133 Am. St. Rep. 170, 119 N. W. 702.

75. Stodenmeyer v. Hart, 155 Ala. 243, 46 So. 488; Mattoon v. Elliott, 259 Ill. 72, 102 N. E. 251; Hayes v. Livingston, 34 Mich. 384, 22 Am. Rep. 533; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891; Petit v. Flint & P. M. R. Co., 119 Mich. 492, 75 Am. St. Rep. 417, 78 N. W. 554; Suttle v. Richmond, F. & P. R. Co., 76 Va. 284.

jurisdictions,⁷⁶ that such an estoppel may be asserted at law as well as in equity. So far as concerns the applicability of the Statute of Frauds in such a case, it may be remarked that though, in the ordinary case, the practical result of the estoppel is equivalent to that of a transfer of the land, it does not actually involve a transfer, and even were it a transfer, it would be a transfer by operation of law, and consequently not within the statute.

In equity the person in favor of whom the owner is estopped to claim the land is entitled to a conveyance of the land by the owner, that is, the owner may be compelled to make good his representations;⁷⁷ this, as before stated, being a recognized equitable doctrine before the legal development of the law of estoppel under that name.⁷⁸ In determining, therefore, the rights of the person to assert the estoppel as against persons other than the person who was originally guilty of the misrepresentation, the former should, it seems, be regarded as standing in the position of any other person having an equity to a conveyance. Consequently, the estoppel should be enforceable as against any subsequent owner of the land, as would any other equity, until the land passes to a *bona fide* purchaser for value.⁷⁹ This view has usually been applied,⁸⁰ though

76. *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Davis v. Davis*, 26 Cal. 23; *Levy v. Cox*, 22 Fla. 546, *Bigelow v. Foss*, 59 Me. 164; *Macomber v. Kinney*, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851; *Brown v. Bowen*, 30 N. Y. 519; *Beaupland v. McKeen*, 28 Pa. St. 124; *Shoemaker v. Beebe*, 35 Vt. 204; *Bigelow, Estoppel* (6th Ed.) 781.

77. *Citizens' Bank of Louisiana v. First Nat. Bank of New Orleans*, L. R. 6 H. L. 360; *Beatty v. Sweeney*, 26 Mich. 217; *Favill v. Roberts*, 50 N. Y. 222; *Hubbard*

v. Slavens, 218 Mo. 598, 117 S. W. 1104.

78. *Ante*, note 71.

79. See *Ewart, Estoppel*, 196. on which the view here presented is based.

80. *Ions v. Harbison*, 112 Cal. 260, 44 Pac. 572; *Ramboz v. Stowell*, 103 Cal. 588, 37 Pac. 519; *Thornton v. Ferguson*, 133 Ga. 825, 134 Am. St. Rep. 226, 67 S. E. 97; *Rutz v. Kehn*, 143 Ill. 558, 29 N. E. 553; *Maxon v. Lane*, 124 Ind. 592, 24 N. E. 683; *Webb v. Hardaway*,—Ky. L. Rep.—, 121 S. W. 669; *Brian*

frequently the subject has been confused by undertaking to determine whether the subsequent owner of the land is a "privity" of the person originally estopped, a question which, by reason of the ambiguity of the terms "privity" and "privity" is difficult of solution.

An important application of the principle of estoppel by representation is seen in the decisions by which one who allows the record title of land belonging to him to stand in the name of another, who is in possession or apparent possession, is precluded from asserting his ownership as against creditors of the record owner who gave credit on the assumption that the record showed the true state of the title.^{80a} These decisions are, to a great extent, cases in which the record title being in the husband, the wife was held to be estopped to assert her beneficial interest as against the husband's creditors,^{80b} but the same view has been applied when the relation of husband and wife was non-existent.

Another important application, and at times extension, of the doctrine of equitable estoppel, is to be found in the decisions, not inconsiderable in number, that if an individual, by reason of a mistaken assumption as to the extent or limits of a street, encroaches upon the street by the erection of buildings or the construction of other improvements, and the municipality makes no objection to such action on his part, the municipality may be estopped subsequently to assert the rights of the public as against such encroachment.⁸¹

v. Bonvillain, 52 La. Ann. 1794, 28 So. 261; Stinchfield v. Emerson, 52 Me. 465, 83 Am. Dec. 524; Southard v. Sutton, 68 Me. 575; Thistle v. Buford, 50 Mo. 278; Smith & Richer v. Hill Bros., 17 N. M. 415, 134 Pac. 243; Hodges v. Eddy, 41 Vt. 485, 98 Am. Dec. 612.

80a. The subject is excellently discussed in Glenn, Creditors

Rights and Remedies, § 206 *et seq.*; Editorial note, 28 Yale Law Journ. 685.

80b. The cases in this regard are collected in A. & E. Ann. Cas. 1914C, 1066, note to Goldberg v. Parker.

81. See 3 Dillon, Municipal Corporations (5th Ed.) §§ 1191, 1194.

The chief difficulty in these cases appears to be in the fact that ordinarily the abutting owner is in a position to ascertain the existence and limits of the street, and is consequently hardly justified in asserting that he was misled by the failure of the municipality to object to the encroachments.⁸²

§ 547. **Improvements by oral grantee.** The cases are generally to the effect that an oral gift of land, if followed by the making of substantial improvements by the donee on the strength thereof, will be recognized and enforced by a court of equity.⁸³ In some of these cases it appears that the court construed the lan-

82. See notes in 8 Columbia Law Rev. at p. 273, 21 Id. at p. 292, 30 Id. 769.

83. Neale v. Neale, 9 Wall. (U. S.) 1, 19 L. Ed. 590; Burris v. Landers, 114 Cal. 310, 46 Pac. 162; Kinsell v. Thomas, 18 Cal. App. 683, 124 Pac. 220; Hunt v. Hayt, 10 Colo. 278, 15 Pac. 410; Howell v. Ellsberry, 79 Ga. 475, 5 S. E. 96; Garbutt v. Mayo, 128 Ga. 269, 13 L. R. A. (N. S.) 58, 57 S. E. 495; Drum v. Stevens, 94 Ind. 181 (but see Winslow v. Winslow, 52 Ind. 8); Bevington v. Bevington, 133 Iowa, 351, 9 L. R. A. (N. S.) 508, 12 Ann. Cas. 490, 110 N. W. 840; Dyer v. School Dist. No. 111 of Sedgwick County, 76 Kan. 889, 92 Pac. 1122; Bigelow v. Bigelow, 93 Me. 439, 45 Atl. 513, 95 Me., 17, 49 Atl. 49; Polk v. Clark, 92 Md. 372, 48 Atl. 67; Whitaker v. McDaniel, 113 Md. 388, 78 Atl. 1; Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754; Maas v. Anchor Fire Ins. Co. of Cincinnati, 148 Mich. 432, 111 N. W. 1044; Dozier v. Matson, 94 Mo. 328, 4 Am. St. Rep. 388, 7 S. W. 268; Story v. Black, 5 Mont. 26, 51 Am. Rep. 37, 1 Pac. 1; Merriman v. Merriman, 75 Neb. 222, 166 N. W. 174; Seavey v. Drake, 62 N. H. 393; Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Messiah Home v. Rogers, 212 N. Y. 315, 106 N. E. 59; Thayer v. Thayer, 69 Ore. 138, 138 Pac. 478; Syler's Lessee v. Eckert, 1 Binn. (Pa.) 378; Burns v. Sutherland, 7 Pa. 103; Cook v. Cook, 24 S. D. 223, 123 N. W. 693; Woolridge v. Hancock, 70 Tex. 18, 6 S. W. 818; Cooke v. Young, 2 Utah, 254; Burkholder v. Ludlan, 30 Gratt. (Va.) 255, 32 Am. Rep. 668; Halsey v. Peters, 79 Va. 60; Coleman v. Larson, 49 Wash. 321, 95 Pac. 262; Crim v. England, 46 W. Va. 480, 76 Am. St. Rep. 826, 33 S. E. 310; Dillwyn v. Llewellyn, 4 De G. F. & J. 517 (*semble*); See 1 White & Tudor's Ldg. Cas. in Eq. (4th Am. Ed.) p. 1047; Pomeroy, Equitable Remedies, § 828; Editorial notes, 15 Harv. Rev. at p. 659; 13 Columbia Law Rev. at p. 151; 26 Yale Law

guage used by the donor as in effect an offer to convey the land to the so-called donee on condition that he would make improvements, which offer was accepted by the making of improvements, giving rise to a contract to convey the land,⁸⁴ but more usually the decision is based upon the theory that, after the owner of land has induced another to make substantial expenditures thereon by purporting to give him the land, a withdrawal of such gift would, although no contract is created, in effect operate as a fraud upon the donee, which equity will interfere to prevent by requiring the execution of a conveyance in accordance with the intended gift. In applying this doctrine the courts perhaps ordinarily refer to it as a case of specific performance, stating that the making of improvements constitutes a part performance sufficient to take the transaction out of the Statute of Frauds. The expressions "part performance" and "specific performance, however, appear to be particularly inappropriate as applied to an attempted conveyance, as distinguished from a contract, and the doctrine may, it is conceived, be more satisfactorily regarded as involving an application, or perhaps extension, of the principle of estoppel *in pais*.

Journ. 592; article by Professor Roscoe Pound, 13 Illinois Law Rev. at p. 672.

In occasional comparatively early decisions the oral donee was restricted to a right to recover the value of his improvements. *Evans v. Battle*, 19 Ala. 398; *Runker v. Abele*, 8 B. Mon. (Ky.) 566. See also *Tolleson v. Blackstock*, 95 Ala. 510, 11 So. 284. Relief to the oral donee was denied in *Adamson v. Lamb*

3 Blackf. (Ind.) 446; *Ridley v. McNain*, 2 Humph. (Tenn.) 174.

84. *Gwynn v. McCauley*, 32 Ark. 97; *Gaines v. Kendall*, 176 Ill. 228, 52 L. R. A. 277, 58 N. E. 598; *Harlan v. Harlan*, 273 Ill. 155, 112 N. E. 452; *Haines v. Haines*, 6 Md. 435; *Seavey v. Drake*, 62 N. H. 393; *Young v. Overbaugh*, 145 N. Y. 158, 39 N. E. 712; *Greenwood v. School District*, 126 Mich. 81, 85 N. W. 241.

CHAPTER XXVII.

ESCHEAT AND FORFEITURE.

§ 548. Escheat.

549. Forfeiture.

§ 548. **Escheat.** At common law, as before stated, an escheat of land occurred in favor of the feudal lord in case the tenure terminated by reason of the failure of inheritable blood, such failure arising from the corruption of the blood of the tenant by attainder of felony, as well as from the death of the tenant without any ascertainable heir.¹ In this country, in those states in which tenure is to be regarded as nonexistent,² the feudal conception of escheat cannot obtain, though even there the right of the state to land the owner of which dies intestate without heirs would no doubt be sustained as an attribute of sovereignty. Any question upon the subject, however, is avoided in most, if not all, the states by statutory provisions that, upon the failure of other heirs, the land shall pass to the state or to some state agency.³ This right of the state to land in default of heirs is ordinarily spoken of as "escheat."⁴

An "escheat" of this character may occur in states where aliens are forbidden to hold lands, as a result of the absence of all heirs other than aliens, and likewise owing to the inability of one, otherwise entitled to inherit, to trace his descent except through an alien.^{4a}

1. 8 Blackst. Comm. 244 *et seq.*; *ante*, § 9.

2. *Ante*, § 13.

3. 1 Stimson's Am. St. Law, §§ 400, 1151-1154, 3125.

4. As to whether a county acquiring land, under the state statute, took "by the intestate

laws of the state" within the inheritance tax law, see 29 Harv.

Law Rev. 455, discussing and approving *People v. Richardson*, Ill. 103 N. E. 1033, in favor of the liability to the state.

4a. *Post*, § 595.

But the term "escheat" is not, it seems applicable to the forcible acquisition by the state of land which an alien has, in violation of law, undertaken to acquire by purchase, though the term is frequently so used, this being in the nature of the enforcement of a forfeiture by the state, rather than an escheat.⁵

§ 549. **Forfeiture—To state.** At common law, upon his attainder of high treason, one forfeited to the crown all his freehold estates, and, in case of petit treason and felony, his freehold estates for life, and his chattel interests absolutely.⁶ In this country the effect of a conviction of crime is rarely to forfeit all the land of the wrongdoer, the statutes of most states providing explicitly that no conviction of crime shall work forfeiture of estate or corruption of blood, though in two or three there may, it seems, be a forfeiture during the life of the offender.⁷

If an alien undertakes to acquire land in violation of the law of the particular state, he may, unless protected by the terms of a treaty with his government, be deprived of such land, and a forfeiture to the state be compelled.⁸

During the American Revolution, many of the colonial governments confiscated the lands of persons supporting the royal cause,⁹ and, during the Civil War, acts confiscating the property of persons aiding the Confederate cause were passed by congress, the confiscation, however, in the case of land, being limited to the term of the offender's natural life.¹⁰ The confiscation of enemies' property is, at the present day, not generally approved by writers on international law.¹¹

5. See 2 Blackst. Comm. 274, 293; 2 Kent's Comm. 61; Read v. Read, 5 Call (Va.) 207.

6. 4 Blackst. Comm. 381-385.

7. 1 Stimson's Am. St. Law, §§ 143, 1162.

8. Post, § 597.

9. Sabine, Loyalists of Ameri-

can Revolution, 75 *et seq.*

10. Jenkins v. Collard, 145 U. S. 546, 36 L. Ed. 812.

11. Lawrence's Wheaton, Internat. Law, 596 *et seq.* Lawrence, Internat. Law, § 178; Taylor, Internat. Law, § 540.

Occasionally the statute, in restricting the power of a corporation to acquire land, provides, expressly or impliedly, that land acquired by the corporation in violation of law shall be forfeited to the state.¹² In the absence of such a provision for forfeiture, though the state may annul the transfer or dissolve the corporation, it does not have any right to the land which the corporation thus wrongfully acquired.¹³

Land used for purposes which violate the internal revenue laws in certain ways become subject to forfeiture, by express provision of statute, to the United States government.¹⁴

At common law, the proceedings on the part of the state to enforce a forfeiture as well as an escheat was by "office found" or "inquest of office," this being a proceeding, by the aid of a jury, which was made use of in any cases in which the crown asserted a claim to lands or goods.¹⁵ There is, in some states, a statutory proceeding for the enforcement of such rights, but an inquest of office as at common law, or, it seems, an action of ejectment, would be sufficient to try the rights of the state to the land in any such case.

— **To individual.** A tenant of a particular estate usually holds it subject to certain implied conditions. At common law, a life tenant held the land subject to an implied condition that he should not make a feoffment thereof in fee simple, since this divested the whole fee-simple title, and by so doing he forfeited his

12. See *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Com. v. New York, L. E. & W. R. Co.*, 132 Pa. St. 591, 7 L. R. A. 634, 19 Atl. 291, 139 Pa. St. 457, 21 Atl. 528; *Louisville & N. R. Co. v. Com.*, 151 Ky. 325, 151 S. W. 934, 151 Ky. 774, 152 S. W. 976.

13. *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *National Bank of Commerce*

v. Licking Valley Land & Mining Co., 15 Ky. L. Rep. 211, 22 S. W. 881; *Com. v. New York, L. E. & W. R. Co.*, 132 Pa. St. 591, 7 L. R. A. 634, 19 Atl. 291, 139 Pa. St. 457, 21 Atl. 528; *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 24 S. E. 1016.

14. Rev. St. U. S. § 3400.

15. 3 Blackst. Comm. 358.

estate. This ground of forfeiture is now obsolete, since a modern conveyance passes only such interest as the grantor has.¹⁶ A life tenant may, however, at the present day, forfeit his interest by the commission of acts of waste, the statute frequently containing a provision to this effect.¹⁷ A tenant under a lease may also forfeit his tenancy by his disclaimer of his landlord's title, and, in some states, by the use of the premises for an illegal purpose.¹⁸

The subject of the forfeiture of an estate in land for breach of an express condition subsequent has been before considered.¹⁹

16. *Ante*, § 33.

18. 2 Tiffany, Landl'd & Ten.

17. 1 Stimson's Am. St. Law, §§ 192, 193. See *ante*, § 77.
§ 1332.

19. *Ante*, §§ 82-88.

CHAPTER XXVIII.

TRANSFER UNDER JUDICIAL PROCESS OR DECREE.

- § 550. Sales and transfers under execution.
- 551. Sales in equity at the instance of creditors.
- 552. Sales of decedent's lands.
- 553. Sales of lands of infants and insane persons.
- 554. Sales and transfers for purpose of partition.
- 555. Decrees transferring title.
- 556. Adjudications of bankruptcy.

§ 550. **Sales and transfers under execution.** The land of a debtor was first made subject to the claims of creditors by an early statute,¹ which provided that one who had recovered a judgment might elect to have the sheriff deliver to him the chattels of the debtor and one-half his land, the writ under which this was done being termed a "writ of *elegit*," because it recited that the creditor had elected (*elegit*) to pursue that remedy. Formerly the creditor had merely the right to retain the land taken under this writ until the rents and profits sufficed to pay the judgment, he being known as a tenant by *elegit*; but now, by statute in England, the creditor may not only take all the debtor's land under the writ, but he may obtain an order for the sale of the land, the proceeds being distributed among all the creditors.²

The writ of *elegit* has been made use of in but few states, and is at the present day, it seems, obsolete in every state but Delaware.³ In most of the states the same method is authorized for the realization of debts from the land of the judgment debtor as from his chattels, that is, a seizure and sale by the sheriff, and ap-

1. 13 Edw. I c. 18 (St. Westminster II.).

Ed.) § 370.

2. Williams, Real Prop. (21st Ed.) 271.

3. Freeman, Executions (3d

plication of the proceeds to the payment of the judgment. In the New England states, however, the satisfaction of a judgment out of the debtor's land is usually obtained, not by a sale of the land, but by a delivery of the land, or a part thereof, at a value fixed by appraisers, to the judgment creditor, this being known as a levy "by extent," and the land being said to be "extended." The statutory provisions as to the method of making the extent are full and precise, and they must be strictly followed. A certain period, usually six months or a year, is allowed to the debtor in which he may pay the judgment and recover the extended lands, but, if this is not done, the creditor acquires the whole estate and interest of the debtor absolutely.⁴ The satisfaction of a pecuniary judgment, whether by a sale under the writ or an extent, is known as an "execution" of the judgment.

As a general rule, all legal interests in land are subject to sale under execution.⁵ But a bare legal title, that is, a legal title not associated with any beneficial interest whatsoever, is not so subject.⁶ The interest of a tenant at will is not so subject,⁷ since he has no interest capable of transfer.⁸ Whether the possibility of an estate created by the limitation of an estate subject to a condition precedent, such as a contingent remainder or an executory devise, is subject to sale under execution would seem ordinarily to depend on whether it is an interest which is capable of transfer,⁹

4. 3 Freeman, Executions, § 372 *et seq.*; 2 Dembitz, Land Titles, § 173. McCann, 24 How. (U. S.) 398, 16 L. Ed. 714.

5. 2 Freeman, Executions, § 172. 7. Colvin v. Baker, 2 Barb. (N. Y.) 206; Bigelow v. Finch, 11 Barb. (N. Y.) 498; Waggoner

6. Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Morrison v. Herrington, 120 Mo. 665, 25 S. W. 568; Mallory v. Clark, 9 Abb. Pr. (N. Y.) 358; Bostick v. Keizer, 4 J. J. Marsh. 597, 20 Am. Dec. 237; Smith v. v. Speck, 3 Ohio, 292.
8. *Ante*, § 62(d).
9. So it would ordinarily not be so liable if in favor of uncertain persons. Taylor v. Taylor, 118 Iowa, 407, 92 N. W. 71 while it might be liable if in

provided the language of the statute authorizing execution sales is sufficiently broad to apply to such a case.¹⁰

At common law there was no method by which equitable interests could be reached by execution, but, by the Statute of Frauds,¹¹ it was enacted that the execution might be levied on lands of which any other person or persons were seised or possessed of in trust for the execution defendant. This provision has been adopted or re-enacted in a number of the states, but it has usually been construed as applicable only in cases in which the execution defendant has, under an express declaration of trust, the exclusive enjoyment of a beneficial interest in property, the legal title to which is in another, and neither it nor its American counterparts have had the effect of making all equitable interests subject to execution. In some states, however, more liberal statutes have been adopted, subjecting equitable interests generally to execution, while in others the common-law rule which prevailed previous to the Statute of Frauds still controls.¹² Equitable interests which cannot be sold under execution may usually be reached by a proceeding in equity, known as a "creditor's bill," or "creditors' suit."¹³

A sale by a sheriff under a writ of execution is by force of a statutory power,¹⁴ and is effective, if legally

favor of a certain person, the execution defendant. *De Haas v. Bunn*, 2 Pa. 335, 44 Am. Dec. 201 (executory devise); *White v. McPheeters*, 75 Mo. 286; *In re Packer's Estate*, 246 Pa. 116, 92 Atl. 70 (*semble*).

Occasionally however it appears to be assumed that no contingent remainder is liable to sale under execution. *Watson v. Dodd*, 68 N. C. 528; *Howard v. Peavy*, 128 Ill. 430, 15 Am. St. Rep. 120, 21 N. E. 503; *Hill v. Hill*, 264 Ill. 219, 106 N. E. 262; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E.

474.

10. In New York it is said that a contingent remainder is not within the terms of the execution statute. *Jackson v. Middleton*, 52 Barb. (N. Y.) 9; *Sheridan v. House*, 4 Abb. Dec. 218.

11. 29 Car. II. c. 3, § 10.

12. 2 Freeman, Executions, §§ 187, 189; 11 Am. & Eng. Enc. Law (2d Ed.) 632.

13. 3 Freeman, Executions, § 424 *et seq.*; 5 Enc. Pl. & Pr. 393. See *post*, § 551.

14. See *ante*, § 312.

made, and followed by a conveyance to the purchaser, to divest the title of the judgment debtor, and to vest it in the vendee. In order that the sale may have this effect, it must be made under a judgment rendered by a court having jurisdiction of the subject-matter and of the parties.¹⁵ If the judgment is valid, an innocent purchaser at the sale is not usually affected by irregularities in the proceedings leading up to the sale, though, if the judgment creditor is the purchaser, the rule is different, and he is regarded as chargeable with notice of any irregularities.¹⁶

The statutes of a number of states give the judgment debtor a certain period after the execution sale within which he may redeem therefrom. In the absence of statute, there is no right of redemption.¹⁷

The sheriff is required, by the statutes of most, if not all, the states, to make a conveyance of the land to the purchaser at the sale, and this is usually regarded as necessary to vest the legal title in the purchaser. This conveyance should recite the recovery of the judgment, the issue of the writ, and the sale thereunder, but any requirements in this regard are regarded as directory merely. The conveyance must usually be executed like other conveyances, and an acknowledgment is, in most states, though not in all, necessary only for the purpose of record. If the conveyance is invalid, the purchaser is ordinarily entitled to have a valid one executed in its place.¹⁸

In the case of a sale under execution, the sale is made by the sheriff as a ministerial officer, acting under the writ, and the court has no control over his actions, and, except in a few states, no confirmation of the sale by the court is necessary in order to validate the sale. An execution sale is accordingly to be distinguished

15. Freeman, Executions, §§ 19, 20; Kleber, Void Judicial Sales, §§ 262-267, 294.

17. 3 Freeman, Executions, § 314.

16. 3 Freeman, Executions, § 339 *et seq.*

18. 3 Freeman, Executions, § 324 *et seq.*

from the sales hereafter referred to in this chapter, which are made in conformity with the order of a court, and must be confirmed by it, and which are accordingly regarded as the act of the court, though a commissioner or other officer is necessarily employed by the court as an instrument in making the sale. An execution sale is accordingly not, properly speaking, a judicial sale.¹⁹

§ 551. Sales in equity at the instance of creditors. The various liens to which land may be subject in behalf of a person other than the owners are enumerated in another part of this work.²⁰ These liens are almost invariably enforced by a sale of the land under the decree of a court of equity for the purpose of paying the amount of the lien from the proceeds. Likewise, equity may decree a sale in a creditors' suit brought to obtain a discovery of assets, to prevent waste and spoliation thereof, or to reach property which is not subject to execution because of its equitable character, or because transferred by a conveyance fraudulent as to creditors.²¹

§ 552. Sales of decedent's lands. At common law, an unsecured debt could not be enforced, as against the real property of the debtor, after the latter's decease, unless it was due on a contract under seal, which expressly bound the debtor's heirs, and then it could be enforced against the heir to the extent of any land in fee simple descended to him.²² Under this condition of the law there was no remedy available to even the specialty creditor in case the decedent had devised the land, or the heir had aliened it, and, accordingly, it was provided by statute²³ that a devisee should be liable to the same extent as the heir, and that no alienation by either the heir or the devisee should affect his

19. Kleber, *Void Judicial Sales*, 1413-1415.
§§ 15-20.

20. *Post*, Part VI.

21. 3 Pomeroy, *Eq. Jur.* §§

22. 2 Blackst. *Comm.* 244, Williams, *Real Prop.* (21st Ed.) 280.

23. 3 Wm. & M. c. 14 (A. D.

liability for the debt. These statutes imposed on the heir and devisee a personal liability for the debt to the extent of the value of land descended or devised to him, and this was restricted to debts under seal. Later it was provided²⁴ that all interests in land should be assets for the payment of debts, whether created by simple contract or by contract under seal, and that the heir or devisee might be sued in equity accordingly by any creditor of the deceased. In this country there is probably in every state a statute making the realty of a decedent liable for his debts as against his heirs and devisees.²⁵

Under the English statute making the lands of a decedent liable in equity for his debts, the proceeding to subject the land was by a "creditors' bill" in equity and this mode of proceeding for the purpose is recognized in a number of the states.²⁶ In most of the states, however, the probate court has full jurisdiction to order the sale of land for the payment of debts, and likewise, frequently, for other purposes, such as the payment of legacies, or in order to make distribution, and the statutes usually provide that such sales shall be ordered on the application of the executor or administrator.²⁷ The length of time after the decedent's death within which a sale of lands for this purpose can be applied for by the personal representatives or the creditors of deceased is in some states fixed by statute.²⁸ In the absence of statute, it is said that the application must be made within a reasonable time,²⁹ and occasionally

1691; 6 & 7 Wm. III c. 14 (A. D. 1695), 1 Wm. IV c. 47 (A. D. 1830).

24. 3 & 4 Wm. IV. c. 104 (A. D. 1833).

25. 2 Dembitz, Land Titles, § 150; 2 Woerner, Administration, §§ 463, 490; 11 Am. & Eng. Enc. Law (2d Ed.) 838.

26. 3 Pomeroy, Eq. Jur. §§ 1152-1154; 2 Woerner, Administra-

tion, § 463; 11 Am. & Eng. Enc. Law, 1072.

27. 2 Woerner, Administration, §§ 463, 464.

28. 2 Woerner, Administration, § 465.

29. Liddel v. McVickar, 11 N. J. Law, 44; Rosenthal v. Renick, 44 Ill. 202; Killough v. Hinton, 54 Ark. 65; State v. Probate Court

this has been determined with reference to the statutory period in which an action to recover lands is barred.³⁰

A sale of real estate to pay debts is ordinarily authorized only when the personal estate is insufficient for the purpose, and that such is the case must appear from the bill or petition for sale in order to give the court jurisdiction. In some states proceedings for sale by an executor or administrator are regarded as adversary to the heirs or devisees, so that a failure to give notice to the latter as required by statute renders the sale void. In other states they are regarded as proceedings *in rem*, and so valid, though no notice is given.³¹ In a number of states the failure of the executor or administrator to give bond before making sale as required by the statute is regarded as absolutely invalidating the sale, and sometimes such effect is given to a failure to make the proper oath.³²

The sale must comply not only with the requirements of the statute, but also with the terms of the order for sale. The sale, when made by the executor or administrator, must, in most states, be confirmed by the court in order to have any effect whatsoever in passing title, since the personal representative, not expressly empowered to sell by the terms of the will, is regarded as the instrument of the court, and the sale, to be valid, must be adopted by the court as its own act.³³ After the sale is confirmed, the executor or administrator, still acting as the instrument of the court, is usually required to make a conveyance of the

of Ramsey County, 40 Minn. 296;
Ferguson v. Scott, 49 Miss. 500.
See Bindley's Appeal, 69 Pa. St.
295.

30. Ricard v. Williams, 7
Wheat. (U. S.) 59, 55 L. Ed. 398;
Wingerter v. Wingerter, 71 Cal.
105, 11 Pac. 853; Rosenthal v.
Renick, 44 Ill. 202; Bozeman v.
Bozeman, 82 Ala. 389, 2 So. 732;

Sumner v. Child, 2 Conn. 607.

31. 2 Woerner, Administration,
§ 466; Kleber, Void Judicial
Sales, §§ 72, 156.

32. 2 Woerner, Administration,
§ 472; Kleber, Void Judicial Sales,
§§ 253, 254, 316, 317.

33. Kleber, Void Judicial Sales,
§§ 1-4, 381.

land to the purchaser, and, until such conveyance is executed, the purchaser has an equitable title merely.³⁴

§ 553. Sales of lands of infants and insane persons.

The extent to which a court of equity has inherent power to sell the land of an infant for his benefit is involved in considerable doubt; but the question has, to a considerable extent, lost its importance, owing to the passage of acts, in most, if not all, of the states, authorizing such sales by courts either of equity or probate jurisdiction.³⁵ These sales are usually conducted by the guardian of the infant, under the direction of the court, the proceedings being generally similar to those in the case of sales of decedents' lands. The application for the sale is ordinarily required to be made by the guardian, but in some states the statute authorizes it to be made by parents or other persons interested in the infant's welfare.³⁶

The lands of persons *non compos mentis* may likewise be sold under the direction of a court by force of statute to that effect in all or in most of the states, and occasionally such power has been asserted by courts of equity apart from statute. The sale is usually made by the committee or guardian of the lunatic acting as an instrument of the court.³⁷

§ 554. Sales and transfers for purpose of partition.

Proceedings by one interested in land as co-owner with others, to obtain a partition or sale of the land, have previously been discussed.³⁸ In this country the jurisdiction of proceedings for partition is usually deter-

34. 2 Woerner, Administration, § 480.

35. And the question of the inherent power of a court of equity may well arise by reason of a failure to comply with the statutory requirements. See editorial note, 23 Harv. Law Rev. 473.

36. Woerner, Guardianship, §§ 68-78; 2 Dembitz, Land Titles, § 151; 3 Pomeroy, Eq. Jur. § 1309; Kleber, Void Judicial Sales, §§ 93, 157, 234-236.

37. Woerner, Guardianship, § 148; 2 Dembitz, Land Titles, § 152.

38. *Ante*, § 204.

mined by the statute, and there are in many states special provisions for the partition of land belonging to a decedent in the probate court, or for a sale for the purpose of partition.³⁹

As before stated, a partition proceeding is available only when there is a unity of possession in two or more persons, and consequently cannot be employed in order to apportion the land, or to procure a sale, when the persons interested in the land have successive rights of possession, as when they are tenants for life and in remainder, or one is tenant in fee simple, subject to an executory limitation in favor of the other. In a few states there is a provision for a sale in such case under the direction of a court of equity.⁴⁰

§ 555. **Decrees transferring title.** The court of chancery in England always acted *in personam*, and not *in rem*, and consequently, in adjudicating rights of the different parties to a proceeding concerning land, it did not, by its decree, undertake to transfer the title from one to the other of such parties, but gave relief by ordering one party to make a conveyance, cancel an instrument, or do other acts so as to establish and perfect the rights of the respective parties as adjudicated. This principle of action on the part of courts of equity has, however, been changed by statute in many states of this country, so that, instead of requiring the parties to carry out the decree, the court itself does so, acting through a commissioner or other officer, and, under some statutes, the decree alone, without any further action, is sufficient to transfer the title.⁴¹ As regards land outside the jurisdiction, however, the court must still act *in personam*.⁴²

39. Freeman, Cotenancy, §§ 550-564.

40. 2 Dembitz, Land Titles, § 156.

41. Huston, Decrees in Equity, Ch. 2.

42. Pomeroy, Eq. Jur. §§ 134, 135, 170, 1317. See Arndt v. Griggs, 134 U. S. 316, 33 L. Ed. 918; Lindley v. O'Reilly, 50 N. J. L. 636, 1 L. R. A. 79, 7 Am. St. Rep. 802, 15 Atl. 379.

While a judgment in an action concerning land of a strictly legal character, such as ejectment, or the old real actions, or the statutory "trespass to try title," is usually decisive of the rights of the parties thereto in regard to the ownership of the land, as between themselves, it cannot be regarded as transferring the title in any sense, but merely decides what effect is to be given to previous transfers.

§ 556. **Adjudications of bankruptcy.** The present bankrupt act⁴³ provides that the trustee of a bankrupt upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. The title to the bankrupt's land, therefore, as well as other property, passes, as it were, by force of the adjudication of bankruptcy, to the trustee subsequently appointed. Previous bankrupt acts, as well as the insolvency statutes of the various states, have contained similar provisions transferring the property of the bankrupt or insolvent to the trustee, for the purpose of distribution among creditors.⁴⁴

43. Act July 1, 1898 (30 Stat. 565, § 70a).

44. 16^a A. & E. Encyc. Law 721.

CHAPTER XXIX.

TRANSFER FOR NONPAYMENT OF TAXES.

§ 557. Character of title acquired.

558. Judgment for taxes.

559. Forfeiture to state.

560. Remedial legislation.

§ 557. **Character of title acquired.** The payment of taxes on land is in this country usually enforced by a summary sale of the land, conducted by the tax collector or some other ministerial officer.

The power to sell lands for nonpayment of taxes is a purely statutory power, and it has always been held that the statutory requirements as to the mode of making sale must be strictly complied with, and that, moreover, since the power to sell exists only in case there are valid taxes, which are unpaid, no title will pass unless the tax was levied and assessed in accordance with law. Tax sales have accordingly been held to be invalid in particular cases for want of a valid assessment or valuation of the property, duly verified by the proper officers, and approved by the legal reviewing authority or "board of equalization," defects in the levy of the tax, defects in the warrant issued to the collector for the collection of the tax, failure to return the list of delinquent taxes, noncompliance with the various requirements as to the mode of advertising the sale, failure to comply with the statute, and also with the advertisement, as to the conduct of the sale, failure to sell all the land, though a part brings enough to pay the taxes.

Furthermore, the statutory requirements as to the return of the sale by the officer must be complied with, and he must make a conveyance to the purchaser in strict conformity to the statute. The sale is also in-

valid if the tax was unconstitutional, or not properly levied by the legislature or the municipal authorities or if the land was exempt, or the taxes had been paid before the sale. In view of these many possible defects in the proceedings, as well as others which might be mentioned, it is not strange that titles based on tax sales are usually regarded as of most questionable soundness, and, though this condition of things has been to some extent removed by legislation of a character hereafter referred to, the possibilities of failure of title through defects in the proceedings are still such that land, when sold for taxes, rarely, if ever, brings its actual value, and its purchase is ordinarily for purposes of speculation, rather than for actual occupation.¹

By the statutes of many states, the sale is of an estate in fee simple in the land, free from any incumbrances, and without reference to the estate or interest belonging to the particular person against whom the tax was assessed, that is, the proceeding for sale is in effect against the land, and not against any particular owner thereof; and if one interested in the land, though not bound to pay the taxes as against the person in possession, desires to protect his interest, he must pay the taxes, or redeem from the tax sale. So, a remainderman or lienor may, by the failure of the owner in possession to pay the taxes, be divested of all interest in the land. In some states, however, or under particular acts, the taxes are not enforceable against the entire interest in the land, but against the interest only of the person against whom the taxes are assessed, in which case the interests of other owners or of lienors are not divested by the sale.

1. An admirable sketch of the uncertainties involved in a tax title is contained in 2 Dembitz, Land Titles, p., 1323 *et seq.* The standard works upon the very extensive subject of tax sales

are those by Henry C. Black, Esq. and by Robert S. Blackwell, the fifth edition of which is well edited by Frank Parsons, Esq.

The statute usually, if not always, names a certain period, varying from six months to three years, within which the owner of the land may redeem from the sale by the payment to the purchaser of the purchase money, interest, and costs, in addition to which he is ordinarily required to pay a penalty, calculated in interest at a high rate.

The purchaser has, until the execution of a conveyance or "deed" by the officer making the sale, neither a legal nor equitable title to the land, but rather a lien thereon for the amount of the purchase money, interest, costs, and penalty. He is usually entitled to the deed upon the expiration of the time for redemption, and not before, and the statutes frequently impose certain formalities as conditions precedent to his obtaining the deed. The requirements of the statute as to the form of the deed, which are frequently most detailed and precise in character, and often include full recitals of the antecedent proceedings, must be strictly followed, and the deed must be executed in strict compliance with the statute in order to vest the title in the purchaser.

§ 558. **Judgment for taxes.** In some states the legislator has provided that the sale of land for taxes shall be preceded by the rendition of a judgment determining the amount of the taxes due. The proceeding to obtain such a judgment is in the nature of a proceeding *in rem* against the land, rather than *in personam* against the owner of the land, and, consequently, personal service of notice of the proceeding is not regarded as a prerequisite to the judgment, constructive service by publication being authorized. Any objections to the validity of the tax or to the assessment must be made by way of defense to the application for judgment, and the judgment is, until reversed, regarded as conclusive of the right to make the sale, according to numerous decisions, even though the taxes were actually paid.

§ 559. **Forfeiture to state.** The statute occasionally provides that, upon nonpayment of taxes due the state, the land, instead of being sold, shall be forfeited to the state. To what extent such a forfeiture is valid if not preceded by a judicial finding that a default in the payment of taxes exists is a question as to which there has been considerable difference of opinion.²

§ 560. **Remedial legislation.** The legislatures of the various states have, particularly in more recent years, frequently passed curative statutes for the purpose of validating tax sales previously made, as well as those thereafter to be made. These acts are regarded as valid in so far as they undertake to validate the proceedings in respect to a particular step therein with which the legislature could have dispensed in the first place, but no further. The same end of curing defective proceedings has frequently been attained by the passage of acts providing that the deed to the purchaser shall be *prima facie* evidence of the regularity of the proceedings, and it has sometimes been made even conclusive evidence in this respect, this latter legislation being valid, however, as are other curative acts, in regard only to matters which could have been previously dispensed with.

Another mode in which the legislatures have undertaken to add to the security of the purchaser at a tax sale is by "short" statutes of limitation in connection with tax titles, requiring the original owner to proceed to recover the land from the purchaser within a certain number of years, less than that within which actions for land must ordinarily be brought. These statutes have usually, like the other statutes having the same purpose in view, been regarded as applicable only when the jurisdictional requirements of a valid sale were present, and as insufficient to validate a sale which is void for want of jurisdiction on the part of the officials to make the sale.

2. Cooley, Taxation (3rd Ed.)

558 *et seq.*

CHAPTER XXX.

APPROPRIATION UNDER EMINENT DOMAIN.

- § 561. The power to appropriate.
- 562. Rights subject to appropriation.
- 563. Mode of appropriation.
- 564. Time of passing of title.
- 565. Cessation of public use.

§ 561. **The power to appropriate.** The power of the state to appropriate property for public use, upon payment of just compensation, may be exercised directly by the state itself, or the state may, in the exercise of the power, select particular agencies, either natural persons or corporations, on whom it confers the right to take private property for public use. Thus, the legislature may, and ordinarily does, authorize municipal corporations to appropriate or "condemn" land for street and other municipal purposes, and so it may authorize a railroad or irrigation company, or other private corporation, to appropriate property for its use, upon payment of just compensation, provided only the use for which it is appropriated is of a public character. This grant by the legislature of the right to exercise the power is frequently by means of a general statute operating in favor of the corporations of a particular class which may desire to exercise the right.¹

The result of the exercise of the power in connection with land is to transfer to the state, or to the corporate body to which the power is delegated by the state, all or some of the rights in particular land previously vested in a particular individual, or in a number of individuals.

1. Randolph, *Eminent Domain*, main (3rd Ed.) § 367 *et seq.*
§§ 102-106; Lewis, *Eminent Do-*

§ 562. **Rights subject to appropriation.** There may be an appropriation of the rights of ownership in a particular piece of land, the entire interest of the former owner thus passing to the appropriator, or a right merely to use the land for the particular public purpose may be acquired. Whether there is an appropriation of the ownership of the land is usually a question of the construction of the statute under which the land is condemned, in connection with any constitutional restrictions upon the power. There is usually a presumption that the ownership, or, as it is ordinarily expressed, the "fee," does not pass, and, unless the statute explicitly authorizes the taking of a fee, or this is necessary for the particular use, it is ordinarily considered that a right of user only is taken by even a municipal corporation.² So a railroad company ordinarily acquires by condemnation merely an easement in the land, and, in the case of land taken for highway purposes, the public frequently acquires merely the right to use the land for such purposes.

The rights of the owner of land may be infringed, not by the actual taking of the land for a particular public purpose, but by the fact that the utilization of neighboring land for such a purpose results in the flowing of water upon the former land, or the casting thereon of stone, earth, or sewerage, thus interfering with the owner's rights of user in the land, and to that extent appropriating his rights in the land.³ The taking for public use may also involve, not a physical invasion of the land itself, but merely the divesting of some of the natural rights incident to the ownership of land. So, one may be divested of rights as to the flow of a natural watercourse, of access to water, or of rights with respect to percolating and surface water. Like-

2. Randolph, *Eminent Domain*, (U. S.) 166, 20 L. Ed. 557; *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504. See editorial notes, 19

3. *Pumpelly v. Green Bay & Mississippi Canal Co.*, 13 Wall. Law Rev. 165.

wise, one may be deprived of his natural right to freedom from dust, smoke, noise, and the like. The cases are in very considerable conflict as to the right to compensation for consequential injuries to land, arising from the invasion of the natural rights of freedom from dust, noise, or noxious odors.⁴

One may be entitled to compensation as having been deprived, by the physical appropriation of another person's land, of an easement which he enjoyed in such land.⁵ And it has been decided that if land is subject to an agreement restricting its use, the person for whose benefit such restriction exists is entitled to compensation when the land is appropriated under the power of eminent domain for a purpose which involves a violation of the agreement.⁶

4. Randolph, Eminent Domain, § 152; 1 Lewis, Eminent Domain, § 235. See notes, 19 Harv. Law Rev. 127; 10 Columbia Law Rev. 245, 12 Id. 165.

5. 1 Lewis, Eminent Domain, § 223; Strickler v. City of Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Indianapolis & C. G. R. Co. v. Belt Ry. Co., 110 Ind. 5, 13, 10 N. E. 923; Ladd v. City of Boston, 151 Mass. 585, 21 Am. St. Rep. 481, 24 N. E. 858; Detroit Leather Specialty Co. v. Michigan Cent. R. Co., 149 Mich. 588, 113 N. W. 14; Arnold v. Hudson River R. Co., 55 N. Y. 661; Willey v. Norfolk S. R. Co., 96 N. C. 408, 1 S. E. 446; Neff v. Pennsylvania R. Co., 202 Pa. 371, 51 Atl. 1038.

6. Long Eaton Recreation Grounds Co. v. Midland Railway (1902) 2 K. B. 574; Flynn v. New York, W. & B. R. Co., 218 N. Y. 140, Ann. Cas. 1918B, 588, 112 N. E. 913. See Allen v. Detroit, 167 Mich. 464, 133 N. W.

317, 36 L. R. A. N. S. 890, and editorial note 21 Harv. Law Rev. 139. In Ladd v. Boston, 151 Mass. 585, 21 Am. St. Rep. 585, 24 N. E. 858, a like result was obtained by regarding the restrictive agreement as creating a legal easement. See also, to the same general effect Riverbank Imp. Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244.

That there is no right of compensation in such a case was decided in Doan v. Cleveland Short Line R. Co., 92 Ohio St. 461, 112 N. E. 505, on the ground that if the person entitled to the benefit of the restriction is allowed damages in such case, "only a mere device of conveyancing is necessary to defeat entirely the rule that depreciation of property incidental to a public use does not constitute a taking," quoting United States v. Certain Lands in Town of Jamestown, R. I., 112 Fed. 622. See also Wharton v. United

The fact that one's land abuts on a highway or street is quite generally considered to give him certain rights of light, air, and access, interference with which entitles him to compensation as for the taking of property. Rights of this character, as the subject of compensation, have been before referred to, as has the question of the extent to which the previous appropriation or dedication of land for a highway authorizes its use, without further compensation, for particular purposes, on the ground that such purposes are of a "highway" character.⁷

§ 563. **Mode of appropriation.** The statutes usually contain explicit provisions as to the constitution of the tribunals which are to decide the amount of compensation to be paid for the property taken. Such a tribunal may, in the absence of any constitutional requirement to the contrary, be composed of a jury of less than twelve men, or of a board of commissioners.

The petition for the condemnation should show the public character of the use, and the necessity of taking the particular land, and this latter must be accurately described. Notice to the owner is necessary before the compensation is assessed, but constructive notice by publication is usually regarded as sufficient. The action of the tribunal in fixing the amount of the compensation is frequently subject to review by appeal or *certiorari*, but is not so in the absence of a statutory provision. In the case of an attempted taking of private property under color of the right of eminent domain, which is, however, unauthorized, on account either of the private nature of the use, the lack of necessity for the appropriation, or lack of legislative authority, the owner may usually obtain an injunction against the wrongful entry on the land, or may sue in ejectment or trespass, and sometimes other remedies are available.

States, 153 Fed. 876, 83 C. C. A. 7. *Ante*, § 417.
58, to the same effect.

The constitutions of some states provide that compensation shall be made before the land is taken, but in others, where there is no such provision, the legislature sometimes authorizes a taking of property, and leaves the onus upon the landowner of instituting proceedings to ascertain the compensation to be paid, and to enforce its payment. Such legislation has usually been supported in the case of a taking by the state or a municipal corporation, but in a number of states it has been held that, in the case of the actual occupation of land by a private corporation, the payment of the compensation must be in some way secured to the owner of the land before he can thus be deprived of his property. When the taking of property does not involve the direct occupation of the land of the person claiming compensation, but merely consequential injuries thereto, the actual payment of the compensation is naturally subsequent to the acts which constitute the taking, since the proper amount thereof was not previously ascertainable.⁸

§ 564. **Time of passing of title.** The statute is usually construed as divesting the title of the owner of the land taken only upon payment of the compensation awarded,⁹ and this is necessarily the case when the constitution provides that the compensation shall be paid

8. Randolph, *Eminent Domain*, §§ 231, 291, 362; 2 Lewis, *Eminent Domain*, §§ 678-681, 872.

9. *New Orleans & S. R. Co. v. Jones*, 68 Ala. 48; *Fox v. Western Pac. R. Co.*, 31 Cal. 538; *Village of Depue v. Banskach*, 273 Ill. 574, 113 N. E. 156; *Perkins v. Maine Cent. R. Co.*, 72 Me. 95; *Mullan v. Belbin*, 130 Md. 313, 100 Atl. 384; *Williams v. New Orleans. M. & T. R. Co.*, 66 Miss. 689; *Horton v. Grand Rapids & I. Ry. Co.*, 199 Mich. 472, 165 N. W. 653; *Provost v.*

Chicago. R. I. & P. R. Co., 57 Mo. 256; *Flynn v. Beaverhead County*, 49 Mont. 347, 141 Pac. 673; *Manchester & K. R. Co. v. Keene*, 62 N. H. 81; *Erie County v. Fridenberg*, 221 N. Y. 389, 117 N. E. 611; *Levering v. Philadelphia, G. & N. R. Co.*, 8 Watts & S. (Pa.) 459; *Stacey v. Vermont Cent. R. Co.*, 27 Vt. 39; *Jones v. Miller*,—Va.—, 23 S. E. 25; *Port of Seattle v. Yesler Estate*, 83 Wash. 166, 145 Pac. 209.

previous to the taking.¹⁰ In the absence of such a constitutional provision, the statute may authorize the taking of the land before payment. Such a statutory provision has occasionally been construed as not transferring the title before payment of the award, but as merely giving a right of entry and occupation of the land as a preliminary to acquiring title by condemnation.¹¹ But, in the absence of such a constitutional provision as that referred to, the fact that the constitution requires a just or reasonable compensation to be paid has not usually been regarded as prohibiting a statute authorizing the passing of the title before payment of the compensation, provided there is adequate provision for the ascertainment and collection of the compensation.¹²

By a number of decisions it is held that the owner of the land has a lien for the amount of the unpaid compensation, either by force of the specific statutory provisions, or by analogy to a vendor's lien for the purchase price.¹³ Such decisions seem necessarily to imply

10. *Southern Railway Co. v. Birmingham, S. & N. O. Ry. Co.*, 130 Ala. 660, 31 So. 509; *Steinhart v. Superior Court of Mendocino County*, 137 Cal. 575, 59 L. R. A. 404, 92 Am. St. Rep. 183, 70 Pac. 629; *Asher v. Louisville & N. R. Co.*, 87 Ky. 391, 8 S. W. 854; *Redman v. Philadelphia, M. & M. R. Co.*, 33 N. J. Eq. 165; *Martin v. Tyler*, 4 N. Dak. 278, 25 L. R. A. 838, 60 N. W. 392; *Brown v. Seattle*, 5 Wash. 35. See 10 *Columbia Law Rev.* at p. 245.

11. *Kennedy v. Indianapolis*, 103 U. S. 599, 103 L. Ed. 550; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 34 L. Ed. 295; *Fox v. Western Pac. R. Co.*, 31 Cal. 538; *Cushman v. Smith*, 34 Me. 247; *Salt*

Lake City Water & Electrical Power Co. v. Salt Lake City, 24 Utah, 282, 67 Pac. 791.

12. *Sweet v. Rechel*, 159 U. S. 380; *Haverhill Bridge Proprietors v. Essex County*, 103 Mass. 120; *Appleton v. City of Newton*, 178 Mass. 59 N. E. 648; *Ballou v. Ballou*, 78 N. Y. 325; *Brewster v. Rogers Co.*, 169 N. Y. 73, 58 L. R. A. 495; *City of Pittsburg, v. Scott*, 1 Pa. 309.

13. *Organ v. Memphis & L. R. R. Co.*, 51 Ark. 235, 11 S. W. 96; *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397; *Drury v. Midland R. Co.*, 127 Mass. 571; *Provolt v. Chicago, R. I. & P. R. Co.*, 69 Mo. 633; *Frelinghuysen v. Central R. Co. of New Jersey*, 28 N. J. Eq. 388; *In re New York, W. S. & B. Ry.*

that the ownership of the land passes by the condemnation proceeding even before payment of the compensation, since one cannot usually have a lien on his own land.

§ 565. **Cessation of public use.** When merely a right of user for the benefit of the public is taken, and subsequently such user ceases, the owner of the land has it free from the public burden.¹⁴ Logically, in such a case, the corporation, which acquired the right of user for one public purpose, having abandoned that mode of user, could not utilize the land, or authorize it to be utilized, for a different public purpose, without payment of the value of the right of user for this latter purpose.¹⁵ There appears, however, to be a disposition occasionally to allow such change of user subject to the payment to the owner of the land of the amount by which the burden of the new user exceeds that of the original user.¹⁶ If not merely a right of user, but the "fee," as it is expressed, is taken, that is, if the ownership of the land is acquired for a public purpose, under the power of eminent domain, the fact that it ceases to be used for that purpose does not ordinarily affect the title, and the corporation which acquired the property may utilize it for other purposes, or may dispose of it, as may be most to its advantage.¹⁷ It may

Co., 94 N. Y. 287; *Lycoming Gas & Water Co. v. Moyer*, 99 Pa. St. 615; *Gillison v. Savannah & C. R. Co.*, 7 Rich. (S. C.) 173; *Kittell v. Missisquoi R. Co.*, 56 Vt. 96; 2 *Lewis, Eminent Domain*, § 885.

14. See *Heard v. Brooklyn*, 60 N. Y. 242; *Pittsburgh & Lake Erie R. Co. v. Bruce*, 102 Pa. 23.

15. See editorial note 22 *Harv. Law Rev.* 439.

16. See *Hatch v. Cincinnati & Indiana R. Co.*, 18 Ohio St. 92;

Malone v. Toledo, 28 Ohio St. 643; *Lucas v. Ashland Light, Mill & Power Co.*, 92 Neb. 550, 138 N. W. 761.

17. *Frank v. Evansville, & I. R. Co.*, 111 Ind. 132, 12 N. E. 105; *Sweet v. Buffalo, N. Y. & P. Ry. Co.*, 79 N. Y. 293; *Eldridge v. City of Binghamton*, 120 N. Y. 309, 24 N. E. 462; *Currie v. New York Transit Co.*, 60 N. J. Eq. 313, 58 Atl. 308; *Malone v. Toledo*, 28 Ohio St. 643; *State v. Griftnier*, 61 Ohio St. 201, 55 N. E. 612; *Wyoming*

conceivably occur, however, that by force of the statute under which the land is taken for public use, a determinable fee only is acquired by the corporation exercising the right of condemnation, limited in effect to endure only so long as the land is utilized for the particular purpose.¹⁸

Coal & Transport Co. v. Price, 81 Pa. St. 156; Chamberlain v. Northeastern R. Co., 41 S. C. 399, 44 Am. St. Rep. 717, 25 L. R. A. 139, 19 S. E. 743, 996; Seattle Land & Imp. Co. v. Seattle, 37 Wash. 274, 79 Pac. 780; Hays v. Walnut Creek Oil Co., 75 W. Va. 263, Ann. Cas. 1918A, 802, 83 S. E. 900.

18. Lithgow v. Pearson, 28 Colo. App. 70, 135 Pac. 759; Ben-

ham v. Potter, 52 Conn. 248; Chambers v. Great Northern Power Co., 100 Minn. 214, 110 N. W. 1128; Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418, 66 N. E. 223; McCombs v. Stewart, 40 Ohio St. 647; Lazarus v. Morris, 212 Pa. St. 128, 61 Atl. 815; Canadian River R. Co. v. Wichita Falls & N. W. Ry. Co., — Okla. —, 166 Pac. 163.

CHAPTER XXXI.

PRIORITIES, NOTICE AND RECORDING.

§ 566. Priorities apart from recording acts.

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- § 575. Purchasers with notice from purchasers without notice.
- 576. Purchasers without notice from purchasers with notice.
- 577. Purchasers at execution sales.
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§ 566. **Priorities apart from recording acts—**(a) **As between legal interests.** "At common law, the title of a purchaser ordinarily depends, first, upon the title of his vendor, secondly, upon whether the vendor has transferred his title to the purchaser. If the vendor had no title, or if his title was defective, it is not material that the purchaser paid the full value of the property, and supposed he was acquiring a perfect title."¹ Were the rule otherwise, it is evident, any owner of property could be divested of his rights by a nominal sale of the property to an innocent purchaser by one having no rights therein.

Applying this rule, it follows that if B claiming under a purported conveyance from A, has no title because the signature on such conveyance was forged, one claiming under a conveyance from B can assert no title, even though he paid value under the supposition that he was acquiring title by B's conveyance²

1. Langdell, *Equity Pleading*, § 139. To the same effect, see Bispham, *Equity*, § 261; 2 White & Tudor's *Leading Cas. in Eq.* (4th Am. Ed.) Hares' notes, at p. 46; *Vattier v. Hinde*, 7 Pet. (U. S.) 252, 8 L. Ed. 675; *Iowa Land & Trust Co. v. U. S.* 217 Fed. 11, 133 C. C. A. 1; *United States v. Southern Co.*, 18 Fed. 273; *Winters v. Powell*, 180 Ala. 425, 61 So. 96; *Bird v. Jones*, 37 Ark. 195; *Compton v. Cas-*

sada, 54 Ga. 74; *John v. Hatfield*, 84 Ind. 75; *Vanhooose v. Fairchild*, 145 Ky. 700, 141 S. W. 75; *Plattsouth First Nat. Bank v. Gibson*, 60 Neb. 767, 84 N. W. 259; *McGregor v. Putney*, 75 N. H. 113, 71 Atl. 226; *Smith v. Markland*, 223 Pa. 605, 72 Atl. 1047; *Jarman v. Farley*, 7 Lea (Tenn.) 141; *Mortimer v. Jackson*, — Tex. Civ. App. —, 155 S. W. 341.

2. *Sampeyreac v. United States*,

Likewise, since a conveyance which has not been delivered is a nullity, one claiming under the grantee therein, though a purchaser for value without notice, cannot, apart from estoppel, assert any title as against the original grantor named,³⁻⁴ and the same principle has been applied in connection with a conveyance delivered in escrow, which was handed by the depositary to the grantee before the satisfaction of the condition.⁵

Since, as just indicated, one who has no title cannot transfer title to another, one who has transferred his legal estate to one person cannot thereafter detract from the effectiveness of such transfer by undertaking to transfer it to another. And it is immaterial that the later grantee pays value under the supposition that he is acquiring the property, that is, that he is a 'bona fide purchaser for value.' And as one who has divested himself of his title cannot convey that title to another, so one claiming under him cannot do so. In other words, apart from statute, transfers of the legal title to land rank, between themselves, according to priority in time. The very considerable departure from this rule, resulting from the statutory provisions for the recording of conveyances, will be subsequently discussed.

— (b) As between legal and equitable interests.

As between a legal and an equitable interest in the same property, courts of equity have favored the former, and have in effect regarded the holder of the legal title as the actual owner, against whom an equitable interest can be asserted only under particular conditions.⁶

7 Pet. (U. S.) 222, 8 L. Ed. 665;
Bird v. Jones, 37 Ark. 195; McGinn v. Tobey, 62 Mich. 252, 4
Am. St. Rep. 848, 28 N. W. 818;
Gross v. Watts, 206 Mo. 373, 121
Am. St. Rep. 662, 104 S. W. 30;
Lee v. Parker, 171 N. C. 144, 88
S. E. 217; Smith v. Markland,
223 Pa. 605, 132 Am. St. Rep.
747, 72 Atl. 1047.

3-4. *Ante*, § 461. And see *Lee v. Parker*, 171 N. C. 144, 88 S. E. 217.

5. *Ante*, § 462.

6. The clearest elementary treatment of this subject is perhaps to be found in Prof. Maitland's *Lectures in Equity*, p. 120 *et seq.*

As between a legal title to property and an equitable interest therein or claim thereto, the legal title, if earlier in point of time, takes priority, that is, as one who has transferred his legal title cannot affect his grantee by subsequently attempting to transfer the legal title to another, so he cannot affect his grantee by subsequently attempting to create an equitable interest in another, even though such other pays value without notice of the prior transfer of the legal title.⁷

If the equitable interest or claim is first created, the question whether one who subsequently acquires the legal title takes free from the equitable interest or claim, will ordinarily depend on whether he is a purchaser for value without notice thereof, courts of equity refusing to enforce the prior equity as against such a purchaser.⁸

7. That the defense of *bona fide* purchase for value is not available against a prior legal title see *Williams v. Lambe*, 3 Bro. C. C. 264; *Finch v. Shaw*, 5 H. L. Cas. 905; *Collins v. Archer*, 1 Russ. & My. 284; *Duncan Townsite Co. v. Lane*, 245 U. S. 308, 62 L. Ed. 309; *Hurst v. McNeil*, 1 Wash. (U. S.) 70; *Curtis v. Cisna*, 7 Biss. (U. S.) 260; *United States v. Southern Co.*, 18 Fed. 273; *Hooper v. Savannah & M. R. Co.*, 69 Ala. 529; *Daniel v. Hollingshead*, 16 Ga. 190; *Jenkins v. Bodley*, *Smedes & M. Ch.* (Miss.) 338; *Jones v. Zollicoffer*, 4 N. C. 645, N. C. Term R. 212, 7 Am. Dec. 708; *Eltner v. Fife*, 32 Ohio St. 358; *Blake v. Heyward*, Bail Eq. (S. C.) 220; *Brown v. Wood*, 6 Rich. Eq. (S. C.) 155.

The defense of *bona fide* purchaser for value was, however, available, under the former chancery practice, as against a prior legal title, when the plain-

tiff was invoking the auxiliary, as distinct from the concurrent or exclusive, jurisdiction of a court of equity. *Langdell*, *Equity Pleading*, § 144; *White & Tudor's Leading Cas. in Eq.* (8th Ed.) 168, 172; 13 *Halsbury's Laws of England*, 77.

8. See, *e. g.*, *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493, 16 L. Ed. 203; *Dean v. Roberts*, 182 Ala. 221, 62 So. 44; *Turner v. Wilkinson*, 72 Ala. 267; *Myers v. Berven*, 166 Cal. 484, 137 Pac. 260; *Mays v. Redman*, 134 Ga. 870, 68 S. E. 728; *Pitts v. Cable*, 44 Ill. 103; *Walker v. Cameron*, 78 Iowa, 315, 43 N. W. 199; *Winlock v. Munday*, 156 Ky. 806, 162 S. W. 76; *Ilaas v. Fontenot*, 132 La. 812, 61 So. 831; *Beidler v. City Bank of Battle Creek*, 172 Mich. 381, 137 N. W. 717; *Conn v. Boutwell*, 101 Miss. 353, 58 So. 105; *Harrington v. Erie County Sav Bank*, 101 N. Y. 257, 4 N. E. 346; *Flesner v. Cooper*,—Okla.—, 134 Pac.

This principle, that equitable relief will be denied as against a purchaser for value and without notice, who has acquired the legal title, is fundamental, the court in effect refusing to deprive him of his right of property in such case because it is not unconscientious for him to retain it. On the other hand equity regards as unconscientious the retention of the right of property, as against a prior equity, by one who acquired it with notice of the equity, or without paying value, and will give relief against him accordingly.⁹

The rule that a purchaser for value without notice will be protected against a prior equity, and its complementary rule, that a purchaser with notice or not for value will not be protected, applies regardless of the character of the equity, whether, for instance, it be an express trust, an implied trust, a right to set aside a conveyance, a right to call for a conveyance, a right to reform a conveyance, an equity of redemption, or an equitable lien.

379; *Elwert v. Reid*, 70 Ore. 318, 139 Pac. 918, 141 Pac. 549; *Bigley v. Jones*, 114 Pa. St. 510, 7 Atl. 54; *High v. Batte*, 10 Yerg. (Tenn.) 335; *Hennessy v. Blair*, 107 Tex. 39, 173 S. W. 871; *Vermont Marble Co. v. Mead*, 85 Vt. 20, 80 Atl. 852; *Croup v. De Moss*, 78 Wash. 128, 138 Pac. 671; *Cresap v. Brown*, 69 W. Va. 658, 72 S. E. 751.

9. See *c. g.*, *Gilley v. Denman*, 185 Ala. 561, 64 So. 97; *Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172; *New York, New Haven & H. R. Co. v. Russell*, 83 Conn. 581, 78 Atl. 324; *Gamble v. Hamilton*, 31 Fla. 401, 12 So. 229; *Finch v. Beal*, 68 Ga. 594; *Mason v. Mullahy*, 145 Ill. 383, 34 N. E. 36; *Walter v. Cox*, 25 Ind. 271; *Burt Zaiser Co. v. Finnegan*, 161 Iowa, 631, 143 N. W.

486; *Price v. Bassett*, 163 Mass. 598, 47 N. E. 243; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230; *Marshall v. Hill*, 246 Mo. 1, 151 S. W. 131; *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. 6; *Brinton v. Scull*, 55 N. J. Eq. 747, 35 Atl. 843; *Bellamy v. Andrews*, 151 N. C. 256, 65 S. E. 963; *Horgan v. Russell*, 24 N. D. 490, 43 L. R. A. (N. S.) 1150, 140 N. W. 99; *Taylor v. Taylor*, 69 Ore. 541, 139 Pac. 852; *Duff v. McDonough*, 155 Pa. St. 10, 25 Atl. 608; *Bristow v. Rosenberg*, 45 S. C. 614, 23 S. E. 957; *Sautelle v. Carlisle*, 13 Lea (Tenn.) 391; *Ayres v. Jack*, 7 Utah, 249, 26 Pac. 300; *Curtis v. Lunn*, 6 Munf. (Va.) 42; *Crowley v. Byrne*, 71 Wash. 444, 129 Pac. 113; *Parker v. Brast*, 45 W. Va. 339, 32 S. E. 269.

— **Claimant under quitclaim deed.** The question whether one claiming under a quitclaim deed may hold as a bona fide purchaser for value as against prior equities, not based on the recording act, has occasionally been adjudicated adversely to such claimant.^{9a} Such a question is for the most part analogous to the question hereafter discussed,^{9b} as to the rights of such claimant as against an unrecorded conveyance, but when only prior equities are outstanding it is somewhat difficult to construe the conveyance, even though in the form of a quitclaim deed, as intended to convey the legal title subject to such outstanding equities.^{9c} Consequently, there might be stronger reason for protecting the grantee under such a deed as against a prior equity, than as against a prior unrecorded deed.

— **Subsequent acquisition of legal title.** Occasionally it happens that a purchaser for value does not acquire the legal title at the time of his purchase, that is, at the time of his payment of the consideration, but acquires it at a later time. He is in such case in the position of the holder of an equity acquiring the legal title. If such subsequent acquisition of the legal title is effected by him without notice on his part of a

9a. *Derrick v. Brown*, 66 Ala. 162; *Hannan v. Seidentopf*, 113 Iowa, 658, 86 N. W. 44; *Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76; *Hudman v. Henderson*, 58 Tex. Civ. App. 358, 124 S. W. 186.

9b. *Post*, § 567(m), notes 14-23.

9c. See editorial note, 10 Columbia Law Rev. at p. 371.

In Missouri the view has been adopted that, while a purchaser holding under a quitclaim deed may claim as against a prior unrecorded deed as being within the protection afforded by the

recording acts, he cannot thus claim as against an equity which could not be made the subject of record, such as a right to set aside the deed to his grantor for fraud. *Hendricks v. Callo-way*, 211 Mo. 536, 111 S. W. 60; *Starr v. Bartz*, 219 Mo. 47, 117 S. W. 1125. If he is to be regarded, however, as an innocent purchaser for the purpose of protection against a prior unrecorded conveyance, he should properly, it would seem, be so regarded for the purpose of protection against prior equities, under the general rule.

prior equity in favor of another, it operates to protect him as against such equity.¹⁰ Indeed, by perhaps the weight of authority, the holder of a later equity, if a *bona fide* purchaser thereof for value, may protect himself as against an earlier equity by acquiring the legal title, even though he does so after he has notice of the earlier equity, and merely for the purpose of securing priority.¹¹ So it is well settled in England that a third mortgagee, who has only an equitable title subsequent to that of the second mortgagee, may, by acquiring the legal title of the first mortgagee, secure priority over

10. 13 Halsbury's Laws of England 83; *Bailey v. Barnes* (1894) 1 Ch. 25; *Taylor v. Russell* (1892) App. Cas. 244; *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *United States v. Detroit Timber & Lumber Co.*, 131 Fed. 668; *People v. Swift*, 96 Cal. 165, 31 Pac. 16; *Carlisle v. Jumper*, 81 Ky. 282; *Flynt v. Hubbard*, 57 Miss. 471; *Newton v. McLean*, 41 Barb. (N. Y.) 285; *Wilson v. Western North Carolina Land Co.*, 77 N. C. 445; *Oviatt v. Brown*, 14 Ohio 285, 45 Am. Dec. 539; *Perkins v. Hays*, 3 Tenn. 163, 5 Am. Dec. 680; *Hill v. Moore*, 62 Tex. 610.

11. *Blackwood v. London Chartered Bank of Australia*, L. R. 5 Priv. Coun. App. 111; *Bailey v. Barnes* (1898) 1 Ch. 25; *Taylor v. Russell* (1892) App. Cas. 244; *Fitzsimmons v. Ogden*, 7 Cranch. (U. S.) 2, 3 L. Ed. 249; *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46, 5 L. Ed. 393; *United States v. Detroit Timber & Lumber Co.*, 131 Fed. 668 (*dictum*); *Wheaton v. Dyer*, 15 Conn. 307; *McNary v. Southworth*, 58 Ill. 473; *Campbell v. Brackenridge*, 8 Blackf. (Ind.) 471; *Weston v.*

Dunlap, 50 Iowa, 185; *Carroll v. Johnston*, 55 N. C. 120; *Gibler v. Trimble*, 14 Ohio, 323; *Dueber Watch Case Mfg. Co. v. Dougherty*, 62 Ohio St. 589, 57 N. E. 455; *Zollman v. Moore*, 21 Gratt. (Va.) 313; *Hoult v. Donahue*, 21 W. Va. 294. See *Smith Paper Co. v. Servin*, 130 Mass. 511.

But that the holder of the later equity cannot thus protect himself after notice of the earlier equity, see *Fash v. Ravesies*, 32 Ala. 451; *Louisville & N. R. Co. v. Boykin*, 76 Ala. 560; *Paul v. McPherrin*, 48 Colo. 522, 21 Ann. Cas. 460, 111 Pac. 59 (*dictum*); *Corn v. Sims*, 3 Metc. (Ky.) 391; *Cline v. Osborn*, 24 Ky. L. Rep. 511, 68 S. W. 1083; *Wing v. McDowell*, Walk. Ch. (Mich.) 175; *Kilcrease v. Lum*, 36 Miss. 569; *Doe v. Doe*, 37 N. H. 268; *Dean v. Anderson*, 34 N. J. Eq. 496; *Grimstone v. Carter*, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; *Goldsborough v. Turner*, 67 N. C. 412; *Bush v. Bush*, 3 Strobb. Eq. (S. C.) 131, 51 Am. Dec. 675; *Pillow v. Shannon*, 3 Yerg. (Tenn.) 508 (*semble*); *Hoover v. Donally*, 3 Hen. & M. (Va.) 316 (*semble*).

the second mortgagee.^{11a} The right of a *bona fide* purchaser thus to protect himself by the *subsequent* acquisition of the legal title is, however, subject to a qualification, to the effect that such acquisition must not involve a breach of trust, as regards the holder of the prior equity, upon the part of the person from whom the legal title is acquired.¹² Whether the trust must be an express trust, and whether the trustee or the purchaser must have notice of the trust, appears not to be definitely settled.¹³

— (c) **As between equitable interests.** As between interests or claims of a purely equitable character, that is, enforceable in equity alone, the rule, as generally stated, is that between equal equities priority of time will prevail, that is, they will rank according to their time of accrual.¹⁴ And the fact that the later equity is acquired without notice of the earlier equity is ordinarily immaterial in this connection.¹⁵ For instance,

11a. *Post*, § 639.

12. *Saunders v. Dehew*, 2 Vern. 271; *Pilcher v. Rawlins*, L. R. 7 Ch. 259; *Bates v. Johnson*, Johns. (N. Y.) 304; *Taylor v. London & County Bank* (1901) 2 Ch. 231; *Mumford v. Stohwasser*, L. R. 18 Eq. 563; *Central Trust Co. v. West India Improvement Co.* 169 N. Y. 314, 62 N. E. 387.

13. See the discussion of the English cases bearing on the subject in *White & Tudor's Leading Cases*, (8th Ed.) vol. 2, at p. 128.

14. *Snell, Equity* (16th Ed.) 10; 2 *Pomeroy, Eq. Jur.* §§ 683, 718; *Louisville & Nashville R. Co. v. Boykin*, 76 Ala. 560; *Carlisle v. Jumper*, 81 Ky. 282; *Wailles v. Cooper*, 24 Miss. 208; *Dedeaux v. Cuevas*, 107 Miss. 7, 64 So. 844; *Boskowitz v. Davis*, 12 Nev. 466; *Wilkes v. Harper*, 2 Barb. Ch. (N. Y.) 338; *Wil-*

iams v. Lewis, 158 N. C. 571, 74 S. E. 17; *Dueber Watch Case Mfg. Co. v. Dougherty*, 62 Ohio St. 589, 57 N. E. 455; *Henry v. Black*, 213 Pa. 620, 63 Atl. 250; 454; *Lowther Oil Co. v. Miller Sibley Oil Co.*, 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433. *Briscoe v. Ashby*, 24 Gratt. (Va.) "Every equitable title is incomplete on its face. It is in truth nothing more than a title to go into chancery to have the legal estate conveyed, and therefore every purchaser of a mere equity takes it subject to every clog that may lie on it, whether he has had notice of it or not." *Chew v. Barnett*, 11 Serg. & R. (Pa.) 389, per Gibson, J.

15. *In re Vernon Ewens & Co.*, 33 Ch. Div. 402; *Boone v. Chiles*, 10 Pet. (U. S.) 177, 9 L. Ed. 388; *Curtis v. Cisna*, 7 Biss.

if one having an equitable interest, the legal title outstanding in another, mortgages his interest, and subsequently undertakes to convey his whole interest to a purchaser, the purchaser can acquire only such interest as is left in the grantor, that is, the equities of the mortgagee and purchaser are ranked according to time.¹⁶ So if a trustee, having the legal title, sells, without conveying the legal title, to another, the equity of the *cestui que trust* against him, being prior in time to that of the purchaser, will be preferred.¹⁷ But this general rule of protection for the earlier equity applies only when the equities are, in other respects than that of time, equal one to the other, and such equality is lacking if the holder of the earlier equity, by his fraudulent or negligent statements or conduct, misled the later incumbrancer.¹⁸ Thus the holder of a prior equity, who expressly disclaimed any such equity, and by such disclaimer induced another to pay value for an equitable interest in the property, could not assert his equity as against the later equity, the former equity being, by reason of his misconduct, inferior to the latter.¹⁹ And it is upon such a theory that the equity of a vendor's lien has occasionally been postponed to the subsequent

(U. S.) 260; Overall v. Taylor, 99 Ala. 12, 11 So. 738; Taylor v. Weston, 77 Cal. 534, 20 Pac. 62; Johnson v. Hayard, 74 Neb. 157, 5 L. R. A. (N. S.) 112, 12 Ann. Cas. 800, 103 N. W. 1058. 107 N. W. 384; Jenkinson v. New York Finance Co., 79 N. J. Eq. 247, 82 Atl. 36; Peabody v. Fenton, 3 Barb. Ch. (N. C.) 451; Bonelli v. Burton, 61 Ore. 429, 123 Pac. 37; LaBelle Coke Co. v. Smith, 221 Pa. 642, 70 Atl. 894; Craig v. Leiper, 2 Yerg. (Tenn.) 193, 24 Am. Rep. 479; National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979; Wilson v. Morrell, 5 Wash. 654, 32 Pac.

733; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433.

16. Phillips v. Phillips, 4 De G., F. & J. 208, per Lord Westbury.

17. Pinkett v. Wright, 2 Hare, 120.

18. Rice v. Rice, 2 Drew. 73; Heyder v. Excelsior Building & Loan Ass'n, 42 N. J. Eq. 403, 59 Am. Rep. 49, 8 Atl. 310; Hume v. Dixon, 37 Ohio St. 66; Wilson v. Hicks, 40 Ohio St. 418; St. Johnsbury v. Morrill, 55 Vt. 165.

19. 2 Pomeroy, Eq. Jur. §§ 686, 779-782.

equity of one who purchased in ignorance of the lien, the conduct of the lienor in failing to take a mortgage to secure his claim, or otherwise to make the existence of the lien a matter of record, being regarded as involving an element of negligence, and as consequently making his equity inferior to that of the subsequent purchaser.²⁰ In England such postponement of the earlier to the later equity quite frequently occurs by reason of the negligent conduct of the holder of the prior equity in not obtaining the title deeds or in not retaining possession of them.²¹ This can obviously not happen in this country, where the possession or non possession of the title deeds possesses no significance. Such cases of postponement of the earlier to the later equity by reason of the misleading conduct of the holder of the earlier equity might usually, if not invariably, it seems, be regarded as applications of a doctrine analogous to that of estoppel *in pais*.²²

The general rule being, as above stated, that as between equal equitable interests or claims the one prior in time will prevail, a qualification of this rule has been suggested by high authority, to the effect that the equities should be against the same person, and that if against different persons, the subsequent equity should be protected in favor of one who acquires it *bona fide* for value, just as if it were a legal title. In other words, that, as a purchaser for value of a legal title, without notice of an equity in favor of another, takes free of the equity, so a purchaser for value of an equitable title, without notice of a "subequity" in favor of another, should take free from such subequity.^{23 24} Under the view suggested, for instance, if

20. Bayley v. Greenleaf, 7 Wheat. (U. S.) 46, 57, 5 L. Ed. 393; Hume v. Dixon, 37 Ohio St. 66; Campbell v. Sidwell, 61 Ohio St. 179, 55 N. E. 609. See Cox v. Romine, 9 Gratt. (Va.) 27.

21. See 2 White & Tudor's

Leading Cases in Equity (8th Ed.) 104 *et seq.*

22. See Mr. Ewart's ingenious and suggestive discussion, in his work on Estoppel, pp. 251-291.

23-24. Professor J. B. Ames, in 1 Harv. Law Rev. at p. 8,

A, having an equitable interest, such as an equity of redemption, or the beneficial interest under a trust, agrees to hold his interest for the benefit of B, or, as having acquired such interest from B by fraud, holds it under a constructive trust for B, and A subsequently conveys his equitable interest to a purchaser for value without notice of B's claim, the latter would take free from such claim. In such a case the personal right in favor of B against A to enforce a trust is not in its nature exclusive of a like personal right in favor of the purchaser against the legal owner, and consequently there would seem to be no reason that the former, though earlier in time, should exclude the latter, though such rights against the *same* person in regard to the same land are necessarily exclusive one of the other, and consequently it is proper to prefer the one which was first acquired. This view, it has been remarked,²⁵ conforms in principle with the doctrine, more generally accepted in this country, that the assignee of a chose in action, for value and without notice of equities in a third person, takes free of such equities.²⁶ It has, however, been criticized, and is probably contrary to the weight of judicial authority.²⁷

It has been not infrequently stated that if the holder of the subsequent equity, having acquired it for value and without notice of the prior equity, has the "best right" to call for the legal estate, he is to be protected as if he had actually acquired such estate.²⁸ "It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an

Lectures on Legal History at p. 263. See Editorial notes, 12 Columbia Law Rev., pp. 155-158; 24 Harv. Law Rev. at p. 490.

25. Editorial note, 24 Harv. Law Rev. at p. 491.

26. *Post*, § 630(b).

27. See article by Professor Thaddeus Kenneson, 23 Yale Law Journ. at p. 205 *et seq.*; Huston,

Enforcement of Decrees in Equity, 116-124, 144.

28. *Wilkes v. Bodington*, 2 Vern. 599; *Wilmot v. Pike*, 5 Hare, 14; *Hume v. Dixon*, 37 Ohio St. 66; *Dueber Watch Case Mfg. Co. v. Dougherty*, 62 Ohio St. 589, 596, 57 N. E. 455; *St. Johnsbury v. Morrill*, 55 Vt. 165; *Preston v. Nash*, 76 Va. 1.

outstanding legal estate, and a subsequent purchaser for value without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him, or even to join as party in a conveyance of the equitable interest, (although he may not formally convey or declare a trust of the legal estate), still the subsequent purchaser gains priority."²⁹ So a *bona fide* purchaser is protected as against a prior equity, if he has the legal title conveyed to another instead of to himself, he having in such case the right to call for a conveyance of the legal title.³⁰ Under what other circumstances this doctrine of the "best right" might become applicable in favor of the holder of the subsequent equity does not clearly appear from the cases.³¹ In one case in this country it was regarded as protecting a subsequent purchaser as against a prior equity by reason of the fact that such purchaser had a right, under his contract, to demand a conveyance.³²

Even though a *bona fide* purchaser has not acquired the legal title, he stands in the same position as if he had done so, as regards a prior equity, if he has power to acquire the legal title by performing some act, without any action on the part of the holder of such title, as, for instance, when he is given an express and irrevocable power to transfer the property to himself or another.³³

29. Stirling, L. J., in Taylor v. London and County Banking Company (1901) 2 Ch. at p. 261.

30. Ames, Cases on Trusts (2nd Ed.) 286; Willoughby v. Willoughby, 1 Term Rep. 763; Kinicott v. Board of Sup'rs of Wayne County, 16 Wall. (U. S.) 452, 21 L. Ed. 319; Stokes v. Riley, 121 Ill. 166, 11 N. E. 877. Compare, Seacoast R. Co. v. Wood, 65 N. J. Eq. 530, 56 Atl. 337, criticized 17 Harv. Law Rev.

426.

31. See 2 White & Tudor, Leading Cases in Eq. (8th Ed.) at p. 151.

32. Preston v. Nash, 76 Va. 1. In Buck v. Winn, 11 B. Mon. (Ky.) 323, it was held that a purchaser at sheriff's sale, before procuring a deed, had such an "inchoate legal title" that he was entitled to protection as a *bona fide* purchaser.

33. Dodds v. Hills, 2 H. & M. 297. See Brewster v. Sime, 42

It has been decided, in one state, that as between equal equities, if the holder of the later equity was a *bona fide* purchaser for value and has actually acquired possession as such and made improvements, he will be protected as against the prior equity.³⁴ Such a doctrine does not appear to be generally recognized.³⁵

§ 567. The recording acts—(a) General considerations. The rule first above referred to, that, as between conveyances of the legal title, the first in time must prevail, has been entirely changed by the recording acts, which exist in every state, and which provide in effect that a conveyance or mortgage of land, and frequently any other instrument affecting land, shall not, as against a subsequent conveyance or mortgage in favor of a purchaser for value, be valid, unless it is filed for record in a public record office. The requirement of record has almost invariably been regarded as intended for the protection of subsequent purchasers only, so that the failure to record the instrument in no way affects the passing of title as between the parties thereto.³⁶ The

Cal. 139; Professor Ames' Essay, 1 Harv. Law Rev. at p. 5, Lectures on Legal History, 257.

34. *St. Johnsbury v. Morrill*, 55 Vt. 165. See *United States v. Detroit Timber & Lumber Co.*, 131 Fed. 668, 678.

35. In *Phillips v. Phillips*, 4 De G. F. & J. 208, which is usually referred to as the leading case on the law of *bona fide* purchaser, Lord Westbury distinctly overruled the argument that the possession of the holder of the subsequent equity, the defendant, gave him any protection as against the prior equity. And see editorial note, 11 Columbia Law Rev. 555.

36. *Western Tie & Timber Co. v. Campbell*, 113 Ark. 570, Ann.

Cas. 1916C, 943, 169 S. W. 253; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166; *Licata v. De Corte*, 50 Fla. 562, 39 So. 58; *Lytle v. Black*, 107 Ga. 386, 33 S. E. 414; *Gibson v. Brown*, 214 Ill. 330, 73 N. E. 578; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381, 22 N. E. 976; *Smith v. Noble*, 174 Ky. 151, 191 S. W. 641, *Willet v. Andrews*, 106 La. 319, 30 So. 883; *Lawry v. Williams*, 13 Me. 281; *Palmer v. Paine*, 9 Gray (Mass.) 56; *Van Husan v. Heames*, 96 Mich. 504, 56 N. W. 22; *McCamant v. Patterson*, 39 Mo. 100; *Ames v. Robert*, 17 N. M. 609, 131 Pac. 994; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *McBrayer v. Harrill*, 152 N. C. 712, 68 S.

grantor merely retains, by force of the statute, a power to defeat the conveyance, if not recorded, by a subsequent conveyance to another.³⁷

The construction placed by the courts upon the recording acts has been in effect to protect a subsequent purchaser as against a prior instrument, if he pays value in ignorance of such instrument, and to make the record of an instrument in accordance with the act equivalent to notice to the subsequent purchaser of the existence and contents of the instrument, irrespective of whether he actually examines the records so as to obtain such information.^{37a} And the record is notice not only of the instrument and of the facts stated therein, but also of any other matters as to which the necessity of an inquiry is suggested by statements in the instrument.³⁸ The practical effect of the acts is that an intending purchaser of land may, by reference to the

E. 204; *McLaughlin v. Ihmsen*, 85 Pa. St. 364; *Wilkins v. McCorkle*, 112 Tenn. 688, 80 S. W. 834; *Raines v. Walker*, 77 Va. 92; *Whalon v. North Platte Canal & Colonization Co.* 11 Wyo. 313, 71 Pac. 995.

In Maryland the legal title does not pass until recorded. *Nickel v. Brown*, 75 Md. 172, 23 Atl. 736; *West v. Pusey*, 113 Md. 569, 77 Atl. 973. And occasionally recording has been regarded as necessary to give validity to a particular class of conveyance, as one by a married woman, *Rorer's Heirs v. Roanoke Nat. Bank*, 83 Va. 589, 4 S. E. 820.

37. See article by Professor Wesley N. Hohfield, 26 Yale Law Journ. at p. 756.

37a. 2 Pomeroy, Eq. Jur. § 649; 2 White & T. Lead. Cas. Eq. Amer. notes, 203; Webb, Record of Title, § 4.

38. *Crawford v. Chicago, B. & T. R. Co.*, 112 Ill. 314; *Mettart v. Allen*, 139 Ind. 644, 39 N. E. 239; *Loser v. Plainfield Sav. Bank*, 149 Iowa, 672, 37 L. R. A. (N. S.) 1112, 128 N. W. 1101; *Taylor v. Mitchell*, 58 Kan. 194, 48 Pac. 859; *Hickman v. Green*, 123 Mo. 165, 29 L. R. A. 39, 22 S. W. 455, 27 S. W. 440; *Carter v. Leonard*, 65 Neb. 670, 91 N. W. 574; *Sweet v. Henry*, 175 N. Y. 268, 67 N. E. 574; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385; *Passumpsic Sav. Bank v. Buck*, 71 Vt. 190, 44 Atl. 93; *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, 681; *Smith v. Owens*, 63 W. Va. 60, 59 S. E. 762.

In Georgia the record of a voluntary deed is not effective to give priority as against a subsequent purchaser, it being necessary that he have notice

record, determine whether his vendor has previously disposed of any interest in the land and also ascertain both the person from whom his vendor obtained the land, and whether such person had disposed of any interest to a person other than such vendor, and so, in the case of each of the successive owners of the land, determine whether, during the period of his ownership, he created any interest not vested in the present vendor.³⁹ The series of successive conveyances by virtue of which the vendor or another asserts ownership of the land is frequently referred to as his or the "chain of title," each conveyance constituting, figuratively speaking, one link in the chain.

— (b) **Instruments capable of record.** Since the effect of the record of an instrument as charging a subsequent purchaser with notice thereof is solely by reason of the statute to that effect, it is necessarily confined to such instruments as the statute authorizes to be recorded.⁴⁰ And it is obviously in the case of such instruments only that the failure to record can affect injuriously a person asserting a claim or benefit under the instrument.⁴¹ The statutes, however, especially the later ones, are usually quite inclusive in this regard; and the tendency of the courts is to give them an

otherwise. *Fowler v. Weldrip*, 10 Ga. 350; *Black v. Thornton*, 31 Ga. 641; *Avera v. Southern Mortg. Co.*, 147 Ga. 24, 92 S. E. 533.

39. A purchaser is bound to examine the records back to the time of the acquisition of title by his vendor, not merely to the time of the record of the conveyance by which the title was acquired. *Higgins v. Dennis*, 104 Iowa, 605, 74 N. W. 9.

40. *Williams v. Smith*, 128 Ga. 306, 57 S. E. 801; *Mack v. McIntosh*, 181 Ill. 633, 54 N. E.

1019; *Sjoblom v. Mark*, 103 Minn. 193, 15 L. R. A. (N. S.) 1129, 14 Ann. Cas. 125, 114 N. W. 746; *Riddle v. Fellows*, 42 N. H. 309; *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344; *Burnham v. Chandler*, 15 Tex. 441; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Prentice v. Duluth Storage & Forwarding Co.*, 58 Fed. 437, 7 C. C. A. 293.

41. *Brown v. Butler*, 87 Va. 621, 13 S. E. 71; *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. 873.

efficient operation, by regarding them as authorizing the record of almost every instrument of a character to affect the title to land. And so, though by some of the earlier decisions the record of an equitable title was not regarded as sufficient to affect a subsequent purchaser with notice thereof, the rule is now generally settled otherwise, sometimes by express statutory provision, and consequently the purchaser takes subject to an instrument, creating or transferring an equity, which has been recorded.⁴² A written contract for the sale of land, of which specific performance would be decreed, is ordinarily regarded as within the recording acts, sometimes by reason of its express mention.⁴³ But occasionally the record of such a contract has been regarded as nugatory because unauthorized by the statute.⁴⁴ In so far as an equity is of a character which

42. *O'Neal v. Seixas*, 85 Ala. 80; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Bailey v. Myrick*, 50 Me. 171; *General Ins. Co. of Maryland v. United States Ins. Co. of Baltimore*, 10 Md. 517, 69 Am. Dec. 174; *Edwards v. McKernan*, 55 Mich. 520, 22 N. W. 20; *Wilder v. Brooks*, 10 Minn. 50, 88 Am. Dec. 49; *Hunt v. Johnson*, 19 N. Y. 279; *Tarbell v. West*, 86 N. Y. 280; *Russell's Appeal*, 15 Pa. 319; *Smith v. Neilson*, 13 Lea (Tenn.) 461; *Herrington v. Williams*, 31 Tex. 448.

A restrictive covenant, not contained in an instrument of conveyance, has in one state been held not to be entitled to record. *Sjoblom v. Mark*, 103 Minn. 193, 15 L. R. A. (N. S.) 1129, 14 Ann. Cas. 125, 114 N. W. 746. *Contra*, *Wootton v. Seltzer*, 83 N. J. Eq. 163, 90 Atl. 701, 84 N. J. Eq. 207, 93 Atl. 1087; *Bradley v. Walker*, 138 N. Y. 291, 33 N. E. 1079.

43. *De Wolf v. Pratt*, 42 Ill. 198; *Case v. Bumstead*, 24 Ind. 429; *Chesbrough v. Vizard Investment Co.*, 156 Ky. 149, 160 S. W. 725 (option contract); *Bailey v. Coffin*, 115 Me. 495, 99 Atl. 447 (as creating trust); *South Baltimore Harbor & Improvement Co. of Anne Arundel County v. Smith*, 85 Md. 537, 37 Atl. 27; *Weisberger v. Wisner*, 55 Mich. 246, 21 N. W. 331; *Thorsen v. Perkins*, 39 Minn. 420, 40 N. W. 557; *McBee v. O'Connell*, 16 N. M. 469, 120 Pac. 734; *Kirven v. Wilds*, 98 S. C. 463, 82 S. E. 673; *Camp Mfg. Co. v. Carpenter*, 112 Va. 79, 70 S. E. 497; *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439; *Conaway v. Sweeney*, 24 W. Va. 643. An assignment of the contract of sale has also been regarded as within the statute. *Salisbury v. La Fitte*, 57 Colo. 358, 141 Pac. 484.

44. *Kendrick v. Colyar*, 143 Ala. 597, 42 So. 110; *Churchill*

does not admit of record, such as a resulting trust, an equity to reform an instrument, or to set aside an instrument, the fact that the equity does not appear of record can obviously not affect the right to assert it as against a subsequent purchaser. A subsequent purchaser acquiring the legal title for value, however, if without notice of the equity, would take free therefrom.

Leases, other than those for brief periods, are ordinarily within the recording laws, so that the record thereof will operate as notice to a subsequent purchaser, and the failure to record it may render it nugatory as to such purchaser.⁴⁵

In many states the statute requires that a power of attorney shall be recorded in order to render the record of a conveyance made under such power effective as notice to subsequent purchasers.⁴⁶ In the absence of such statutory requirement there is no necessity, it seems, of recording the power, since the conveyance puts the purchaser on inquiry as to the authority of the agent or attorney.⁴⁷ The revocation of a power of attorney is also frequently required to be recorded in order to be valid, if the power itself has been recorded.⁴⁸

— (c) **Unauthorized record of instrument.** In order that the record of an instrument shall operate as constructive notice to subsequent purchasers, the form of the instrument must be such that its record is authorized. Consequently, if it is not duly executed,⁴⁹ or

v. Little, 23 Ohio St. 301; First Nat. Bank of Stevens Point v. Chafee, 98 Wis. 42, 73 N. W. 318.

45. Jones v. Marks, 47 Cal. 242; Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130; Kronfeld v. Missal, 87 Conn. 491, 89 Atl. 95; Toupin v. Peabody 162 Mass. 473, 39 N. E. 280; Lucas v. Sunbury & E. R. Co., 32 Pa. St. 458; Bova v. Norigian, 28 R. I. 319, 67 Atl. 326.

46. 1 Stimson's Am. St. Law, § 1624(10), 1670.

47. See Anderson v. Dugas, 29 Ga. 440; Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Wilson v. Troup, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458.

48. 1 Stimson's Am. St. Law, § 1673.

49. Racouillat v. Sansevain, 32 Cal. 376; Carter v. Champion, 8 Conn. 549, 21 Am. Dec. 695; Parret v. Shaubhut, 5 Minn. 323

if it is not acknowledged or certified as required by law,⁵⁰ its record does not operate as constructive notice to subsequent purchasers. Moreover, in order to give priority as against a subsequent purchaser, the instrument must describe the land with sufficient accuracy to enable one examining the record to identify the land.⁵¹

The view has usually been accepted that if a subsequent purchaser actually sees the record of a prior instrument, although it was not entitled to be recorded, he is to be regarded as charged with notice thereof.⁵²

(Gil. 258), 80 Am. Dec. 424; *Rainey v. Lamb Hardwood Lumber Co.*, 91 Miss. 690, 45 So. 367; *Van Thorniley v. Peters*, 26 Ohio St. 471; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

50. *McDonald v. Norton*, 123 Ark. 473, 185 S. W. 791, 1199; *Herndon v. Kimball*, 7 Ga. 432, 50 Am. Dec. 406; *Donalson v. Thomason*, 137 Ga. 848, 74 S. E. 762; *Harris v. Reed*, 21 Idaho, 364, 121 Pac. 780; *Sinclair v. Gunzenhauser*, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376; *Blackman v. Henderson*, 116 Iowa, 578, 56 L. R. A. 902, 87 N. W. 655; *Ferrell v. Childress*, 172 Ky. 760, 189 S. W. 1149; *Cockey v. Milne's Lessee*, 16 Md. 200; *Graves v. Graves*, 6 Gray (Mass.) 391; *Tinnin v. Brown*, 98 Miss. 378, Ann. Cas. 1913A, 1081, 53 So. 780; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Bradley v. Walker*, 138 N. Y. 291, 33 N. E. 1079; *Indian Land & Trust Co. v. Scott*, — Okla. —, 158 Pac. 1164; *Fleschner v. Sumpster*, 12 Ore. 161, 6 Pac. 506; *Heister's Lessee v. Fortner*, 2 Binn. (Pa.) 40, 4 Am. Dec. 417; *Phillis v. Gross*, 32 S. D. 438, 143 N. W. 373; *Childers v. Wm. H. Cole-*

man Co., 122 Tenn. 109, 118 S. W. 1018; *Hayden v. Moffatt*, 74 Tex. 647, 15 Am. St. Rep. 866, 12 S. W. 820; *Raines v. Walker*, 77 Va. 92; *South Penn. Oil Co. v. Blue Creek Development Co.*, 77 W. Va. 682, 88 S. E. 1029; *Girardin v. Lampe*, 58 Wis. 267, 16 N. W. 614.

51. *Evans v. Russ*, 131 Ark. 335, 198 S. W. 518; *Chamberlain v. Bell*, 7 Cal. 292, 68 Am. Dec. 260; *Touchstone v. Ford*, 146 Ga. 797, 92 S. E. 524; *Thorpe v. Helmer*, 275 Ill. 86, 113 N. E. 954; *Bailey v. Galpin*, 40 Minn. 319, 41 N. W. 1054; *Simmons v. Hutchinson*, 81 Miss. 351, 33 So. 21; *Baker v. Bartlett*, 18 Mont. 446, 56 Am. St. Rep. 594, 45 Pac. 1084; *Banks v. Ammon*, 27 Pa. St. 172; *Merritt v. Bunting*, 107 Va. 174, 12 Ann. Cas. 954, 57 S. E. 567; *Bright v. Buckman (C. C.)* 39 Fed. 247.

52. *Parkside Realty Co. v. MacDonald*, 166 Cal. 426, 137 Pac. 21; *Walter v. Hartwig*, 106 Ind. 123, 6 N. E. 5; *Musick v. Barney*, 49 Mo. 458; *Woods v. Garnett*, 72 Mass. 78, 16 So. 390; *Hastings v. Cutler*, 24 N. H. 481; *Masgrove v. Bonser*, 5 Ore. 313, 29 Am. Rep. 737; *Phillis v. Gross*,

But occasionally a directly contrary view has obtained, to the effect that the purchaser may entirely ignore the record in such case.⁵³

— (d) **Instruments not in chain of title.** The recording acts have been construed as charging a purchaser with notice of a recorded instrument on the theory that, if he exercised proper diligence, he would discover the existence and terms of such instrument, and he has, on the same records, a conveyance, previously recorded, from C to D, unless B's title appears on the record to be derived through C.⁵⁴ And, if a conveyance is not recorded, the

32 S. D. 438, 143 N. W. 373, Gilbert v. Jess, 31 Wis. 110.

And so where an instrument was recorded in the wrong county, but the subsequent purchaser saw it on record. Perrin v. Reed, 35 Vt. 2.

53. Nordman v. Rau, 86 Kan. 19, 38 L. R. A. (N. S.) 400, Ann. Cas. 1913B, 1068, 119 Pac. 351; Kerns v. Swope, 2 Watts (Pa.) 75.

54. Abbott v. Parker, 103 Ark. 425, 147 S. W. 70; Standard Oil Co. v. Slye, 164 Cal. 435, 129

Pac. 489; Harris v. Reed, 21 Idaho, 364, 121 Pac. 780; City of Chicago v. Witt, 75 Ill. 211; Sinclair v. Gunzenhauser, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376; Gardner v. Jaques, 42 Iowa, 577; Ora v. Bane, 92 Kan. 567, 141 Pac. 303; John T. Moore Planting Co. v. Morgan's Louisiana & T. R. & S. S. Co., 126 La. 840, 53 So. 22; Roberts v. Bourne, 23 Me. 165, 39 Am. Dec. 614; Baker v. Griffin, 50 Miss. 158; Page v. Waring, 76 N. Y. 463; Blake v. Graham, 6 Ohio St. 580, 67

fact that a conveyance or mortgage by the grantee therein is recorded will not affect with notice a person who subsequently obtains a conveyance from the same grantor.⁵⁵ And the fact that there is of record a mortgage from B to A does not charge a subsequent purchaser from A with notice of a prior conveyance by A to B which was not recorded.^{55a} Likewise, the record of the conveyance of an equitable title from one who has such title only, while notice to a subsequent purchaser of the same title from the same grantor, is not notice to one who purchases from the holder of the legal title,⁵⁶ provided at least he has no notice, actual

Am. Dec. 360; Perkins v. Cissell, 32 Okla. 827, 124 Pac. 7; Advance Thresher Co. v. Esteb, 41 Ore. 469, 69 Pac. 447; Hetherington v. Clark, 30 Pa. St. 393; Smyly v. Colleton Cypress Co., 95 S. C. 347, 78 S. E. 1026; White v. McGregor, 92 Tex. 556, 71 Am. St. Rep. 875, 50 S. W. 564; Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484. In Fullerton Lumber Co. v. Tinker, 22 S. D. 427, 18 Ann. Cas. 11, 118 N. W. 700, the decision to the contrary is based on the fact that the register of deeds was required to keep an index, which would show in one place all the conveyances which might be made of any particular piece of property.

55. Tennessee Coal, Iron & Railroad Co. v. Gardner, 131 Ala. 599, 32 So. 622; Rowe v. Henderson Naval Stores Co., 139 Ga. 318, 77 S. E. 17; Booker v. Booker, 208 Ill. 529, 100 Am. St. Rep. 250, 70 N. E. 709; Roberts v. Bourne, 23 Me. 165, 39 Am. Dec. 614; Board of Education of Minneapolis v. Hughes, 118 Minn. 404, 41 L. R. A. (N. S.) 637,

136 N. W. 1095; Hart v. Gardner, 81 Miss. 650, 33 So. 442; Page v. Waring, 76 N. Y. 463; Hetherington v. Clark, 30 Pa. St. 393; Sayward v. Thompson, 11 Wash. 706, 40 Pac. 379.

It has been said that a purchaser from one in possession can not assert ignorance of a prior recorded conveyance by his vendor, merely because no conveyance to his vendor appears of record, and that he is chargeable with notice of any recorded conveyance made by his vendor in possession. Eversole v. Virginia Iron, Coal & Coke Co., 122 Ky. 649, 92 S. W. 593. But he would be chargeable with notice of a previous recorded conveyance by his vendor even if his vendor is not in possession.

55a. Sternberger v. Ragland, 57 Ohio St. 148, 48 N. E. 811; Pyles v. Brown, 189 Pa. St. 164, 69 Am. St. Rep. 794, 42 Atl. 11; Veazie v. Parker, 23 Me. 170; Pierce v. Taylor, 23 Me. 246.

56. Pearce v. Smith, 126 Ala. 116, 28 So. 37; Ora v. Bane, 92 Kan. 567, 141 Pac. 303; Becker

or constructive, of the equitable title.^{56a} This general rule, restricting the operation of the record as notice to subsequent purchasers, is obviously based upon the prevailing method of indexing the records by the names of the grantors and grantees, and it is readily conceivable that the introduction, in any particular community, of a method of indexing the records with reference to the property affected, might be regarded by the courts as ground for abrogating the rule.⁵⁷

If two or more persons join as grantors or mortgagors, the grantee or mortgagee, or one claiming under him, is chargeable with notice of recorded instruments executed by each of them, or by persons in the chain of title under which each of them claims.⁵⁸ And the case is the same when two or more persons, as asserting conflicting claims to land, or as having merely undivided interests therein, make separate conveyances thereof to one person.⁵⁹

— **Conveyance of neighboring land.** A purchaser is, it appears, ordinarily charged with notice of an incumbrance upon the property created by an instrument which is of record, although the primary purpose of such instrument is, not the creation of such incumbrance, but the conveyance of neighboring property. For instance, if one owning two adjoining city lots

v. Strocher, 167 Mo. 306, 66 S. W. 1083; Tarbell v. West, 86 N. Y. 280; Sands v. Beardsley, 32 W. Va. 594, 9 S. E. 925.

56a. Davis & Son v. Milligan, 88 Ala. 523, 6 So. 908 (*semble*); Alden v. Garver, 32 Ill. 32; Jones v. Lapham, 15 Kan. 540; Balen v. Mercier, 75 Mich. 42, 42 N. W. 666; Crane v. Turner, 7 Hun (N. Y.) 357, *aff'd* 67 N. Y. 437. See Edwards v. McKernan, 55 Mich. 520, 22 N. W. 20. These citations are in part from an editorial note in 17 Columbia

Law Rev. at p. 324, upon the effect of a mortgage by one claiming under a contract of sale.

57. See Fullerton Lumber Co. v. Tinker, 22 S. D. 427, 18 Ann. Cas. 11, 118 N. W. 700; Harris v. Reed, 21 Idaho, 364, 121 Pac. 780; Balch v. Arnold, 9 Wyo. 17, 59 Pac. 434.

58. Gimon v. Davis, 36 Ala. 589; Creel v. Keith, 148 Ala. 233, 41 So. 750.

59. Brannan v. Marshall, 184 Ala. 375, 63 So. 1007.

conveys one of them, the instrument of conveyance expressly granting an easement as against the lot retained in favor of that conveyed, the record of such conveyance will, it seems, affect a subsequent purchaser of the former lot with notice of such easement and he will take subject thereto. In such a case, at common law, the purchaser would take subject to the easement previously created, as being a legal interest, irrespective of whether he has notice thereof,⁶⁰ and the rule in this respect could not well be regarded as changed by the adoption of the recording law, as applied to a case in which the grant of the easement does appear of record, though in connection with the conveyance of other land, to which the easement is made appurtenant.⁶¹ And when, as may occur,⁶² the acceptance of a conveyance of land, or of a grant of an easement in particular land, involves the creation of an easement upon other land, belonging to the grantee, in favor of land belonging to the grantor, by reason of words of contract or reservation inserted in the instrument, a subsequent purchaser of such other land from the grantee would, it seems, be charged with notice of the easement, by reason of the record of the conveyance or grant, although the primary purpose thereof was to convey an interest in

60. See *ante*, § 566(a), 11 Halsbury's Laws of England, 247; *Leech v. Schweder*, 9 Ch. App. 463, 474.

61. See *Hammonds v. Eads*, 146 Ky. 162, 142 S. W. 379, *Glorieux v. Lighthipe*, 88 N. J. L. 199, Ann. Cas. 1917E, 484, 96 Atl. 94; *Bowman v. Holland*, 116 Va. 805, 83 S. E. 393. In *Mitchell v. D'Olier*, 68 N. J. L. 375, 59 L. R. A. 949, 53 Atl. 467, it was held that where a conveyance to B of a tract of land contained an exception of a certain part specifically described, as having been previously conveyed to A, B was

chargeable with notice, by the record of the conveyance to A, that not only did she, A, have the part described, but also that an easement was granted by that conveyance to A over the balance of the tract.

62. See *Dyer v. Sanford*, 9 Metc. (Mass.) 404; *Case v. Haight*, 3 Wend. (N. Y.) 632; referred to in 6 Harv. Law Rev. 311, article by H. W. Chaplin, Esq. In the first cited case, Shaw, C. J., says: "We think a grant may be so made as to create a right in the grantee's land in favor of the grantor. For

different land. And if, in conveying lot A, the grantor enters into a restrictive agreement as to the improvement of lot B, retained by him, a subsequent purchaser of lot B would ordinarily be charged with notice of the agreement, by reason of its record as a part of the conveyance of lot A. Were he not so charged, the restrictive agreement might be to a considerable extent nugatory.⁶³ And, as will appear later,⁶⁴ where one mortgage covers two or more lots or tracts, the purchaser of one lot or tract is, by the record of a previous conveyance or mortgage of the other tract, increasing the proportion of the mortgage debt to be borne by the former lot or tract, charged with notice thereof.

— (e) **Instruments executed prior to acquisition of title.** The question whether a purchaser is charged with notice by the record of a conveyance, executed by a person in his grantor's chain of title before such person's acquisition of the title, has been considered in connection with our discussion of the doctrine of the grantor's estoppel to assert an after acquired title,⁶⁵⁻⁶⁷ it being only by reason of that doctrine that such a conveyance by one without title can in any case be effective.

instance; suppose A. has close No. 2, lying between two closes, Nos. 1 & 3, of B; and A grants to B the right to lay and maintain a drain from close No. 1, across his close No. 2, thence to be continued through his own close, No. 3, to its outlet; and A, in his grant to B, should reserve the right to enter his drain, for the benefit of his intermediate close, with the right and privilege of having the waste water therefrom pass off freely through the grantee's close, No. 3, forever. In effect, this, if accepted, would secure to the grantor a right in the grantee's land."

63. *King v. St. Louis Union Trust Co.*, 226 Mo. 351, 126 S. W. 415; *Lowe v. Carter*, 124 Md. 678, 93 Atl. 216; *Whistler v. Cole*, 81 N. Y. Misc. 519, 143 N. Y. Supp. 478, 146 N. Y. Supp. 1118; *Holt v. Fleischman*, 75 N. Y. App. Div. 593, 78 N. Y. Supp. 647. But a contrary view was adopted in *Glorieux v. Lighthipe*, 88 N. J. L. 199, Ann. Cas. 1917E 484, 96 Atl. 94, on the ground that the statute, in making the record notice to subsequent purchasers, meant purchasers of the same land as that previously conveyed.

64. *Post*, § 625.

65-67. *Ante*, § 545(e).

The cases are not in harmony as to whether a purchaser, finding the record of a conveyance by A to B for instance, and a subsequent conveyance by B to the vendor, must examine the records to see whether B, before the conveyance by A to him, had made a conveyance to some other person, which, upon B's acquisition of title, vested the title in such person.

— (f) **Instruments executed after apparently parting with title.** It is generally agreed that a purchaser is not charged with notice of a conveyance by a person in the grantor's chain of title, by reason of the record thereof, if such conveyance was executed after the grantor therein appears, by a recorded conveyance, to have parted with the title.⁶⁸ For instance, if A first conveys to B, and then conveys to C, a purchaser from B, is not, by reason of the record of the conveyance to C, charged with notice of its existence, so as to be put on inquiry as to the validity of the conveyance by A to B. He has the right to assume that A, having conveyed to B, would have made no further conveyance, and he is consequently under no obligation to search for such a conveyance. Whether, in case the purchaser from B had actual notice of the subsequent conveyance to C, he would be put on inquiry thereby as to the validity of the conveyance to B, is another question, which would probably call for an affirmative answer.

— (g) **Instrument recorded after parting with title.** When a purchaser who receives his conveyance before the record of a prior conveyance by the same grantor to another, nevertheless takes subject to such prior conveyance, as having actual notice thereof, one who purchases from him, but after the record of such prior conveyance, has usually been regarded as taking

68. *Goodkind v. Bartlett*, 153 Ill. 419, 38 N. E. 1045; *Tydings v. Pitcher*, 82 Mo. 379; *Chowen v. Phelps*, 26 Mont. 524, 69 Pac. 54;

Hooker v. Pierce, 2 Hill (N. Y.) 650; *White v. McGregor*, 92 Tex. 556. 71 Am. St. Rep. 875, 50 S. W. 564.

subject thereto. Such last purchaser cannot claim priority as a purchaser from an innocent purchaser,⁶⁹ since his vendor took with notice, and he cannot himself claim to be an innocent purchaser, because he is charged with notice by the record of the prior conveyance before his purchase.⁷⁰ In states in which a subsequent purchaser, in order to be protected as against an unrecorded conveyance of which he has no notice, must first record his conveyance,⁷¹ it seems that the last purchaser might, under such circumstances, be postponed, even though he purchased before the record of such first conveyance, unless he records his conveyance before the first conveyance is recorded.⁷²

Under the doctrine stated in the preceding paragraph, an intending purchaser, although he finds by the index of grantors in the record office, that a particular person in the chain of title executed a conveyance of the land, must nevertheless continue the examination of the records under the name of such person, in order to see whether there was subsequently recorded a prior conveyance by such person, though, as before stated⁷³ he is under no such duty for the purpose of seeing whether there was subsequently recorded a *subsequent* conveyance by such person. If, however, he perform his duty in searching for any prior conveyance, he would usually discover any subsequent conveyance of record, and for this reason there seems a certain inconsistency in making the question of his constructive notice of a conveyance subsequently recorded depend upon

69. *Post*, § 575.

70. *Mahoney v. Middleton*, 41 Cal. 41; *Bayles v. Young*, 51 Ill. 127; *Van Aken v. Kleason*, 34 Mich. 477; *Cook v. French*, 96 Mich. 525, 56 N. W. 101; *Woods v. Garnett*, 72 Miss. 78, 16 So. 390; *Jackson v. Post*, 9 Cow. (N. Y.) 120, 15 Wend. (N. Y.) 588; *Van Rensselaer v. Clark*, 17 Wend. (N. Y.) 25, 31 Am. Dec.

280; *Parrish v. Mahany*, 10 S. D. 276, 66 Am. St. Rep. 715, 73 N. W. 97; *White v. McGregor*, 92 Tex. 556, 71 Am. St. Rep. 875, 50 S. W. 564, (*dictum*); *Erwin v. Lewis*, 32 Wis. 276.

71. *Post*, § 567(1), note 11.

72. *Fallass v. Pierce*, 30 Wis. 443.

73. *Ante*, § 567(f).

the date of the conveyance. In one state any distinction in this regard is obviated by decisions to the effect that an intending purchaser, having found on the records a conveyance by a particular person in the chain of title, is under no obligation to "run down" such person further in the index of grantors for the purpose of discovering any prior conveyance by him subsequently recorded.⁷⁴

— (h) **What constitutes recording.** By the construction usually placed on the recording acts, and frequently by the express language thereof, it is the time of the filing or deposit of an instrument for record, and not the time of its actual record by the official recorder, that determines the rights of the claimant thereunder as against a subsequent purchaser.⁷⁵

That after the instrument has been recorded, the record is in some way destroyed, as by fire, has been regarded as not affecting the validity of the act of record, for the purpose of protecting the claimant thereunder as against a subsequent purchaser.⁷⁶⁻⁷⁷

74. *Morse v. Curtis*, 140 Mass. 11, 54 Am. Rep. 456, 2 N. E. 929. In *Day v. Clark*, 25 Vt. 397, the same result is attained on the theory that, as a subsequent purchaser with notice from a purchaser without notice takes free from any adverse claim, the last purchaser is, in this case, to be preferred, because he does not know that his grantor had actual notice of the unrecorded conveyance. Such a view, that a purchaser is protected unless he knows that his vendor had notice of an adverse claim, appears to find no support elsewhere. See also *Bowman v. Holland*, 116 Va. 805, 83 N. E. 393.

75. See *Chapman & Co. v. Johnson*, 142 Ala. 633, 4 Ann.

Cas. 559, 38 So. 797; *Lewis v. Hinman*, 56 Conn. 55, 13 Atl. 143; *Greenfield v. Stout*, 122 Ga. 303, 50 S. E. 111; *Tucker v. Shaw*, 158 Ill. 326, 41 N. E. 914; *Sinclair v. Slawson*, 44 Mich. 123, 38 Am. Rep. 235, 6 N. W. 207; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464, 53 N. W. 665; *Davis v. Whitaker*, 114 N. C. 279, 41 Am. St. Rep. 793, 19 S. E. 699; *Fabee v. McKerihan*, 172 Pa. 234, 51 Am. St. Rep. 734, 33 Atl. 583; *Throckmorton v. Price*, 28 Tex. 605, 91 Am. Dec. 334. And see authorities cited *post*, § 567(i), note 78.

76-77. *Paxson v. Brown*, 10 C. C. A. 135, 61 Fed. 874; *Houston Oil Co. of Texas v. Wilhelm*, 104 C. C. A. 618, 182 Fed. 474; *Alvis*

— (i) **Time allowed for recording.** The statute occasionally provides that the instrument shall be recorded or filed for record within a certain period after its delivery, or expressly allows such a period for recording. A requirement that the instrument shall be recorded within a specified time would ordinarily be satisfied by the filing of it for record within that time, the grantee not being in a position to control the time of actual recording by the official recorder.⁷⁸ This would seem to be a reasonable construction to place upon such a provision, and usually the statute contains an express declaration that the instrument shall be regarded as recorded from the time at which it is filed or "lodged" for record, or that it shall be effective as against subsequent purchasers from that time, thus indicating that the time of filing and not the time of actual recording is the important consideration.

A provision thus specifying the time within which the instrument must be recorded in order to make it effective as against subsequent purchasers has ordinarily been construed as making the record of the instrument at any time within the period named equivalent to its record at the time of its delivery, so as to give it priority over a subsequent conveyance made to a *bona fide* purchaser within that period, even though this be first recorded.⁷⁹ The record of an instrument *after* the

v. Morrison, 63 Ill. 181, 14 Am. Rep. 117; Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146; Hyatt v. Cochran, 69 Ind. 436; Thomas v. Hanson, 59 Minn. 274; Myers v. Buchanan, 46 Miss. 397; Geer v. Missouri Lumber Min. Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489; Deming v. Miles, 35 Neb. 739, 37 Am. St. Rep. 464, 53 N. W. 665; Cooper v. Flesner, 24 Okla. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29, 103 Pac. 1016; Houston v. Blythe, 71 Tex. 719, 10 S. W. 520; Armentrout v.

Gibbons, 30 Gratt. (Va.) 632.

78. McGregor v. Hall, 3 Stew. & P. 397; Dubose v. Young, 10 Ala. 365; Gill v. Fauntleroy's Heirs, 8 B. Mon. (Ky.) 177; Harrold v. Simonds & Bailey, 9 Mo. 326; Hughes v. Powers, 99 Tenn. 480, 4 S. W. 1. And see authorities cited *ante*. § 567(h) note 75. But see Benson v. Green, 80 Ga. 230, 4 S. E. 851; Moore v. Collins, 15 N. C. 384.

79. Betz v. Mullin, 62 Ala. 365; White v. Interstate Bldg. Ass'n., 106 Ga. 146, 32 S. E. 26; Mc-

statutory period can obviously not have such an effect of making the record relate back to the time of delivery,⁸⁰ but for other purposes it is as effective as record within the period, that is, it operates as constructive notice to one purchasing after such record.⁸¹

As between two instruments, neither of which is recorded within the statutory time, the matter of priority would ordinarily be determined, it seems, as if there were no provision in the statute as to time.⁸² As between two instruments, of which the one first recorded was not recorded within the statutory time, and the other was recorded within such time, it was held, on a construction of the statute, that the one first recorded was entitled to priority.⁸³

In the absence of a statutory provision as to the time of recording, the record of an instrument cannot relate back to the time of its delivery, so as to take priority over an intervening conveyance or incumbrance.⁸⁴ If the record did so relate back, without any limitation as to the extent of the interval between the delivery and record of the conveyance, a subsequent

Carthy v. Seisler, 130 Ind. 63, 29 N. E. 407; Finley v. Spratt, 14 Bush (Ky.) 225 Claiborne v. Holmes, 51 Miss. 146; Fries v. Null, 154 Pa. 573, 26 Atl. 554 (*dictum*); Steele v. Mansell, 6 Rich. L. (S. C.) 543; Camp Mfg. Co. v. Carpenter, 112 Va. 79, 70 S. E. 497.

80. Maddox v. Wilson, 91 Ga. 39, 16 S. E. 213; Pollard v. Cocke, 19 Ala. 188; Schmidt v. Zahndt, 148 Ind. 447, 47 N. E. 335; Littlefield v. Prince, 96 Me. 499, 52 Atl. 1010; Harding v. Allen, 70 Md. 395, 17 Atl. 377; Leger v. Doyle, 11 Rich. L. (S. C.) 109, 70 Am. Dec. 240.

81. Adair v. Davis, 71 Ga. 769; McVay v. English, 30 Kan. 368, 1 Pac. 795; Finley v. Spratt, 14

Bush (Ky.) 225; Claiborne v. Holmes, 51 Miss. 146; Sanborn v. Adair, 29 N. J. Eq. 338; Northrup v. Bremer, 8 Ohio, 392; Fleschner v. Sumpter, 12 Ore. 161, 6 Pac. 506; Fries v. Null, 154 Pa. 573, 26 Atl. 554; Collins v. Aaron, 162 Pa. 539, 29 Atl. 724; Levi v. Gardner, 53 S. C. 24, 30 S. E. 617; Turner v. Cochran, 94 Tex. 480, 61 S. W. 923.

82. McGuire v. Barker, 61 Ga. 339; Fleschner v. Sumpter, 12 Ore. 161, 6 Pac. 506; Souder v. Morrow, 33 Pa. 83; Collins v. Aaron, 162 Pa. 539, 29 Atl. 724.

83. Fries v. Null, 154 Pa. 573, 26 Atl. 554, 158 Pa. 15, 27 Atl. 867.

84. See Sigourney v. Larned, 10 Pick. (Mass.) 72.

purchaser would never be protected against a prior unrecorded conveyance. In one state, however, it has been held that, although there is no statutory provision as to the time of record, the record will relate back to the time of delivery if the recording occurs within a "reasonable" time.⁸⁵ In one state it has been decided that, although the statute in terms invalidates an unrecorded conveyance only as against a subsequent purchaser whose conveyance shall first be duly recorded, a delay in recording an instrument may operate by way of estoppel to prevent the beneficiary thereunder from asserting it as against a subsequent purchaser whose conveyance is *not* first recorded.⁸⁶ This view appears not to have been asserted elsewhere, though there are numerous decisions to the effect that the failure to record may operate by way of estoppel in favor of creditors of the grantor who give credit to him on the assumption that he is still the owner of the land.^{86a}

The question of the effect of a delay in recording presents obvious difficulties from a practical point of view. A statute which allows a grantee, by recording his conveyance at any time within a certain period, thereby to obtain priority over an intervening purchaser who took in ignorance of the prior conveyance and had no means of discovering its existence, must frequently work hardship, and prevents a purchaser from relying with any sense of absolute security upon the title as it appears of record. On the other hand, if a grantee is allowed *no* time within which he may re-

85. *Goodsell v. Sullivan*, 40 Conn. 83; *Hartford Building & Loan Ass'n v. Goldreyer*, 71 Conn. 95, 41 Atl. 659.

86. *Marling v. Nommensen*, 127 Wis. 363, 5 L. R. A. (N. S.) 412, 115 Am. St. Rep. 1017, 7 Ann. Cas. 364, 106 N. W. 844. See, as to the effect of a failure for twenty-two years to record or to make claim as constituting laches,

Kappes v. Rutherford Park Ass'n, 60 N. J. Eq. 129. See also *Longworth v. Chase*, 1 McLean, (U. S.) 282. And compare *Mintz v. Russ*, 161 N. C. 538, 77 S. E. 851. That a delay of several years in recording does not involve an "abandonment" of one's title, see *Bond v. Wilson*, 129 N. C. 325, 40 S. E. 179.

86a. *Ante*, § 546.

cord the instrument, being in effect liable to be postponed to a subsequent conveyance to another executed immediately after his own conveyance, during the interval of time, perhaps, necessary for the transmission of his own instrument to the record office, such grantee is evidently not fully protected.

The statutory provisions as to the time for recording, construed, as they have been, as allowing the grantee to postpone recording for a certain period without thereby endangering his right of priority, seem to be of questionable expediency. A greater degree of justice is likely to be attained by the statutes which, not naming any time for recording, afford protection as against a subsequent purchase only if the prior conveyance is recorded before the subsequent purchase occurs. Under such a statute no doubt a purchaser who exercises the greatest possible promptitude in recording his conveyance may occasionally be postponed by reason of the immediately previous record of a conveyance to another, but this is not apt to occur, and if it does occur, he is in a position immediately to learn thereof and to take measures accordingly, while when a certain period is allowed for recording, a purchaser although he has recorded his conveyance, must wait until the statutory period has expired before he can rest assured that he has obtained the title which he undertook to purchase.⁸⁷

— (j) **Mistakes by recording officer.** The courts of the different states are divided upon the question as to who must suffer the loss occasioned by an error made by the officer in recording a conveyance deposited with him for record. Some courts hold that a grantee, by lodging the instrument with the proper officer for record, acquits himself of all responsibility as to the actual recording, and that from that time it is notice to subsequent purchasers of what it contains, and not of what

87. See Webb, Record of Title,
§ 7.

the recording officer may make it show on the record.⁸⁸⁻⁸⁹ This view is usually based upon the language of the recording statute of the particular state, providing in effect that a conveyance shall be operative as a record, or as against a subsequent purchaser, from the time that it is filed or deposited for record. Other courts hold that subsequent purchasers are bound only by what the records show, and that the grantee in a conveyance, in order absolutely to guard against mistakes by the recorder, and to insure the preservation of his rights as against subsequent purchasers, must ascertain that the recording is correctly done.⁹⁰ This latter view is usually based on the theory that the recording officer is to be regarded, in respect to the record of any particular instrument, as the agent of the beneficiary under the instrument, and that the latter is in a position, by the exercise of a considerable degree of diligence, to ascertain whether the officer has correctly performed his duty, which a subsequent purchaser, even by the exercise of the greatest diligence, could not possibly

88-89. *Mims v. Mims*, 35 Ala. 23; *Chapman & Co. v. Johnson*, 142 Ala. 633, 4 Ann. Cas. 559, 38 So. 797; *Carter v. Tennessee Coal & Iron & Ry. Co.*, 180 Ala. 367, 61 So. 65 (deed lost in record office); *Case v. Hargadine*, 43 Ark. 144; *Lewis v. Hinman*, 56 Conn. 55, 13 Atl. 143; *Merrick v. Wallace*, 19 Ill. 486; *Tucker v. Shaw*, 158 Ill. 326, 41 N. E. 914; *Zeiner v. Edgar Zinc Co.*, 79 Kan. 406, 99 Pac. 614; *Gillespie v. Rogers*, 146 Mass. 610, 16 N. E. 711; *Mangold v. Barlow*, 61 Miss. 593, 48 Am. Rep. 84; *Sinclair v. Slawson*, 44 Mich. 123, 38 Am. Rep. 235; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464, 53 N. W. 665; *Davis v. Whitaker*, 114 N. C. 279, 41 Am. St. Rep. 793, 19 S. E. 699; *Ferabee v.*

McKerrihan, 172 Pa. 234, 51 Am. St. Rep. 734, 33 Atl. 583; *Parrish v. Mahany*, 10 S. D. 276, 66 Am. St. Rep. 715.

90. *Cady v. Purser*, 131 Cal. 552, 82 Am. St. Rep. 391, 63 Pac. 844; *Shepherd v. Burkhalter*, 13 Ga. 443, 58 Am. Dec. 523; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Miller v. Bradford*, 12 Iowa, 14; *Hall v. Wright*, 137 Ky. 39, 127 S. W. 516; *Hill v. McNichol*, 76 Me. 314; *Brydon v. Campbell*, 40 Md. 331; *Grand Rapids Nat. Bank v. Ford*, 143 Mich. 402, 114 Am. St. Rep. 668, 8 Ann. Cas. 102, 107 N. W. 76; *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 288; *Beekman v. Frost*, 18 Johns. (N. Y.) 544; *New York Life Ins. Co. v. White*, 17 N. Y. 469; *Jennings' Lessee v.*

do. This view has occasionally been adopted even when the statute in terms provided that the instrument shall operate as notice from the time of its filing for record.⁹¹

Accordingly as the one or the other of the two views referred to is adopted, it is, in some states, immaterial to the grantee in a conveyance that the instrument is recorded in the wrong book, it nevertheless operating as constructive notice to subsequent purchasers,⁹² while in other states the contrary is true.⁹³

The rule before referred to⁹⁴ that it is the time of the filing or deposit of an instrument of record, and not the time of its actual record by the official recorder, that determines the rights of the claimant thereunder as against a subsequent purchaser, is recognized even in

Wood, 20 Ohio 261; Prouty v. Marshall, 225 Pa. 570, 25 L. R. A. (N. S.) 1211, 74 Atl. 550; Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459; Ritchie v. Griffiths, 1 Wash. 429, 12 L. R. A. 384, 22 Am. St. Rep. 155, 25 Pac. 341; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772.

91. Miller v. Bradford, 12 Iowa, 14; Terrell v. Andrew County, 44 Mo. 309; Sinclair v. Gunzenhauser, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376 (*semble*).

92. Lignoski v. Croiker, 86 Tex. 324, 24 S. W. 278, 788; Swenson v. Bank, 9 Lea (Tenn.) 723. In Cawthon v. Stearns Culver Lumber Co., 60 Fla. 313, 53 So. 738, it was held that since the statute did not contain any requirement as to recording in a particular book, the fact that the instrument was recorded in a book other than the one in which it might be expected to be found was immaterial.

In Pennsylvania, although, according to the latest decision, a

purchaser is bound only by what the records show, nevertheless he is bound by a mortgage recorded and indexed, not in the mortgage book and index, but in the deed book and index, since it would be discovered by any person examining the title. See Prouty v. Marshall, 225 Pa. 570, 25 L. R. A. (N. S.) 1211, 74 Atl. 550; distinguishing Farabee v. McKerrihan, 172 Pa. 234, 51 Am. St. Rep. 734, 33 Atl. 583.

93. Cady v. Purser, 131 Cal. 552, 82 Am. St. Rep. 391, 63 Pac. 844; Sinclair v. Gunzenhauser, 197 Ind. 78, 98 N. E. 37, 100 N. E. 376; Grand Rapids, etc., Bank v. Ford, 143 Mich. 402, 114 Am. St. Rep. 668, 8 A. & E. Ann. Cas. 102, 107 N. W. 76; Gillig v. Maass, 28 N. Y. 191; Parsons v. Lent, 34 N. J. Eq. 67; Drake v. Reggel, 10 Utah, 376, 37 Pac. 583; Sawyer v. Adams, 8 Vt. 172; Bernard v. Benson, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439.

94. *Ante*, § 567(h).

those states in which a grantee is not protected as against subsequent purchasers by the mere filing of the instrument for record, but must see that the recording is correctly done. In this class of states it is considered that, while the filing or deposit of the instrument for record is in itself nugatory, yet if it is thereafter properly recorded, the recording dates back to the time of filing, for the purpose of determining priorities.⁹⁵

— (k) **Index to records.** An index of the grantors and grantees as named in the recorded conveyances is ordinarily kept in the record office, and the statute frequently so requires. And occasionally the statute requires that this index also indicate the property conveyed, and perhaps other details of the conveyance. A subsequent purchaser has been regarded as chargeable with notice of statements in the index, even after the conveyance is actually recorded, in so far as such statements may serve to correct errors or supply omissions in the record itself.⁹⁶ An entry in the index is sufficient if it serves to put a purchaser on inquiry,⁹⁷ and, in so far as it undertakes to describe the land, points thereto with reasonable certainty.⁹⁸ An omission, from the entry in the index, of all description of the land, although there is a blank space for such

95. *Anderson v. Dugas*, 29 Ga. 440; *Sinclair v. Gunzenhauser*, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376; *Terrell v. Andrew County*, 44 Mo. 309; *Leger v. Doyle*, 11 Rich. (S. C.) 109, 70 Am. Dec. 240; *Bigelow v. Topliff*, 25 Vt. 282. In *Whalley v. Small*, 25 Iowa, 184, while this principle was conceded, it was decided to be inapplicable when there was a delay of twenty-five years in the actual recording.

96. *Sinclair v. Slawson*, 44

Mich. 123, 38 Am. Rep. 235, 6 N. W. 207; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772. But a subsequent purchaser has been held not chargeable with notice of statements in the index as to matters not required to be stated. *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

97. *Jones v. Berkshire*, 15 Iowa, 248, 83 Am. Dec. 412.

98. *Barney v. Little*, 15 Iowa, 527; *Malbon v. Grow*, 15 Wash. 301, 46 Pac. 330.

description, and it is ordinarily inserted, has been held not to affect the effectiveness of the entry, the index referring to the place of record of the conveyance.⁹⁹

In so far as the recording statute of the particular state is construed as charging a subsequent purchaser with notice of an instrument by reason merely of the filing thereof, without reference to mistakes or omissions of the recorder,¹ a subsequent purchaser can not assent that he was misled by errors or omissions in the index, he being chargeable with notice of the prior instrument without reference to the index.² In jurisdictions in which a subsequent purchaser is chargeable with notice of a prior conveyance by reason of the record thereof only if the record is correct,³ the question whether a subsequent purchaser is bound by a prior conveyance not properly indexed has usually been determined by the consideration whether its inclusion in the index is to be regarded, under the statute, as an essential part of its record, the subsequent purchaser not being chargeable with notice of the conveyance if such inclusion is an essential part of its record,⁴ while he is so chargeable otherwise.⁵

99. *Oconto v. Jerrad*, 46 Wis. 317, 50 N. W. 591; *St. Croix Land & Lumber Co. v. Ritchie*, 73 Wis. 409, 41 N. W. 345, 1064.

1. *Ante*, § 566(j) note 88.

2. See *Amos v. Givens*, 179 Ala. 605, 60 So. 829; *Davis v. Whitaker*, 114 N. C. 279, 41 Am. St. Rep. 793, 19 S. E. 699; *Herndon v. Ogg*, 119 Ky. 814, 84 S. W. 754.

3. *Ante*, § 566(j), note 90.

4. *Barney v. McCarty*, 15 Iowa, 510, 83 Am. Dec. 427; *Koch v. West*, 118 Iowa, 468, 96 Am. St. Rep. 394, 92 N. W. 663; *Prouty v. Marshall*, 225 Pa. 570, 25 L. R. A. (N. S.) 1211, 74 Atl. 550; *Ritchie v. Griffiths*, 1 Wash. 429, 12 L. R. A. 384, 22 Am. St. Rep.

155, 25 Pac. 341; *Lombard v. Culbertson*, 59 Wis. 433, 18 N. W. 399.

5. *Chatham v. Bradford*, 50 Ga. 327, 15 Am. Rep. 692; *Agurs v. Belcher & Creswell*, 111 La. 378, 100 Am. St. Rep. 485, 35 So. 607; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Mutual Life Ins. Co. of New York v. Dake*, 87 N. Y. 257; *Green v. Garrington*, 16 Ohio St. 548, 91 Am. Dec. 103; *Stockwell v. McHenry*, 107 Pa. St. 237, 52 Am. Rep. 475; *Armstrong v. Austin*, 45 S. C. 69, 29 L. R. A. 772, 22 S. E. 763; *Curtis v. Lyman*, 24 Vt. 338, 58 Am. Dec. 176.

—(1) **Persons affected with notice by record.**

The recording acts usually in terms require the record of an instrument for the benefit of a subsequent purchaser or incumbrancer only. Consequently, one who has previously acquired an interest in the land, or who is a party to the instrument itself, is not charged with notice of any facts by the record.⁶ For instance, the record of a conveyance does not charge the grantor therein with notice that the grantee, after its execution, fraudulently inserted an additional provision therein,⁷ nor does it charge the rightful owner of the property with notice of an adverse claim thereto on the part of the grantor and grantee.⁸ And it appears to be well recognized that one having a debt secured by mortgage on land is not, by the record of a subsequent conveyance or mortgage of part of the mortgaged land, charged with notice thereof, so as to be precluded from releasing another part of the land to the detriment of the subsequent grantee or mortgagee.⁹

The purchaser of an equitable title, it seems evident, cannot be in a better position as regards a prior instrument than if he acquired a legal title, and consequently he takes subject to a prior conveyance or in

6. *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101, 22 Pac. 57; *Lowden v. Wilson*, 233 Ill. 340, 84 N. E. 245; *Annan v. Hays*, 85 Md. 505, 37 Atl. 20; *Corey v. Smalley*, 106 Mich. 257, 58 Am. St. Rep. 474, 64 N. W. 13; *Lausman v. Drahos*, 8 Neb. 457; *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151; *First Nat. Bank of Dickinson v. Big Bend Land Co.*, 38 N. D. 33, 164 N. W. 322; *Stevens v. Summers*, 68 Ohio St. 421, 67 N. E. 884.

7. *Davis v. Monroe*, 187 Pa. 212, 67 Am. St. Rep. 581, 41 Atl. 44.

8. *Holley v. Hawley*, 39 Vt.

525, 94 Am. Dec. 350; *Bradtl v. Sharkey*, 58 Ore. 153, 113 Pac. 653.

9. *Birnie v. Main*, 29 Ark. 591; *Woodward v. Brown*, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 168; *Lewis v. Hinman*, 56 Conn. 55, 13 Atl. 143; *Boone v. Clark*, 129 Ill. 446, 5 L. R. A. 276, 21 N. E. 850; *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741; *Howard Insurance Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Lynchburg Perpetual Bldg. Ass'n v. Fellers*, 96 Va. 337, 70 Am. St. Rep. 851, 31 S. E. 505. So, a judgment lienor may release part of his lien without first examin-

cumbrance duly recorded to the same extent as the purchaser of the legal title. In case the prior conveyance involved a disposition of the legal title, the grantor has nothing left of which to dispose, and in case it involved a disposition of the equitable title only, it would be entitled to priority as being first in order of time.¹⁰

— (m) **Persons entitled to assert failure to record.**

The statute in a number of the states provides that an unrecorded conveyance shall be void as against a subsequent purchaser without notice "whose conveyance is first recorded," thus making the question of priority depend to a considerable extent upon priority of recording.¹¹ In the absence of such a clause, it has usually been held that the later purchaser may, without recording his conveyance, assert priority over an earlier unrecorded conveyance of which he has no notice.¹² The statutory clause referred to, by which the priority of a subsequent conveyance over an earlier unrecorded conveyance is made dependent upon the earlier record of the subsequent conveyance, has been referred to¹³ as not in accord with the general policy of the recording laws, which is to protect a subsequent purchaser who takes for value and without notice as against the prior

ing the records to see how it will affect other persons. *Taylor's Ex'rs v. Maris*, 5 Rawle (Pa.) 51.

10. See *Digman v. McCollum*, 47 Mo. 372. And *ante*, § 566(c).

11. 1 *Stimson's Am. St. Law*, § 1611. See *Simmons v. Stum*, 101 Ill. 454; *Clabaugh v. Byerly*, 7 Gill (Md.) 354, 48 Am. Dec. 575; *Drake v. McLean*, 47 Mich. 102, 10 N. W. 126; *Westbrook v. Gleason*, 79 N. Y. 23; *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. St. 9.

12. *Steele v. Spencer*, 1 Pet. (U. S.) 552, 7 L. Ed. 259; *Miller v. Merine*, 43 Fed. 261; *Coster's Ex'rs v. Bank of Georgia*, 24 Ala.

37; *McGuire v. Barker*, 61 Ga. 339; *Sanborn v. Adair*, 29 N. J. Eq. 338; *Swanstrom v. Washington Trust Co.*, 41 Wash. 561; *Webb*, *Record of Title*, § 13, 166. But *Houlahan v. Finance Consol. Min. Co.*, 34 Colo. 365, 82 Pac. 484; *Brookfield v. Goodrich*, 32 Ill. 363; *Simmons v. Stum*, 101 Ill. 454 are to the effect that even though the statute does not in terms require the later conveyance to be first recorded this is necessary in order that it be given priority.

13. *Webb*, *Record of Title*, §§ 13-15, 165-167.

unrecorded conveyance, it being said that "where, through the neglect of the first grantee to record his deed, a subsequent party has been led to part with a valuable consideration, a race for registry between the two does not afford a proper criterion by which their rights should be determined." There is considerable force in this view, but as a practical matter a "race for registry" is not likely to occur, since ordinarily each party is ignorant of the conveyance to the other, and the subsequent purchaser can ordinarily protect himself against the possible subsequent record of a prior conveyance by promptly recording his own conveyance. There does not seem to be any particular injustice in confining the benefit of the recording acts to those subsequent purchasers who act promptly in placing their conveyances or contracts upon the records, although such a provision involves, to some extent, a departure from the theory that a purchaser is to be protected from a prior unrecorded conveyance because he is in effect a purchaser without notice thereof. Such a provision has a beneficial operation as encouraging the prompt record of conveyances, since no grantee can feel assured that a prior conveyance, unknown to him, may not be filed for record after the time of his purchase, and before he files his own, unless he does this immediately.

— **Claimant under quitclaim deed.** In a very considerable number of jurisdictions it has been decided that the grantee under a "quitclaim deed" is entitled, to the same extent as the grantee in any other conveyance, to the protection of the recording laws as against a prior unrecorded conveyance.¹⁴ These decisions are usually in terms based upon the broad and inclusive language of the recording laws and sometimes upon the

14. *Henry Wrape Co. v. Cox*, 122 Ark. 445, 183 S. W. 955; *Frey v. Clifford*, 44 Cal. 335; *Kelsey v. Norris*, 53 Colo. 306, 125 Pac. 111; *Marshall v. Pierce*, 13 Ga. 543, 71 S. E. 893; *Reed v. McConnell*, 5 Ill. 117; *Smith v. McClain*, 146 Ind. 77, 45 N. E. 41;

fact that what is ordinarily known as a quitclaim deed, that is, a deed which in terms conveys only the grantor's right title and interest in certain property, without covenants of title, does not, in that jurisdiction, differ in its nature and operation from one in terms conveying the property itself.¹⁵ In some states, however, a different view has been adopted, that a purchaser under a quitclaim deed cannot claim as a *bona fide* purchaser for value, as against a prior unrecorded deed, or at least that he is put on inquiry, by the form of the conveyance, as to possible defects in his grantor's title.¹⁶ In support of this view two reasons have been given. One is that the fact that the vendor offers a conveyance in this form is sufficient to raise a suspicion in the mind of the purchaser that the title is defective. As to this, however, it may well happen that the vendor prefers this form with an absence of covenants for title, merely

Eger v. Brown, 77 Kan. 510, 15 L. R. A. (N. S.) 459, 94 Pac. 803; Williams v. White Castle Lumber & Shingle Co., 114 La. 448, 38 So. 414; Dow v. Whitney, 147 Mass. 1, 16 N. E. 722; Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316; Schlott v. Dosh, 49 Neb. 187, 59 Am. St. Rep. 531, 68 N. W. 386; Brophy Min. Co. v. Mining Co., 15 Nev. 101; Wilhelm v. Wilken, 149 N. Y. 447, 52 Am. St. Rep. 743, 32 L. R. A. 370, 44 N. E. 82; Morris v. Daniels, 35 Ohio St. 406; Babcock v. Wells, 25 R. I. 23, 105 Am. St. Rep. 848, 54 Atl. 596; Shutz v. Tidrick, 26 S. D. 505, 128 N. W. 811; Campbell v. Home Ice & Coal Co., 126 Tenn. 524, 150 S. W. 427; Cutler v. James, 64 Wis. 178, 54 Am. Rep. 606, 24 N. W. 874; Eyanson v. Waidlich, 57 Wash. 234, 106 Pac. 746; Ellison v. Torpin, 44 W. Va. 414, 30 S. E. 183; Olmstead v. McCrory, 158 Wis. 323, 148 N.

W. 87; Moelle v. Sherwood, 148 U. S. 21, 37 L. Ed. 350; United States v. California & O. Land Co., 148 U. S. 31, 37 L. Ed. 354; Boynton v. Haggart, 57 C. C. A. 301, 120 Fed. 819.

That a sheriff's conveyance of "all the right, title, and interest" of the execution debtor in certain described land is effective as against a prior unrecorded conveyance by the debtor, see Woodward v. Sartwell, 129 Mass. 210, and Parker v. Prescott, 87 Me. 444, 32 Atl. 1001.

15. See cases cited *post*, this section, note 21.

16. Wood v. Holly Mfg. Co., 100 Ala. 326, 46 Am. St. Rep. 56, 13 So. 948; Townley v. Corona Coal & Iron Co.,—Ala.—, 77 So. 1; Snow v. Lake, 20 Fla. 656, 51 Am. St. Rep. 625; Steel v. Sioux Val. Bank, 79 Iowa, 339, 7 L. R. A. 524, 18 Am. St. Rep. 370, 44 N. W. 564; Hannen v. Seiden-

because he knows nothing about the title, or because, though believing the title good, he prefers not to assume any responsibility, and it seems hardly proper to say that this preference on the vendor's part is calculated to raise a suspicion on the purchaser's part of a defect in the title.¹⁷ Indeed, as has been forcibly suggested by an able writer, the fact that a purchaser accepts a quitclaim deed without covenants of title, tends to indicate his confidence in the title, while his insistence on such covenants might well indicate the contrary.¹⁸ It is, moreover, very questionable whether the fact that the grantee in a conveyance has reason to suspect that the grantor has doubts as to the validity of the title should of itself preclude him from claiming as a *bona fide* purchaser for value, he having no clue by the aid of which to determine the propriety of the grantor's doubts.

The other reason given for the view that a "quitclaim deed" does not take priority of a prior unrecorded conveyance, is that by a quitclaim deed one undertakes to convey only his right or interest in the property, whatever that may be, and that it consequently passes only such interest as may remain to him after the execution of the first conveyance, and can pass no interest as against this latter, although this is not re-

topf, 113 Iowa, 658, 86 N. W. 44; Lasley v. Stout, 90 Kan. 712, 136 Pac. 249; Reed v. Knights, 87 Me. 181, 32 Atl. 870; Peters v. Cartier, 80 Mich. 124, 20 Am. St. Rep. 508, 45 N. W. 73; Backus v. Cowley, 162 Mich. 585, 127 N. W. 775; McAdow v. Black, 6 Mont. 601, 13 Pac. 377; Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717; Muller x. McCann, 50 Okla. 710, 151 Pac. 621; Fowler v. Will, 19 S. D. 131, 117 Am. St. Rep. 938, 8 Ann. Cas. 1093, 102 N. W. 598; Garrett v. Christopher,

74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67.

17. See opinion of Field, J., in Moelle v. Sherwood, 148 U. S. 21, 37 L. Ed. 350; Babcock v. Wells, 25 R. I. 23, 105 Am. St. Rep. 848, 54 Atl. 596.

18. Rawle, Covenants for Title, § 29. See Schott v. Dosh, 49 Neb. 187, 59 Am. St. Rep. 531, 68 N. W. 346; Babcock v. Wells, 25 R. I. 23, 105 Am. St. Rep. 848, 54 Atl. 596; Wilhelm v. Wilken, 149 N. Y. 447, 32 L. R. A. 370, 52 Am. St. Rep. 743, 44 N. E. 82.

corded. The soundness of this reason for the view indicated appears to be beyond question, provided it be conceded that the deed was intended, not as a conveyance of the property as such, but as a disposition merely of what interest the grantor had therein, subject, as it were, to any prior conveyance made by him or another in the chain of title. If a conveyance is to be construed as equivalent to a conveyance of "such interest as I may now have" or of "such interest as I have not disposed of,"¹⁹ the grantee therein cannot well claim any interest which has been previously disposed of by the grantor, whether the previous conveyance was or was not recorded, and if the previous conveyance disposed of all the grantor's interest, the later conveyance would be nugatory. Whether a conveyance in the form of a quitclaim deed is thus to be limited in its operation is a question, it seems, of the intention of the parties thereto, to be determined by a construction of the language used with reference to the circumstances of its execution, including the usage of the community as to the employment of such deeds. This view has been clearly expressed in occasional decisions.²⁰

The view expressed in some of the decisions upholding the priority of the subsequent quitclaim deed, that such a deed is in its operation and effect equivalent to a deed of grant or of bargain and sale,²¹ does

19. As, for instance, a conveyance of "Such interest only as they (the grantors) now have, whatever that may be." *Virginia & T. Coal & Iron Co. v. Fields*, 94 Va. 102, 26 S. E. 426. And see *Mason v. Black*, 87 Mo. 329; *Stephen Putney Shoe Co. v. Richmond, F. & P. R. Co.*, 116 Va. 211, 81 S. E. 93; *Eaton v. Trowbridge*, 38 Mich. 454.

20. *Brown v. Banner Coal Co.*, 97 Ill. 214, 37 Am. Rep. 103; *Cook v. Smith*, 107 Tex. 119, 174 S. W. 1094; *Garrett v. Chris-*

topher, 74 Tex. 435, 15 Am. St. Rep. 850, 12 S. W. 67; *Cutler v. James*, 64 Wis. 173, 54 Am. Rep. 603, 24 N. W. 874. And see *Hooper v. Leavitt*, 109 Me. 70, 82 Atl. 547; *Schmittou v. Dunham*, —Tex. Civ. App.—, 142 S. W. 941; *Gallup v. Harding*, 241 Fed. 858, 154 C. C. A. 560.

21. *Robinson v. Clapp*, 65 Conn. 365, 29 L. R. A. 582, 32 Atl. 939; *Frey v. Clifford*, 44 Cal. 335; *Brown v. Banner etc., Co.*, 97 Ill. 214, 37 Am. Rep. 105; *Babcock v. Wells*, 25 R. I. 23, 105

not necessarily conflict with the view, above expressed, that it is a question as to what is the meaning of the language used. The courts rendering these decisions would hardly assert that a deed might not be so phrased as to pass only such rights as the grantor actually has, that is, to transfer merely a chance of the title, and these decisions merely assert in effect, it would seem, that the fact that a conveyance is in the ordinary form of a quitclaim deed does not of itself show an intention merely to relinquish such claim or title as the grantor may have. And the same may be said of the statutory provisions which are in force in some states, making a quitclaim deed equivalent to a deed of grant or bargain and sale.²² These do no more, it would seem, than create a presumption that such a deed is not to be given a limited effect. But a conveyance in terms of "such interest or title as I now have," though it might properly be denominated a quitclaim deed, would presumably, even in those states, not take priority over a prior unrecorded conveyance by the same grantor. Neither such a statute, nor a statute invalidating an unrecorded conveyance as against a subsequent purchaser, could well give priority to a person who undertakes to purchase merely what the vendor has not previously disposed of, and so give to the conveyance an operation not intended by the parties.

The tendency of the courts is no doubt in favor of the view that the purchaser under a quitclaim deed is entitled to protection as against a prior unrecorded deed, a tendency which has become much more marked since the United States Supreme Court adopted this

Am. St. Rep. 848, 54 Atl. 596; Southern Ry. v. Carroll, 86 S. C. 56, 138 Am. St. Rep. 1017, 67 S. E. 4.

22. See Chapman v. Sims, 53 Miss. 154; Smith v. McClain, 146 Ind. 77, 45 N. E. 41; Cutler v. James, 64 Wis. 173, 54 Am. Rep. 603, 24 N. W. 874. In Strong v.

Lynn, 38 Minn. 315, 37 N. W. 448, it was held that such a statute gave the grantee in a quitclaim deed the right to claim as a *bona fide* purchaser, a previous decision denying such right to him (Marshall v. Roberts, 18 Minn. 405) having been rendered before the adoption of the statute.

view,²³ repudiating prior *dicta* in that court to the contrary. That the view favored by the later decisions works in favor of justice and the security of titles seems sufficiently apparent. That one takes a conveyance of the grantor's "right, title and interest" in certain property, rather than of the property itself, does not, as a matter of fact, ordinarily indicate that the purchaser intends to take, not a title such as appears on the records, but a mere chance of a title, subject to any unrecorded conveyances that may have been made by the grantor, and it does not seem desirable that the courts should, by reason of the use of that language, impute such an intention.

In some of the states, while priority is accorded to a *bona fide* purchaser holding under a quitclaim deed, the view has nevertheless been expressed that the fact that one accepts a quitclaim is *evidence* tending to show a lack of good faith.²⁴⁻²⁶ But, as is remarked above, it appears most questionable whether, as a practical matter, this can properly be regarded as indicative of bad faith.²⁷

It has usually been assumed, and there are express decisions to that effect, that, even if the grantee in a quitclaim deed cannot claim protection as a *bona fide* purchaser, a purchaser from him for value holding under a warranty deed can so claim. That, in other words, one may be a *bona fide* purchaser although a quitclaim deed occurs in his vendor's chain of title.²⁸

23. *Moelle v. Sherwood*, 148 U. S. 21, 37 L. Ed. 350.

24-26. *Moore v. Morris*, 118 Ark. 516, 177 S. W. 6; *Ennis v. Tucker*, 78 Kan. 55, 130 Am. St. Rep. 352, 96 Pac. 140; *Schott v. Dosh*, 49 Neb. 187, 59 Am. St. Rep. 531, 68 N. W. 386; *Lowry v. Brown*, 1 Cold. (Tenn.) 456. See *McDonald v. Belding*, 145 U. S. 492, 36 L. Ed. 788; *Mansfield v. Dyer*, 131 Mass. 200; *Boileau v.*

Records & Breen, 165 Iowa, 134, 144 N. W. 336; *Lasley v. Stout*, 90 Kan. 712, 136 Pac. 249.

27. *Ante*, this section, note 18.

28. *United States v. California & O. Land Co.*, 148 U. S. 31, 37 L. Ed. 354; *Stanley v. Schwalby*, 162 U. S. 255, 40 L. Ed. 960; *Meikel v. Border*, 129 Ind. 529, 29 N. E. 29; *Winkler v. Miller*, 54 Iowa, 476, 6 N. W. 698; *Hannan v. Seidentopf*, 113 Iowa,

The reason ordinarily asserted for this view is that otherwise the occurrence of one quitclaim deed in a chain of title would to a great extent render the title unmarketable. But it is difficult to see how, if a quitclaim deed is insufficient to give a good title to the grantee therein, as against a prior unrecorded conveyance, such grantee can give a good title to another, and thereby divest the rights of the grantee under the prior conveyance. The practical necessity, if it be so regarded, of protecting a subsequent claimant under the grantee in the quitclaim deed, tends strongly to indicate the propriety of protecting the grantee himself.

A conveyance purporting to convey land by a general description, such as "all my land," or "all the land which I have," or "all which I now have," in a certain place, has been held not to take precedence of a prior unrecorded conveyance of particular land in such place, the language used, construed in connection with the surrounding circumstances, showing an intention to convey only such land as the grantor still retains.²⁹

659, 86 N. W. 44; *Rich v. Downs*, 81 Kan. 43, 25 L. R. A. (N. S.) 1035, 105 Pac. 9, and note; *Culbertson v. H. Witbeck Co.*, 92 Mich. 469, 52 N. W. 993; *Otis v. Kennedy*, 107 Mich. 312, 65 N. W. 219; *Marston v. Catterlin*, 270 Mo. 5, 192 S. W. 413; *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. 661; *Martin v. Ragsdale*, 71 S. C. 67, 50 S. E. 671; *Campbell v. Home Ice & Coal Co.*, 126 Tenn. 524, 150 S. W. 427. And see *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373. But see to the contrary *Schmidt v. Musson*, 20 S. D. 389, 107 N. W. 367; *Cook v. Smith*, 107 Tex. 119, 174 S. W. 1094, 1095; *Muller v. McCann*, 50 Okla. 710, 151 Pac. 621 (*semble*).

29. *Callanan v. Merrill*, 81 Iowa, 73, 46 N. W. 753; *Coe v.*

Persons Unknown, 43 Me. 432; *Fitzgerald v. Libby*, 142 Mass. 235, 7 N. E. 917; *Ames v. Robert*, 17 N. M. 609, 131 Pac. 994; *McNamara Syndicate v. Boyd*, 112 Va. 145, 70 S. E. 694; See *Henderson v. Armstrong*, 128 Ga. 804, 58 S. E. 624; *Buttergeld v. Smith*, 11 Ill. 485; *Brown v. Banner, etc., Co.*, 97 Ill. 214, 37 Am. Rep. 105. In *Hetherington v. Clark*, 30 Pa. St. 393, the question whether such a conveyance was intended to convey only such land as the grantor still retained was regarded as a question for the jury. In *Garner v. Boyle*, 97 Tex. 460, 79 S. W. 1066, it was considered that such a conveyance passed all land which on the records appeared to belong to the grantor, an un-

— **Purchaser from heir or devisee.** It has occasionally been decided that a purchaser from an heir or devisee takes subject to a conveyance by the ancestor which was not recorded, on the theory that the conveyance being valid as against the ancestor, he retained no interest which could pass to the heir or devisee and consequently the latter's grantee acquired nothing.³⁰ But usually it has been held, more consistently, it would seem, with the policy of the recording laws, that a purchaser from an heir or devisee is, like a purchaser from any other person, entitled to rely upon the title as it appears of record.³¹

— **Purchaser of equitable interest.** To what extent one who acquires an equitable interest is entitled to take advantage of the failure to record an instrument earlier in date, as giving him priority over the earlier instrument, would properly depend on whether the person acquiring the equitable interest could be regarded as a purchaser or incumbrancer such as the statute undertakes to protect. In several cases the purchaser of an equitable interest has been regarded as entitled to protection as against a prior unrecorded conveyance,³² while in one or two states the right to take ad-

recorded conveyance being regarded as non existent. And see *Cook v. Smith*, 107 Tex. 119, 174 S. W. 1094.

30. *Hill v. Meeker*, 24 Conn. 211; *Hancock v. Beverly's Heirs*, 6 B. Men. (Ky.) 531; See *Henderson v. Armstrong*, 128 Ga. 804, 58 S. E. 624. The Kentucky rule in this regard was changed by statute. See *Dozier v. Barnett*, 13 Bush (Ky.) 457.

31. *Hallett v. Alexander*, 50 Colo. 37, 34 L. R. A. (N. S.) 328, Ann. Cas. 1912B, 1277, 114 Pac. 490, 491; *Kennedy v. Northup*, 15 Ill. 148; *McClure v. Tallman*, 30 Iowa, 515; *Earle v. Fiske*, 103

Mass. 491; *First Nat. Bank of Durand v. Phillpotts*, 155 Mich. 331, 119 N. W. 1; *Youngblood v. Vastine*, 46 Mo. 239; *Powers v. McFerran*, 2 Serg. & R. (Pa.) 47; *McCulloch's Lessee v. Eudaly*, 3 Verg. (Tenn.) 346; *Holmes v. Johns*, 56 Tex. 41; *Keenon v. Burkhardt*, — Tex. Civ. App. —, 162 S. W. 483; *Memphis Land & Timber Co. v. Ford*, 58 Fed. 452, 7 C. C. A. 304.

32. *Weston v. Dunlap*, 50 Iowa, 185; *United States Insur. Co. v. Shiver*, 3 Md. Ch. 381; *General Insur. Co. v. United States Insur. Co.*, 10 Md. 517; *Tarbell v. West*, 86 N. Y. 280; *Trodden v. Wil-*

vantage of the failure to record is apparently confined exclusively to purchasers of the legal title.³³

— **Lessees.** The question whether a lessee is within the protection of the recording statute, so as to be able to assert the failure to record a prior conveyance, is one which is not calculated to arise, since a lessee, agreeing merely to pay a periodical rent, as is usually the case, could not well be regarded as a purchaser for value. If, however, he does pay value, he may come within the protection accorded to purchasers for value, the fact that the estate acquired by him being for years only instead of in fee simple being immaterial.³⁴

— **Claimant under judicial decree.** In at least one state it has been decided that one taking title by judicial decree is to be regarded as a purchaser for the purpose of receiving protection under the recording acts as against a prior unrecorded conveyance.³⁵

— **Creditors.** The recording acts, in many jurisdictions, in terms invalidate an unrecorded instrument only as against a subsequent purchaser or mortgagee, and consequently a creditor of the grantor cannot assert a claim in priority over the grantee by reason of the failure to record, except so far as the failure to record may operate, under the doctrine of estoppel by representation, to preclude the grantee from asserting his title as against such creditor's claim.³⁶ In some jurisdictions, however, the statutes expressly require a con-

liams, 144 N. C. 192, 10 L. R. A. N. S. 867, 56 S. E. 865 (semble); *Bellass v. McCarty*, 10 Watts, (Pa.) 13; *Rhines v. Baird*, 41 Pa. 256; *Batts v. Scott*, 37 Tex. 59; *Preston v. Nash*, 76 Va. 1.

33. *Combs v. Nelson*, 91 Ind. 123; *Wailes v. Cooper*, 24 Miss. 208; *Dedeaux v. Cuevas*, 107 Miss. 7, 64 So. 844.

34. That a lease is a "conveyance" within the protection of the recording act, see *Waskey v. Chambers*, 224 U. S. 564, 56 L. E. 885. *Contra*, *Topping v. Parish*, 96 Wis. 378, 71 N. W. 367.

35. *Wilkins v. McCorkle*, 112 Tenn. 688, 80 S. W. 834.

36. *Ante*, § 546, note 80a.

veyance or mortgage to be recorded in order that it may be effective as against creditors of the grantor or mortgagor as well as against subsequent purchasers.³⁷ Such a statute, in terms protecting creditors against unrecorded instruments, is ordinarily construed as protecting only such creditors as have, by attachment or judgment, acquired a lien on the property,³⁸ though occasionally the statute is given a broader effect, in favor of general creditors.³⁹ The usual construction of the statutes, as not applying to general creditors unless the language clearly shows an intention to that effect, is based on the theory that the purchaser, in failing to record his deed, has done merely what the creditor has done, unduly trusted the grantor, and that the equity of the creditor is no higher than that of the purchaser under the unrecorded deed, who, if deprived of the property, would also be a creditor of the grantor.

Ordinarily the statutes are construed to protect creditors as to such claims only as were created after the execution of the instrument in question, it being considered that, as regards claims which existed previously, they could not have suffered by reason of the failure of the record to show the true state of the title.⁴⁰

§ 568. Notice as substitute for recording. Of the statutes in reference to the recording of conveyances,

37. The provisions of the recording acts, as regards their operation in favor of creditors, are conveniently summarized in a note in 13 Columbia Law Rev. at p. 539.

38. See *McGhee v. Importers' & Traders' Nat. Bank*, 93 Ala. 192, 9 So. 734; *Martin v. Dryder*, 6 Ill. 187; *Campbell v. Remaly*, 112 Mich. 214, 67 Am. St. Rep. 393, 70 N. W. 432; *Hall v. Sauntry*, 72 Minn. 420, 71 Am. St. Rep. 497, 75 N. W. 720; *Nu-*

gent v. Priebastch, 61 Miss. 402; *King v. Fraser*, 23 S. C. 543; *Grace v. Wade*, 45 Tex. 522.

39. See *e. g.*, *Sixth Ward Building Ass'n v. Willson*, 41 Md. 506; *Henderson v. McGhee*, 6 Heisk. (Tenn.) 55.

40. See *e. g.*, *Clift v. Williams*, 105 Ky. 559, 49 S. W. 328; *Dyson v. Simmons*, 48 Md. 207; *Brown v. Brabb*, 67 Mich. 17, 11 Am. St. Rep. 549, 34 N. W. 403. *Contra*, *Price v. Wall*, 97 Va. 334, 75 Am. St. Rep. 788, 33 S. E. 599.

some provide that a conveyance, if not recorded, shall be invalid as against a subsequent purchaser without notice, some, that it shall be invalid as against a *bona fide* purchaser or purchaser in good faith, and some omit any reference to the matter of notice or good faith. The statutes almost invariably, however, without reference to the particular language used, have received the same construction, as affording protection to a subsequent purchaser only when he is without notice of the unrecorded conveyance.⁴¹ This appears to be merely a logical result of the construction put upon the recording acts, as making the record of an instrument equivalent to notice thereof on the part of a subsequent purchaser, since this construction implies that notice otherwise obtained will have the same effect.⁴² In a considerable number of cases, however, the rule that notice obtained otherwise than from the record excludes a purchaser from the protection of the act, is based upon the theory that one taking a conveyance with the purpose of impairing prior rights in another of which he has notice is guilty of fraud,⁴³ a view which was originally adopted from the decisions of the English courts in connection with the local registration acts of that country.⁴⁴

41. See cases cited, 24 A. & E. Encyc. Law (2d Ed.) 131; 2 Pomeroy, Eq. Jur. § 649; Webb, Record of Title, § 201; 2 White & T. Lead. Cas. Eq., Judge Hare's notes, 213. Occasionally the statute has been construed as so absolutely requiring the record of a mortgage as to make it invalid, if not recorded, even as against a subsequent purchaser having actual notice thereof. Mayham v. Coombs, 14 Ohio, 428; Building Ass'n v. Clark, 43 Ohio St. 427, 2 N. E. 846; Dodd v. Parker, 40 Ark. 536; Moore v. Clilson, 105 Ark. 241, 150 S. W. 1028. And in North Carolina

this is so in the case of a conveyance as well as a mortgage. Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99; Moore v. Johnson, 162 N. C. 266, 78 S. E. 158; Allen v. Roanoke Railroad & Lumber Co., 171 N. C. 339, 88 S. E. 492. As also in Louisiana, McDuffie v. Walker, 125 La. 152, 51 So. 100; Somat v. Whitmer, 141 La. 235, 74 So. 916.

42. 2 Pomeroy, Eq. Jur. § 665.

43. 2 Pomeroy, Eq. Jur. §§ 659, 660; 2 White & T. Lead. Cas. Eq. 213; Webb, Record of Title, § 215.

44. See Le Neve v. Le Neve,

Notice of one defect in a title is obviously not sufficient to charge one with notice of an entirely different defect.⁴⁵

In states in which lien creditors are protected as against an unrecorded conveyance,⁴⁶ the protection does not ordinarily exist if the creditor, at the time of acquiring the lien, had actual or constructive notice of the conveyance.⁴⁷

§ 569. Information putting on inquiry. In most states it is sufficient, in order to deprive a person of the right to claim as against a prior unrecorded conveyance, that he has either actual knowledge of such conveyance, or that he has information sufficient to put him on inquiry in regard to such conveyance,⁴⁸ and this con-

Ambl. 436, 1 Ves. Sr. 64; Webb, Record of Title, § 215.

45. *Koons v. Grooves*, 20 Iowa, 373; *Thompson v. Lapsley*, 90 Minn. 318, 96 N. W. 788; *Rutherford Land & Improvement Co. v. Sannrock*, (N. J. Ch.), 44 Atl. 938, aff'd 60 N. J. Eq. 471, 46 Atl. 648; *Todd v. Eighmie*, 10 N. Y. App. Div. 142, 41 N. Y. Supp. 1013; *Allen v. Anderson & Anderson* (Tex. Civ. App.), 96 S. W. 54.

46. *Ante*, § 567m, note 38.

47. *Richards v. Steiner*, 166 Ala. 353, 52 So. 200; *O'Rourke v. O'Connor*, 39 Cal. 442; *Western Chemical Mfg. Co. v. McCaffrey*, 47 Colo. 397, 107 Pac. 1081; *McAdow v. Wachob*, 45 Fla. 482, 33 So. 702; *Feinberg v. Stearns*, 56 Fla. 279, 131 Am. St. Rep. 119, 47 So. 797; *Van Gundy v. Tandy*, 272 Ill. 319, 111 N. E. 1020; *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146; *Stanhope v. Dodge*, 52 Md. 483; *Priest v. Rice*, 1 Pick. (Mass.) 164, 11

Am. Dec. 156; *Northwestern Land Co. v. Dewey*, 58 Minn. 359, 59 N. W. 1085; *Loughridge v. Bowland*, 52 Miss. 546; *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. 873; *Ildvedsen v. First State Bank of Bowbells*, 24 N. D. 227, 139 N. W. 105; *Britton's Appeal*, 45 Pa. St. 172; *Brown v. Sartor*, 87 S. C. 116, 69 S. E. 88; *Freiberg v. Magale*, 70 Tex. 116, 7 S. W. 684.

But that notice to the creditor is immaterial, see *Edwards v. Brinker*, 9 Dana (Ky.) 69; *Mayham v. Coombs*, 14 Ohio, 428; *Lookout Bank v. Noe*, 86 Tenn. 21, 5 S. W. 433; *Dobyns v. Wraing*, 82 Va. 159.

48. *Thompson & Ford Lumber Co. v. Dillingham*, 223 Fed. 1000, 139 C. C. A. 376; *Gamble v. Black Warrior Coal Co.*, — Ala. —, 55 So. 190; *White v. Moffett*, 108 Ark. 490, 158 S. W. 505; *Lawton v. Gordon*, 37 Cal. 202; *Bradford v. Carpenter*, 13 Colo. 30, 21 Pac. 908; *Hunt v. Dunn*, 74 Ga. 120;

struction has usually been given to statutes which provide that an unrecorded conveyance shall be void except as against persons having "actual notice."⁴⁹ But in one state at least such a statutory requirement of "actual notice" has been held to involve the necessity of actual knowledge of the prior conveyance.⁵⁰ That information sufficient to put one on inquiry in regard to an adverse right is *prima facie* sufficient to charge one with notice of such right is a principle well settled in equity, without reference to the recording acts, and the question as to what constitutes such information in connection with these acts, when actual knowledge is not required, is determined by an application of equitable considerations.

Erickson v. Rafferty, 79 Ill. 209; Young v. Wiley (Ind. App.), 72 N. E. 54; Clark v. Holland, 72 Iowa, 34, 2 Am. St. Rep. 230, 33 N. W. 350; Price v. McDonald, 1 Md. 403, 54 Am. Dec. 567; Baldwin v. Anderson, 103 Miss. 462, 60 So. 578; Lyon v. Gombert, 63 Neb. 630, 88 N. W. 774; Nute v. Nute, 41 N. H. 60; Williamson v. Brown, 15 N. Y. 354; Doran v. Dazey, 5 N. D. 167, 57 Am. St. Rep. 550, 64 N. W. 1023; Brooks v. Reynolds, 37 Okla. 767, 132 Pac. 1091; Musgrave v. Bonser, 5 Ore. 313, 20 Am. Rep. 737; Alexander v. Fountain, 195 Ala. 3, 70 So. 669; Hingtgen v. Thackery, 23 S. D. 329, 121 N. W. 839; LeVine v. Whitehouse, 37 Utah, 260, Ann. Cas. 1912C, 407, 109 Pac. 2; Lamaille County Sav. Bank & Trust Co. v. Belden, 90 Vt. 535, 98 Atl. 1002.

49. Hamilton v. Fowkes, 16 Ark. 340; Pope v. Nichols, 61 Kan. 230, 59 Pac. 257; Farriss v. Finnup, 84 Kan. 122, 113 Pac. 407; Knapp v. Bailey, 79 Me.

195, 1 Am. St. Rep. 295, 9 Atl. 122; Maupin v. Emmons, 47 Mo. 304; Drey v. Doyle, 99 Mo. 459, 12 S. W. 287; Creek Land & Imp. Co. v. Davis, 28 Okla. 579, 115 Pac. 468; Rector v. Wildrick, — Okla. —, 158 Pac. 610; Musgrove v. Bonser, 5 Ore. 313, 20 Am. Rep. 737; Manigault v. Lofton, 78 S. C. 499, 59 S. E. 534; Tolland v. Corey, 6 Utah, 392, 24 Pac. 190; Brinkman v. Jones, 44 Wis. 498.

50. Pomroy v. Stevens, 11 Metc. (Mass.) 244; Lamb v. Pierce, 113 Mass. 72; Toupin v. Peabody, 162 Mass. 473, 39 N. E. 280. See Crassen v. Swoveland, 22 Ind. 427; Wade, Notice, § 14; 2 White & Tudor, Leading Cas. Eq. Amer. Notes, 218.

In Ohio it was held that when the statute made an unrecorded conveyance invalid as against a subsequent *bona fide* purchaser having "no knowledge" of such conveyance, the fact that he took under circumstances sufficient to put him on inquiry as

The information thus sufficient to put one on inquiry may consist of a statement made by the claimant of the adverse right,⁵¹ or by a third person not pecuniarily interested, if he is in a position to know the facts, and his statement is definite.⁵² The information must be sufficient to furnish a basis for investigation, and a mere rumor or indefinite statement that there is an adverse claim is not sufficient to put one on inquiry.⁵³

Knowledge by the purchaser of the condition of the land, as by the presence of structures thereon, may be sufficient to put him on inquiry as to whether this does not indicate the existence of some adverse right or easement.⁵⁴ The fact that a purchaser obtains the property at a very inadequate price is also, it is usually considered, a fact which should put him on inquiry as to the

to such conveyance did not cause him to take subject thereto. *Varwig v. Cleveland, C., C. & St. L. R. Co.*, 54 Ohio St. 455, 44 N. E. 92.

51. *Davis v. Kennedy*, 105 Ill. 300; *Nelson v. Sims*, 23 Miss. 383, 57 Am. Dec. 144; *Epley v. Witherow*, 7 Watts (Pa.) 163; *Bell v. Bell*, 103 S. C. 95, 87 S. E. 540.

52. *Lawton v. Gordon*, 37 Cal. 202; *Cox v. Milner*, 23 Ill. 476; *Curtis v. Mundy*, 3 Metc. (Mass.) 405; *Jackson, L. & S. R. Co. v. Davison*, 65 Mich. 416, 32 N. W. 726; *Jaeger v. Hardy*, 48 Ohio St. 335, 27 N. E. 863; *Butcher v. Yocum*, 61 Pa. St. 168, 100 Am. Dec. 625; *Martel v. Somers*, 26 Tex. 551; *Pocahontas Tanning Co. v. St. Lawrence Boom & Manufacturing Co.*, 63 W. Va. 685, 60 S. E. 890. See 2 *Pomeroy Eq. Jur.* §§ 600-612.

53. *Tompkins v. Henderson*, 83 Ala. 391, 3 So. 774; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec.

167; *Hopkins v. O'Brien*, 57 Fla. 444, 49 So. 936; *City of Chicago v. Witt*, 75 Ill. 211; *Buttrick v. Holden*, 13 Metc. (Mass.) 355; *Shepard v. Shepard*, 36 Mich. 173; *Loughridge v. Bowland*, 52 Miss. 546; *Condit v. Wilson*, 36 N. J. Eq. 370; *Raymond v. Flavel*, 27 Ore. 219, 40 Pac. 158; *Maul v. Rider*, 59 Pa. St. 167; *Martel v. Somers*, 26 Tex. 551.

54. *Webb v. Robbins*, 77 Ala. 176; *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; *Pollard v. Rebman*, 162 Cal. 633, 124 Pac. 235; *Blatchley v. Osborn*, 33 Conn. 226; *New York N. H. & H. R. Co. v. Russell*, 83 Conn. 581, 78 Atl. 324; *Ashelford v. Willis*, 194 Ill. 492, 62 N. E. 817; *Joseph v. Wild*, 146 Ind. 249, 45 N. E. 467; *Brown v. Honeyfield*, 139 Iowa, 414, 116 N. W. 731; *Kamer v. Bryant*, 103 Ky. 723; 46 S. W. 14; *Illinois Cent. R. Co. v. Sanders*, 93 Miss. 107, 46

possible existence of an adverse claim.⁵⁵ As is, it has been decided, knowledge on his part that one under whom his grantor claims acquired the property at an exceedingly inadequate price.⁵⁶

If one put on inquiry makes such investigation as may reasonably be demanded of a person of ordinary diligence and understanding, and fails to ascertain the existence of the adverse claim, any inference of notice is rebutted.⁵⁷

One is, it has been held, not charged with notice of an adverse claim by the fact that there are circumstances sufficient to put him on inquiry in reference thereto, and that he makes no inquiry, if inquiry by him would necessarily have been futile.⁵⁸ The circumstances

So. 241; *Seng v. Payne*, 87 Neb. 812, 128 N. W. 655; *Day, Williams & Co. v. Atlantic & G. W. R. Co.*, 41 Ohio St. 392; *McDougal v. Lame*, 39 Ore. 212, 64 Pac. 864; *Randall v. Silverthorn*, 4 Pa. 173; *Eshleman v. Parkersburg Iron Co.*, 235 Pa. 439, 84 Atl. 399.

55. *Mason v. Mullahey*, 145 Ill. 383, 34 N. E. 36; *Kuhn v. Wise*, 90 Kan. 583, 135 Pac. 571; *Atty. Gen. v. Abbott*, 154 Mass. 323, 13 L. R. A. 251, 28 N. E. 346; *Connecticut Mut. Life Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623; *Durant v. Crowell*, 97 N. C. 367, 2 S. E. 541; *Wood v. French*, 39 Okla. 685, 136 Pac. 734; *Hume v. Hare*, 87 Tex. 380, 28 S. W. 935; *Wisconsin River Land Co. v. Selover*, 135 Wis. 594, 16 L. R. A. (N. S.) 1073, 116 N. W. 265; *Lufkin Land & Lumber Co. v. Beaumont Timber Co., Ltd.*, 151 Fed. 740, 81 C. C. A. 98. See *Booker v. Booker*, 208 Ill. 529, 100 Am. St. Rep. 250, 70 N. E. 709.

56. *Winters v. Powell*, 180 Ala. 425, 61 So. 96; *Gaines v. Summers*, 50 Ark. 322, 7 S. W. 301; *Hume v. Franzen*, 73 Iowa, 25, 34 N. W. 490; *Webber v. Taylor*, 2 Jones Eq. (55 N. C.) 9; *Baldwin v. Anderson*, 103 Miss. 462, 60 So. 578. See *Moore v. Sawyer*, 167 Fed. 826.

As to whether a purchaser is, by notice of the inadequacy of the consideration for the conveyance to his grantor, affected with notice that such conveyance was fraudulent as to the grantors' creditors, see *Longbeed v. Armstrong*, 84 N. J. Eq. 49, 92 Atl. 93, and cases there cited.

57. *Thompson v. Pioche*, 44 Cal. 508; *Gregory v. Savage*, 32 Conn. 250; *Cavin v. Middleton*, 63 Iowa, 618, 19 N. W. 805; *Schweiss v. Woodruff*, 73 Mich. 473, 41 N. W. 511; *Williamson v. Brown*, 15 N. Y. 354; *Loomis v. Cobb*, — Tex. Civ. App. —, 159 S. W. 305; 2 *Pomeroy, Eq. Jur.* § 607.

58. *Cornell v. Maltby*, 165 N. Y. 557, 59 N. E. 291; *Herbert*

may be such, however, that a reasonably diligent inquiry would necessarily involve the ascertainment of the adverse claim, and in such case the presumption of notice may be regarded as conclusive.⁵⁹ Each case must, to a very considerable degree, depend upon its own peculiar circumstances, and it is impossible to frame any absolute rule by which to determine whether an intending purchaser has sufficient information to put him on inquiry, and what constitutes due and sufficient inquiry.⁶⁰

§ 570. Notice to agent. The rule that notice to an agent is notice to his principal applies in the case of a purchaser of land acting through an agent, and he may consequently be charged with notice of adverse claims either by the agent's actual knowledge, or by information acquired by the latter sufficient to put him on inquiry.⁶¹ The limitations upon the general rule in connection with the time of the acquisition of notice by the agent, and the character of the transaction in connection with which the notice is received, are by no means settled, and are properly a matter for consideration in a treatise on agency.

It is held by some courts that notice acquired by the agent before the beginning of the agency is in no case to be imputed to the principal;⁶² while other courts hold that such notice is to be imputed to the principal,

v. Wagg, 27 Okla. 674, 117 Pac. 209.

59. 2 Pomeroy, Eq. Jur. § 608; Kernochan v. Durham, 48 Ohio St. 1, 12 L. R. A. 41, 26 N. E. 982; Ohio River Junction R. Co. v. Pennsylvania Co., 222 Pa. St. 573, 72 Atl. 271.

60. Webb, Record of Title, § 227. See Kuhn v. Wise, 90 Kan. 583, 135 Pac. 571.

61. Clark v. Fuller, 39 Conn. 238; Smith v. Dunton, 42 Iowa, 48; Russell v. Swezey, 22 Mich.

235; Hickman v. Green, 123 Mo. 165; Kimmel v. Scott, 34 Neb. 493, 52 N. W. 371; Cowan v. Withrow, 111 N. C. 306, 16 S. E. 397; La Forest v. Downer, 63 Ore. 176, 126 Pac. 995; Bigley v. Jones, 114 Pa. St. 510, 7 Atl. 54; Steinman v. Clinchfield Coal Corporation, 121 Va. 611, 93 S. E. 684.

62. Hufcutt, Agency (2d Ed.) § 144; Houseman v. Girard Mut. Building & Loan Ass'n, 81 Pa. St. 256; Kauffman v. Robey, 60

provided the fact of which he has received notice is present in his mind while acting for the principal,⁶³ and provided he is at liberty to disclose it to the principal.⁶⁴

Notice of a fact to the agent will not in any case bind the principal if the fact is not within the scope of the agency.⁶⁵ Nor is the principal charged with notice if the agent is acting in fraud of the principal, and, to further his own ends, conceals the fact from the principal.⁶⁶

§ 571. Notice from possession.—(a) General considerations. An intending purchaser of land is, as a general rule, by the fact that the land is in the possession of a person other than he who is undertaking to sell it, charged with notice of the rights of such person, to the extent that he could, by reasonable inquiry, have ascertained the nature of such rights.⁶⁷ This presump-

Tex 308, 48 Am. Rep. 264; McCormick v. Joseph, 83 Ala. 401, 3 So. 796.

63. The Distilled Spirits, 11 Wall. (U. S.) 356, 20 L. Ed. 167; Armstrong v. Abbott, 11 Colo. 220, 17 Pac. 517; Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019; Constant v. University of Rochester, 111 N. Y. 604, 2 L. R. A. 734, 7 Am. St. Rep. 769, 19 N. E. 631; Arrington v. Arrington, 114 N. C. 151, 19 S. E. 351; First State Bank of Keota v. Bridges, 39 Okla. 355, 135 Pac. 378; Mechem, Agency, § 1809.

64. The Distilled Spirits, 11 Wall. (U. S.) 356, 20 L. Ed. 167; Littauer v. Houck, 92 Mich. 162, 31 Am. St. Rep. 572, 52 N. W. 464; Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019; Mechem, Agency, § 1814.

65. Roach v. Karr, 18 Kan.

529; Trentor v. Pothen, 46 Minn. 298, 24 Am. St. Rep. 225, 49 N. W. 129; Tucker v. Tilton, 55 N. H. 223; Anketel v. Converse, 17 Ohio St. 11, 91 Am. Dec. 115; Wood v. Rayburn, 18 Ore. 3, 22 Pac. 521; Mechem, Agency, § 1831.

66. Frenkel v. Hudson, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758; Allen v. South Boston R. Co., 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; Hickman v. Green, 123 Mo. 165, 29 L. R. A. 39, 22 S. W. 455, 27 S. W. 440; National Life Ins. Co. of United States v. Minch, 53 N. Y. 144.

67. Kirby v. Tallmadge, 160 U. S. 379, 40 L. Ed. 463; Enslen v. Thornton, 182 Ala. 314, 62 So. 525; Grant's Pass Land & Water Co., 168 Cal. 456, 143 Pac. 754; Davis v. Pursel, 55 Colo. 287, 134 Pac. 107; Coursey v. Coursey,

tion of notice appears to exist, even though the intending purchaser is a nonresident, or for other reasons is without actual knowledge of the possession by a third person.⁶⁸ As is stated hereafter, however, the possession may not be of such a character as to put the pur-

141 Ga. 65, 80 S. E. 462; Truesdale v. Ford, 37 Ill. 210; Johnson v. Clark, 18 Kan. 157; Everidge v. Martin, 164 Ky. 497, 175 S. W. 1004; Kushler v. Weber, 182 Mich. 224, 148 N. W. 418; Niles v. Cooper, 98 Minn. 39, 13 L. R. A. (N. S.) 49, 107 N. W. 744; Strickland v. Kirk, 51 Miss. 795; Maupin v. Emmons, 47 Mo. 304; Pleasants v. Blodgett, 39 Neb. 741, 42 Am. St. Rep. 624, 58 N. W. 423; Phelan v. Brady, 119 N. Y. 587, 8 L. R. A. 211, 23 N. E. 1109; Brown v. Trent, 36 Okla. 239, 128 Pac. 895; Rayburn v. Davisson, 22 Ore. 242, 29 Pac. 738; Kerr v. Day, 14 Pa. St. 112, 53 Am. Dec. 526; Johnson v. Olberg, 32 S. D. 346, 143 N. W. 292; Toland v. Corey, 6 Utah, 392, 24 Pac. 190; Chapman v. Chapman, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813; Field v. Copping, Agnew & Scales, 65 Wash. 359, 36 L. R. A. (N. S.) 488, 118 Pac. 329; Mills v. McLanahan, 70 W. Va. 288, 73 S. E. 927; Olmstead v. McCrory, 158 Wis. 323, 148 N. W. 871.

68. King v. Paulk 85 Ala 156. 4 So. 825; Hamilton v. Fowkes, 16 Ark. 340; Hyde v. Mangan, 88 Cal. 319, 26 Pac. 180; Tate v. Pensacola, Gulf, Land & Development Co., 37 Fla. 439, 53 Am. St. Rep. 251, 20 So. 542; Tillotson v. Mitchell, 111 Ill. 518; Delosh v. Delosh, 171 Mich,

175, 137 N. W. 81; Groff v. Ramsey, 19 Minn. 44; Friedlander v. Ryder, 30 Neb. 783. 9 L. R. A. 700, 47 N. W. 83; Galley v. Ward, 60 N. H. 33; Hodge v. Amerman, 40 N. J. Eq. 99, 2 Atl. 257; Phelan v. Brady, 119 N. Y. 587, 8 L. R. A. 211, 23 N. E. 1109; Edwards v. Thompson, 71 N. C. 177; Ranney v. Hardy, 43 Ohio St. 157, 1 N. E. 523; Hottenstein v. Lerch, 104 Pa. St. 454, 1 N. E. 523; Sheorn v. Robinson, 22 S. C. 32; Bliss v. Waterbury, 27 S. D. 429, 131 N. W. 731; Ramirez v. Smith, 94 Tex. 184, 59 S. W. 258; Chapman v. Chapman, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813; Weekly v. Hardesty, 48 W. Va. 39, 55 S. E. 880. See Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. Ed. 1063. Contra, Harral v. Leverty, 50 Conn. 46, 47 Am. Rep. 608; Harris v. Arnold, 1 R. I. 125.

To satisfy a requirement of "actual notice" within the recording acts, a knowledge of the possession on the part of the purchaser has been held to be necessary. Vaughn v. Tracy, 22 Mo. 15, 25 Mo. 318, 69 Am. Dec. 471; Masterson v. West End Narrow Gauge R. Co., 5 Mo. App. 64, 72 Mo. 342; Brinkman v. Jones, 44 Wis. 498. See Porter v. Sevey, 43 Me. 519; Pomroy v. Stevens, 11 Metc. (Mass.) 244.

chaser on inquiry.⁶⁹ Furthermore, even though the possession was sufficient to put the purchaser on inquiry, he is not chargeable with notice if he followed up the inquiry in good faith without discovering any adverse interest.⁷⁰ For instance, if the person in possession refuses, upon inquiry, to indicate the nature of his interest, the purchaser is justified in carrying through the purchase without reference to any possible claim in favor of such person,⁷¹ or, it would seem, in favor of one in behalf of whom the possession may be held, the possessor's landlord, for instance.⁷² And if the person in possession, upon inquiry by the purchaser, disclaims any interest or anything more than a limited interest, the purchaser is not charged with notice of a greater interest in such person by reason of his possession or occupation.⁷³

Even though the purchaser fails to perform his duty of inquiry, he is not, it seems, charged with notice of the interest of the person in possession if the inquiry would have been unavailing, as when the possessor is ignorant of the nature of his interest,⁷⁴ or he has previously indicated an intention to deceive the purchaser as to the basis of his possession.⁷⁵

69. *Post*, § 571(b).

70. *Hellman v. Levy*, 55 Cal. 117; *Emerich v. Alvarado*, 90 Cal. 471, 27 Pac. 356; *Austin v. Southern Home Building & Loan Ass'n*, 122 Ga. 439, 50 S. E. 382; *Penrose v. Cooper*, 88 Kan. 210, 128 Pac. 362; *Rogers v. Jones*, 8 N. H. 264; *Huffman v. Cooley*, 28 S. D. 475, 134 N. W. 49; *Ellison v. Torpin*, 44 W. Va. 414, 30 S. E. 185.

71. *Fair v. Stevenot*, 29 Cal. 486; *Riley v. Quigley*, 50 Ill. 304.

72. In *Fair v. Stevenot*, 29 Cal. 486, it is said that the possession of an adverse claimant's servant does not charge

with notice if he refuses to answer inquiries.

73. *Yates v. Hurd*, 8 Colo. 343, 8 Pac. 575; *Barchent v. Sellick*, 89 Minn. 513, 95 N. W. 458; *Trumpower v. Marcey*, 92 Mich. 529, 52 N. W. 999; *Cavin v. Middleton*, 63 Iowa, 618, 19 N. W. 805; *Losey v. Simpson*, 11 N. J. Eq. 246.

74. *Cornell v. Maltby*, 165 N. Y. 557, 59 N. E. 291; *Bowles v. Belt*. — *Tex. Civ. App.* —, 159 S. W. 885; *First Nat. Bank v. Chafee*, 98 Wis. 42, 73 N. W. 318; *Teal v. Scandinavian American Bank*, 114 Minn. 435, 131 N. W. 486.

75. *Austin v. Southern House*

In every case, it is conceived, a purchaser put on inquiry by another's possession, must make inquiry of that very person as to the nature of his rights, and he does not fulfil his duty if he makes inquiry merely of others.⁷⁶

One who has the record title to land put in the name of another, in order to conceal his own interest therein from his creditors, has no equity, it has been held, which he can assert as against an innocent purchaser from such other, even though he is himself in the actual possession of the property.⁷⁷

— (b) **Character of the possession.** What acts and circumstances may or may not constitute possession for this purpose are necessarily varied, and depend to some extent upon the nature and locality of the property, the use to which it may be applied, and the situation of the parties.⁷⁸ It is, in the final analysis, a question of fact in each case, whether there is such possession of the property by A as to affect B with notice thereof,⁷⁹ and that this is so must be recognized in seeking to harmonize the numerous decisions.

Building & Loan Ass'n, 122 Ga. 439, 50 S. E. 382.

76. *Lestrade v. Barth*, 19 Cal. 660; *Williams v. Brown*, 14 Ill. 200; *Allen v. Caldwell*, 55 Mich. 8, 20 N. W. 692; *Sailor v. Hertzeg*, 4 Whart. (Pa.) 259; *Canfield v. Hard*, 58 Vt. 217, 2 Atl. 136.

77. *Gill v. Hardin*, 48 Ark. 409, 3 S. W. 519; *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 126; *Alliance Trust Co. v. O'Brien*, 32 Ore. 333, 51 Pac. 640. But the creditors might, it seems, assert that the purchaser was charged with notice by the possession. *Hood v. Fahnestock*, 1 Pa. St. 470.

78. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. Ed. 1063; *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169. See also *Tate v. Pensacola, Gulf, Land & Development Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 So. 542; *Bolland v. O'Neal*, 81 Minn. 15, 83 Am. St. Rep. 362, 83 N. W. 471. See *Fraser v. Fleming*, 190 Mich. 238, 157 N. W. 269.

79. *Emeric v. Alvarado*, 90 Cal. 444, 471, 27 Pac. 356; *Heim v. Kaddatz*, 107 Ill. App. 413; *Hall v. Hilley*, 134 Ga. 77, 67 S. E. 428; *Hottenstein v. Lerch*, 104 Pa. St. 154; *Betts v. Letcher*, 1 S. D. 182, 46 N. W. 193; *Ponton v. Ballard*, 24 Tex. 619.

The possession, to charge a purchaser with notice, must, it is said, be an actual and visible possession,⁸⁰ by which is meant, apparently, merely that the possession must be sufficiently open, continuous and unambiguous in character, to indicate to the purchaser, if he views the property, that some person other than the vendor claims possession thereof.⁸¹

It appears to be generally recognized that the acts of possession need not extend to the entire tract sold, in order to charge the purchaser with notice of the adverse claim, such acts as to part being regarded as sufficient to raise a duty of inquiry as to the extent and source of the possessor's rights.⁸² And so occupancy of part of a building has been regarded as sufficient to put on inquiry a purchaser of the building.⁸³ If, however, the vendor is actually in occupation of part of the tract

80. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. Ed. 1063; *Taylor v. Central Pac. R. Co.*, 67 Cal. 615, 3 Pac. 436; *Tate v. Pensacola, Gulf, Land & Development Co.*, 37 Fla. 439, 33 Am. St. Rep. 251, 20 So. 542; *Mason v. Mullahy*, 145 Ill. 332, 24 N. E. 36; *McMechan v. Grifing*, 3 Pick. (Mass.) 149, 15 Am. Dec. 198; *Holland v. Brown*, 140 N. Y. 344, 35 N. E. 577; *Ranney v. Hardy*, 43 Ohio St. 157, 1 N. E. 523; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489.

81. See *Rankin Mfg. Co. v. Bishop*, 137 Ala. 271, 34 So. 991; *Jerome v. Carbonate Nat. Bank*, 22 Colo. 37, 43 Pac. 215; *Smith v. Gibson*, 15 Minn. 89; *Cox v. Devinney*, 65 N. J. L. 389, 47 Atl. 569; *Brown v. Volkening*, 64 N. Y. 76; *Rayburn v. Davisson*, 22 Ore. 242; *Ranney v. Hardy*, 43 Ohio St. 157, 1 N. E. 523; *Meehan v. Williams*, 48

Pa. 238; *Billington's Lessee v. Welsh*, 5 Binn. (Pa.) 132, 6 Am. Dec. 406.

82. *Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521; *Gale v. Shillock*, 4 Dak. 182, 29 N. W. 661; *Small v. Stagg*, 95 Ill. 39; *Mallett v. Kaehler*, 141 Ill. 70, 30 N. E. 549; *Watters v. Connelly*, 59 Iowa. 217, 13 N. W. 32; *Holland v. Brown*, 140 N. Y. 344, 35 N. E. 577; *Day v. Atlantic & G. W. R. Co.*, 41 Ohio St. 392; *Sweatman v. Edmunds*, 28 S. C. 58, 62, 5 S. E. 165; *Huffman v. Cooley*, 28 S. D. 475, 134 N. W. 49; *Ramirez v. Smith*, 94 Tex. 184, 59 S. W. 258; *Dennis v. North Pac. R. Co.*, 29 Wash. 229, 55 Pac. 210; *Wickes v. Lake*, 25 Wis. 71.

83. *Boyer v. Chandler*, 160 Ill. 294, 32 L. R. A. 113, 43 N. E. 803; *Truth Lodge No. 213, A. F. & A. M. v. Barton*, 119 Iowa, 230, 97 Am. St. Rep. 303, 93 N. W. 106.

sold, the possession by a third person of the other part would not usually be calculated to put the purchaser on inquiry as to such third person's rights.⁸⁴

The possession, to put a purchaser on inquiry, must, it is said, be actually existent at the time of the purchase, and the purchaser is not affected by a possession which has been abandoned before that time.⁸⁵ But the courts do not regard actual personal occupation of the land as necessary to constitute possession for this purpose, it being usually considered sufficient that an inspection of the land would indicate, or at least suggest, that it is habitually utilized for agricultural or other purposes, even though no person is actually in the occupation of the land at the time.⁸⁶ Some of the courts have, it is conceived, gone somewhat far in regarding a purchaser as put on inquiry with reference to an adverse claim by the existence of indications on the land that it has been utilized in a particular way. That, for instance, crops have been raised on the premises, that timber has been taken therefrom, or that the land has been fenced, furnishes practically no information to the purchaser as to an adverse claim, and to hold that it

84. *Jeffersonville, etc., R. Co. v. Oyler*, 82 Ind. 394; *Cincinnati, I. & St. L. & C. R. Co. v. Smith*, 127 Ind. 461, 26 N. E. 109; *Billington v. Welsh*, 5 Binn. (Pa.) 132, 6 Am. Dec. 406. See *Wade v. Hiatt*, 32 N. C. 302; *Robertson v. Smith*, 191 Mich. 660, Ann. Cas. 1918D, 145, 158 N. W. 207.

85. *O'Neal v. Prestwood*, 153 Ala. 443, 45 So. 251; *Aden v. Vallejo*, 139 Cal. 165, 72 Pac. 905; *Hewes v. Wiswell*, 8 Me. 94; *Roussain v. Norton*, 53 Minn. 560, 55 N. W. 747; *Hiller v. Jones*, 66 Miss. 636, 6 So. 465; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Bost v. Setzer*, 87 N. C. 187; *Boggs v. Warner*, 6

Watts & S. (Pa.) 474; *King v. Porter*, — W. Va —, 71 S. E. 202.

86. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. Ed. 1063; *Sloss-Sheffield Steel & Iron Co. v. Taff*, 178 Ala. 382, 59 So. 658; *Colburn v. Gilcrest*, 60 Colo. 92, 151 Pac. 909; *Thomas v. Burnett*, 128 Ill. 37, 4 L. R. A. 222, 21 N. E. 352; *Rodgers v. Turpin*, 105 Iowa, 183, 74 N. W. 925; *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Krider v. Lafferty*, 1 Whart. (Pa.) 303; *Chapman v. Chapman*, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813.

puts him on inquiry as to such a claim means that he must, in the first place, assume that such prior use of the land was by some person other than his vendor or the latter's predecessor in title, and must then, by inquiry of the owners of neighboring property, endeavor to ascertain the identity of such person, and, having ascertained his identity, must inquire as to the character of his claim. This occasionally places a heavy burden upon the intending purchaser, for the protection, ordinarily, of one whose adverse claim might, with proper diligence, have been made a matter of record.

In case only an easement in the land is claimed, there will not be any actual possession of the land by the claimant, but merely an exercise of the easement thereover, which exercise will ordinarily be intermittent in character. In such case the notice will be based, strictly speaking, not on possession of the land, but on the exercise of the easement over the land with sufficient constancy or continuity to inform one observing the land of its exercise,⁸⁷ or, quite frequently, upon the existence of improvements or structures on the land adapting it for the exercise of the easement.⁸⁸

— (c) Possession consistent with record title.

One limitation upon the effect of possession as notice, which has been recognized in a number of states, is that the possession of one who has a title of record is not notice of any title in him other than that which appears of record, the purchaser being regarded as justified in attributing his possession to such record title.^{88a} It has accordingly been quite frequently de-

87. *Franklin v. Pollard Mill Co.*, 88 Ala. 318, 6 So. 685; *McLure v. Keon*, 25 Colo. 284, 53 Pac. 1058; *Rock Island & Pac. R. Co. v. Dimick*, 144 Ill. 628, 19 L. R. A. 105, 32 N. E. 291; *Campbell v. Indianapolis & V. R. Co.*, 110 Ind. 490, 11 N. E. 482; *Harman v. Southern R. Co.*, 72

S. C. 228, 51 S. E. 689.

88. *Ante*, § 569, note 54.

88a. *Kirby v. Tallmadge*, 160 U. S. 379, 40 L. Ed. 463; *Schumacher v. Truman*, 134 Cal. 430, 66 Pac. 591; *Crooks v. Jenkins*, 124 Iowa, 317, 104 Am. St. Rep. 326, 100 N. W. 82; *Red River Valley Land, etc., Co. v. Smith*,

cided that one purchasing an undivided interest from A, who appears of record to be a tenant in common with B, is not, by the fact that B has the sole possession, chargeable with notice that A has previously transferred his interest to B,⁸⁹ it being well recognized that one tenant in common may hold possession in behalf of all of the tenants,⁹⁰ and the possession of B being consequently consistent with the existence of an undivided interest in A, as indicated by the records. And there is a decision that if a mortgagee, having the legal title of record, and so entitled to possession, takes a conveyance of the equity of redemption, which he fails to record, a subsequent purchaser from the mortgagor will not, by the mortgagee's possession, be charged with notice of such conveyance,⁹¹ such possession being consistent with the equitable title of record being in the mortgagor.⁹² And when the title to land appeared of

7 N. D. 236, 74 N. W. 194; *Woods v. Farmere*, 7 Watts (Pa.) 382, 32 Am. Dec. 772.

89. *Stortlitz v. Chapline*, 71 Ark. 31, 70 S. W. 465; *Schumacher v. Truman*, 134 Cal. 430, 66 Pac. 591; *Tyler v. Johnson*, 61 Fla. 730, 55 So. 870; *May v. Sturdivant*, 75 Iowa, 116, 9 Am. St. Rep. 463, 39 N. W. 221; *Dutton v. McReynolds*, 31 Minn. 66, 16 N. W. 468; *Jones v. Brenizer*, 70 Minn. 525, 73 N. W. 255; *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004; *Ilvedsen v. First State Bank*, 24 N. D. 227, 139 N. W. 105; *Farmers', etc., Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439; *Martin v. Thomas*, 56 W. Va. 220, 49 S. E. 118. See *Kendall v. Lawrence*, 22 Pick. (Mass.) 542; *Peck v. Williams*, 113 Ind. 256, 15 N. E. 270.

So it has been held that the possession of the lessee of one who appears by the records to be a tenant in common merely, is consistent with the record title of the other tenant in common, and does not put a purchaser of the latter's undivided interest on inquiry. *Schumacher v. Truman*, 134 Cal. 430, 66 Pac. 591.

The possession of one cotenant can obviously not operate as notice of the fact that the interest of his cotenant has been transferred to a third person. *Williams v. Sprigg*, 6 Ohio St. 585; *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. 1136.

90. *Ante*, § 513(h).

91. *Plumer v. Robertson*, 6 Serg. & R. (Pa.) 179.

92. *Post*, § 612.

record as being vested in three persons in equal undivided shares, without mention of any partnership relation between them, a purchaser from one of them was regarded as justified in assuming that he had a one-third beneficial interest, although the land was occupied for the purposes of a partnership consisting of such persons, and the vendor's beneficial interest was less than a third.⁹³ It has likewise been decided that, if land sold under a judgment against A is, at the time of the sale, in the possession of B, who claims under a recorded deed which was executed after the judgment, the purchaser is justified in imputing B's possession to such deed, and not to a possible pre-existing interest in him, not apparent of record.⁹⁴ Occasionally, however, this limitation upon the effect of possession as notice has not been accepted,⁹⁵ and such a view appears not to be entirely without justification.

The theory at the base of the general rule of notice from possession is that the purchaser, as he knows or ought to know of the fact of possession by a third person, is under an obligation to make inquiry of that person as to the character and extent of the latter's rights. The limitation just referred to, upon the rule, in effect relieves the purchaser from such an obligation to make inquiry of the person in possession, if a title in the latter appears of record sufficient to explain his possession. This asserted limitation upon the general

93. *Adams v. Bradley*, 12 Mich. 346.

94. *Rogers v. Hussey*, 36 Iowa, 664; *Lance v. Gorman*, 136 Pa. 200, 20 Am. St. Rep. 914, 20 Atl. 792.

95. *Farmers' Nat Bank v. Sperling*, 113 Ill. 273; *Weisberger v. Wisner*, 55 Mich. 246, 21 N. W. 331; *Schmidt v. Steinbach*, 193 Mich. 640, 160 N. W. 448; *Collum v. Sanger*, 98 Tex. 62, 82 S. W. 459, 83 S. W. 184; *Tol-*

land v. Corey, 6 Utah, 392, 24 Pac. 190. See *Carr v. Brennan*, 166 Ill. 108, 57 Am. St. Rep. 119, 47 N. E. 721; *Ellison v. Torpin*, 44 W. Va. 415, 438, per Brannon, P. J.

A purchaser is not justified in ascribing the possession to a recorded deed made to the possessor if he knows that deed to be void. *Simonson v. Manson*, 36 S. D. 167, 153 N. W. 1020.

rule has, by a judge of pre-eminent ability,⁹⁶ been based on a *quasi* estoppel, it being said by him that the person in possession, in recording one only of his titles, does an act which, by reason of its tendency to mislead, ought to postpone his other title in favor of a purchaser, and this is the course of reasoning indicated in other cases on the subject. But it may happen that the person in possession is not responsible for the fact that one of his titles is, and that the other is not, recorded. One of his titles might be of a character not susceptible of record, as when it is based on an oral transaction or on an instrument not duly acknowledged.⁹⁷ And conceding that the record of the one title alone is calculated to mislead a subsequent purchaser, it may happen that, not having examined the records before purchasing, he is not actually misled. Is he protected in such case as against the unrecorded title of the person in possession? It is to be borne in mind, moreover, that the recording of one only of two titles which one may have, can properly be characterized as misleading only upon the assumption that it is calculated to lead the subsequent purchaser to refrain from making inquiries as to the rights of the possessor, and whether it is so calculated is open to question. It might be suggested that a reasonably prudent person, in purchasing from A an interest in land which is in the possession of B, would make inquiry of B as to his rights, even though there is of record a title in B which is not exclusive of the asserted title in A. The fact that there is such a title of record in B makes it no more difficult for the purchaser to make inquiry as to the

96. Gibson, C. J., in *Woods v. Farmere*, 7 Watts. (Pa.) 382. See also editorial note, 18 Harv. L. Rev. 218.

97. In *Woods v. Farmere*, 7 Watts (Pa.) 382, Gibson, C. J. says that "an exception to this might be the case of possession taken under a parol contract

partly executed, which is not susceptible of registration; yet if it were the title mainly relied on, why register another, when, if neither were registered, the possession would be notice of both." But this omits to recognize the possibility that the person in possession may have

rights of B. Furthermore, if a purchaser is justified in refraining from inquiry as to the rights of the person in possession merely because such person has a title, which appears of record, to which his possession may be attributed, it is difficult to see why he is not so justified when such person has such a title, not of record, of which the purchaser has notice. But the imputation of such an effect to an unrecorded title is practically denied by the decisions, hereafter referred to,⁹⁸ that the possession of a tenant under a lease is notice of rights in such tenant not based on the lease. The tenant in possession under a lease has a title, namely the lease, adequate to explain his possession, and the purchaser has, in the ordinary case, knowledge of such title, and yet it is held that the possession of the tenant is notice, not only of his interest under the lease, but of any other interest which he may have.

— (e) **Joint possession or occupation.** The cases not infrequently assert that the possession of a third person, in order to affect a purchaser with notice of such person's claim, must be "exclusive." Just what this means is by no means clear. Legal possession is in its nature exclusive of others, the only case in which the possession of one person is not exclusive of others being when there is a joint possession in him and another or others. The statement referred to probably means that the possession must be an actual legal possession, and not a mere occupation under a license, in connection with possession in another.

When two persons are together in the possession of property, a person purchasing the property from a third person, not in possession, would ordinarily be put on inquiry as to the claims of such joint possessors. If one person is in possession, and another person is apparently associated with him in the use of the prop-

registered his one title without of registration.

knowing that he might subse- 98. *Post*, § 571(f), note 20.
quently acquire another incapable

erty, as a member of his family, for instance, but not as sharing in the legal possession, a purchaser from a third person would presumably be put on inquiry as to the rights of the former but not of the latter.

There are a number of decisions to the effect that if two persons, A and B, are in occupation of land, and B is merely a lodger with A, or is a subordinate member of A's family, or otherwise A appears to be in control of the land, the presence of B upon the land is not such possession on his part as to charge a purchaser from A with notice of an adverse interest in B.⁹⁹ In such case B is, in the ordinary case, and strictly speaking, not in possession, and furthermore the fact that he has apparently no powers of control serves to indicate that he has no actual interest in the land, but is there merely in the right of A, and by his permission. On the other hand, a purchaser from B, would, it appears, by the possession of A, be put on inquiry as to the rights of A.¹ If the two persons on the land appear to have equal rights of control thereover, a purchaser from either would, it is conceived, be put on inquiry as to the rights of the other, the presumption being that each has a joint interest.

In perhaps a majority of the decisions as to the effect of joint occupation, as charging a purchaser from one occupant with notice of the other's claim, reference is made to the matter of record title, it being said that if, of two joint occupants, one alone has the record

99. *Townsend v. Little*, 109 U. S. 504, 510, 27 L. Ed. 1012; *Kirby v. Tallmadge*, 160 U. S. 379, 40 L. Ed. 463; *Adams-Booth Co. v. Reid*, 112 Fed. 106; *Munn v. Achey*, 110 Ala. 628, 18 So. 299; *Rubel v. Parker*, 107 Ark. 314, 155 S. W. 114; *Goodwynne v. Bellerby*, 116 Ga. 901, 43 S. E. 275; *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182; *Nabelspach v. Shaw*, 146 Mich. 493, 109

N. W. 843, 111 N. W. 343; *Bell v. Twilight*, 22 N. H. 500 (*semble*); *Rankin v. Coar*, 46 N. J. Eq. 566, 11 L. R. A. 661, 22 Atl. 177; *Patterson v. Mills*, 121 N. C. 258; *Atteberry v. O'Neil*, 42 Wash. 487, 85 Pac. 270. But see *Wyatt v. Elam*, 23 Ga. 201, 68 Am. Dec. 518.

1. *Watson v. Murray*, 54 Ark. 499, 16 S. W. 293.

title, a purchaser has the right to assume that the other has no title,² reference being also usually made, by way of analogy, to the doctrine before referred to,³ that if a person in possession has a title of record, his possession may be imputed to that title. It does not seem, however, that the question of record title should ordinarily affect the question of the sufficiency of the possession to operate as notice. If both A and B are occupying the premises, but A appears to be in control and B to be on the premises in a merely subordinate capacity, a purchaser from B should, it is conceived, inquire as to A's interest in the premises, even though B has the record title, while a purchaser from A should not, in such case, be put on inquiry as to B's interest, even though neither has the record title. Perhaps when both A and B appear to have equal powers of control, a purchaser might be justified in assuming that the one who has the record title is the one actually in possession, and so be relieved from inquiring as to the rights of the other,⁴ but even in such case, it would seem, a purchaser from either might reasonably be required, without reference to the record title, to inquire by what right the other exercises any control over the property.

Actual possession by one of two persons having joint interests would seem to be sufficient, ordinarily, to affect a purchaser from a stranger with notice of the individual interest of the other of such persons.⁵ The

2. See *Kirby v. Talmadge*, 160 U. S. 379, 40 L. Ed. 463; *Munn v. Achey*, 110 Ala. 628, 18 So. 299; *Walden v. Williams*, 128 Ark. 5, 193 S. W. 71; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Whalen v. Schneider*, 281 Ill. 557, 118 N. E. 41; *Thierman v. Bodley*, 23 Ky. L. Rep. 756, 63 S. W. 737; *Butler v. Stevens*, 26 Me. 484 (*semble*); *Pope v. Allen*, 90 N. Y. 298; *Farmers'*

Bank v. Wallace, 45 Ohio St. 152, 12 N. E. 439.

3. *Ante*, § 571(c).

4. *Butler v. Stevens*, 26 Me. 484; *Rankin v. Coar*, 46 N. J. Eq. 566, 11 L. R. A. 661, 22 Atl. 177; *Pope v. Allen*, 90 N. Y. 298; *Cameron v. Romele*, 53 Tex. 238, are perhaps to that effect.

5. See *Ramirez v. Smith*, 94 Tex. 184, 59 S. W. 258; *Kerr v.*

purchaser, upon inquiry of the one in possession, would usually be informed by him that his interest is an undivided one, and that there is a similar interest outstanding in another. Such possession by one cotenant is obviously sufficient to put a purchaser on inquiry as to the interest of such cotenant himself.⁶

That the property is occupied by a married couple has been held to put a purchaser from a third person on inquiry as to a title in the wife adverse to such person,⁷ as it would, no doubt, as to such a title in the husband. And the case would be the same when the husband claims under a lease from the vendor.⁸ That the property is occupied by a married couple would not ordinarily put a purchaser from the husband on inquiry as to an adverse interest in the wife, he having the right to assume that she is on the premises merely by reason of the marital relationship.⁹

Whether the joint occupation of husband and wife would be sufficient to put a purchaser from the wife on inquiry as to a title in the husband appears to be a matter in regard to which no positive rule can be asserted.¹⁰

Kingsbury, 39 Mich. 150, 33 Am. Rep. 362.

6. Anthe v. Heide, 85 Ala. 236, 4 So. 380; Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042; Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 19 Am. St. Rep. 259, 45 N. W. 1136.

7. Kirby v. Talmadge, 160 U. S. 379, 40 L. Ed. 463; Butler v. Thweatt, 119 Ala. 325, 24 So. 545; Iowa Loan & Trust Co. v. King, 58 Iowa, 598, 12 N. W. 595; Phelan v. Brady, 119 N. Y. 587, 23 L. R. A. 211, 23 N. E. 1109; Walker v. Neil, 117 Ga. 733, 45 S. E. 387.

8. Garrard v. Hull, 92 Ga. 787, 20 S. E. 357.

9. Langley v. Pulliam, 162

Ala. 142, 50 So. 365; Neal v. Perkerson, 61 Ga. 346; Austin v. Southern Home Bldg. & Loan Ass'n, 122 Ga. 439, 50 So. 382; Gray v. Lamb, 207 Ill. 258, 69 N. E. 794; Westerfield v. Kimmer, 82 Ind. 365; Thomas v. Kennedy, 24 Iowa, 397, 95 Am. Dec. 740; Allen v. Caldwell, 55 Mich. 8, 20 N. W. 692. But see Brown v. Carey, 149 Pa. 134, 23 Atl. 1103.

10. That it is sufficient, see Broome v. Davis, 87 Ga. 584, 13 S. E. 749. That it is not sufficient, see Kirby v. Talmadge, 160 U. S. 370, 40 L. Ed. 463 (*dictum*); Atwood v. Bearss, 47 Mich. 72, 10 N. W. 112 (*semble*); Fassett v. Smith, 23 N. Y. 252 (*semble*).

— (f) **Possession by tenant under lease.** By the decided weight of authority in this country, a purchaser may, by the possession of a third person, be charged with notice of the rights of one under whom such person holds as tenant.¹¹ This effect given to a tenant's possession is based on the theory that, upon inquiring of the tenant as to his rights, the purchaser would be informed as to the identity of the landlord, and would be put on inquiry as to the latter's rights. In England, however, as in one or two cases in this country, the view has been adopted that a purchaser who neglects to inquire into the title of the occupant, while taking subject to such occupant's rights, does not take subject to the rights of one under whom the latter holds as tenant, unless the purchaser knows that the rent is paid to one whose title is inconsistent with that of the vendor.¹²

The ordinary American rule that the purchaser of land in the possession of a tenant under a lease is

11. *Brunson v. Brooks*, 68 Ala. 248; *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *O'Rourke v. O'Connor*, 39 Cal. 442; *Tillotson v. Mitchell*, 111 Ill. 523; *Gallagher v. Northrup*, 215 Ill. 536, 74 N. E. 711; *Dickey v. Lyon*, 19 Iowa, 544; *Townsend v. Blanchard*, 117 Iowa, 36, 90 N. W. 519; *Penrose v. Cooper*, 86 Kan. 597, 121 Pac. 1103; *Hanly v. Morse*, 32 Me. 287; *Brady v. Sloman*, 156 Mich. 423, 120 N. W. 795; *Wilkins v. Bevier*, 43 Minn. 213, 19 Am. St. Rep. 238, 45 N. W. 157; *Ludowese v. Amidon*, 124 Minn. 288, 144 N. W. 965; *Bratton v. Rogers*, 62 Miss. 281; *Conlee v. McDowell*, 15 Neb. 184, 18 N. W. 60; *Wood v. Price*, 79 N. J. Eq. 620, 38 L. R. A. (N. S.) 772, Ann. Cas. 1913A, 1210, 81 Atl.

983; *McBee v. O'Connell*, 19 N. M. 565, 145 Pac. 123; *Edwards v. Thompson*, 71 N. C. 177; *Randall v. Lingewall*, 43 Ore. 383, 73 Pac. 1; *Hood v. Fahnestock*, 1 Pa. 470; *Hottenstein v. Lerch*, 104 Pa. 454; *Glendenning v. Bell*, 70 Tex. 632, 8 S. W. 324.

12. *Barnhart v. Greenshields*, 9 Moore, P. C. C. 34; *Hunt v. Luck* (1902), 1 Ch. 428; *Flagg v. Mann*, Fed. Cas. No. 4,847, 2 Sumn. 486; *Beattie v. Beattie*, 21 Mo. 313, 64 Am. Dec. 234. For a criticism of the English view, see editorial note 12 Columbia Law Rev. 549.

It has been decided that possession by a tenant does not charge a purchaser with notice that the rent has been assigned. *Steel v. De May*, 102 Mich. 274, 60 N. W. 684.

charged with notice of the rights of the landlord, has, in a number of cases, been regarded as inapplicable when the same tenant had previously held possession as tenant under the vendor, the theory being that there having been no actual change of possession in such case, a subsequent purchaser from the vendor has no reason to suspect a divestiture of the latter's title.¹³ One difficulty with this view is that it appears to assume that the purchaser invariably has notice of the prior state of the title. If he is not aware that the tenant formerly held under the vendor, he is certainly not justified in assuming that the tenant holds under the vendor at the time of the sale.¹⁴ It might furthermore be questioned whether a purchaser has a right to assume, because he knows that the person in possession was formerly holding under a particular person, that he is still holding under the same person.¹⁵ There are occasional decisions apparently opposed to those above cited.¹⁶

Whether, adopting the ordinary American rule, the purchaser would be relieved from further inquiry in case the tenant informs him that he holds under a lease, but refuses to inform him as to the identity of the landlord, appears not to have been decided. He would, presumably, in such case, have no right to assume that

13. *Fitzgerald v. Williamson*, 85 Ala. 585, 5 So. 309; *King v. Paulk*, 85 Ala. 186, 4 So. 825; *Griffin v. Hall*, 111 Ala. 601, 20 So. 48; *Wahrenberger v. Waid*, 8 Colo. App. 200, 45 Pac. 518; *Stockton v. National Bank of Jacksonville*, 45 Fla. 590, 34 So. 897; *Veasie v. Parker*, 23 Me. 170. *Loughridge v. Bowland*, 52 Miss. 546; *Conlee v. McDowell*, 15 Neb. 189, 18 N. W. 60. See *McCormick v. McCormick Harvesting Mach. Co.*, 122 Iowa, 393, 95 N. W. 181.

14. See *Phelan v. Brady*, 119 N. Y. 587, 8 L. R. A. 211, 23 N. E. 1109.

15. See *Mainwaring v. Templeman*, 51 Tex. 212.

16. *Haworth v. Taylor*, 108 Ill. 275; *Mallett v. Kaehler*, 141 Ill. 70, 30 N. E. 549; *Hannan v. Seidentopf*, 113 Iowa, 659, 86 N. W. 44; *Penrose v. Cooper*, 86 Kan. 597, 121 Pac. 1103; *Duff v. McDonough*, 155 Pa. 10, 25 Atl. 608; *Mainwaring v. Templeman*, 51 Tex. 212; *Duncan v. Matula*, (Tex. Civ. App.) 26 S. W. 638.

the person in possession holds as tenant under the vendor.¹⁷

There are occasional decisions that, if the person in possession held originally as tenant under the vendor, the fact that the vendor transferred his reversionary interest to another does not of itself, without any attornment by the tenant to the transferee, make the latter the landlord, so as to charge a subsequent purchaser with notice of the latter's rights by reason of the tenant's possession.¹⁸ This requirement of attornment, which is, in connection with the transfer of a reversion, for most purposes obsolete,¹⁹ is presumably to be regarded as based on the theory that until the tenant has in some way recognized his new landlord, an inquiry of him would usually not result in the discovery of the transfer of the reversion.

It has been decided in a number of states that, by the possession of a tenant under a lease, a purchaser is chargeable with notice, not only of the tenant's rights under the lease, but also of any right which he may have not under the lease, as, for instance, under an agreement by the lessor to sell the property to him.²⁰

17. There is a decision that, although a purchaser, upon inquiring of the tenant in possession, is told by him that he is holding as tenant of the vendor, he is nevertheless charged with notice of the rights of another, under whom the tenant is actually holding as tenant. *Clarke v. Beck*, 72 Ga. 127. This decision is based on the (mistaken) theory that a tenant can never deny his landlord's title. See 1 Tiffany, *Landlord & Tenant* pp. 448-450. The hardship on the purchaser seems obvious.

18. *McCormick v. McCormick Harvesting Mach. Co.*, 122 Iowa, 393, 95 N. W. 181; *Wilkins v. Bevier*, 43 Minn. 213, 19 Am. St.

Rep. 288, 45 N. W. 157; *Ferguson v. McCrary*, 20 Tex. Civ. App. 529, 50 S. W. 472.

19. *Ante*. § 53(a).

20. *Brewer v. Brewer*, 19 Ala. 481; *McRae v. McMinn*, 17 Fla. 876; *Coari v. Olson*, 91 Ill. 273; *Crooks v. Jenkins*, 124 Iowa, 317, 104 Am. St. Rep. 326, 100 N. W. 82; *Russell v. Moore*, 3 Metc. (Ky.) 476; *Hull v. Noble*, 40 Me. 481; *Dengler v. Fowler*, 94 Neb. 621, 143 N. W. 944; *Havens v. Bliss*, 26 N. J. Eq. 363; *Wood v. Price*, 79 N. J. Eq. 620, 28 L. R. A. (N. S.) 772, Ann. Cas. 1913A 1210, 81 Atl. 983; *Chesterman v. Gardner*, 5 Johns. Ch. (N. Y.) 29; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Anderson v.*

These decisions are based on English decisions, to the same effect,²¹ and involve merely an application of the general rule, as recognized in England, that a purchaser is under a primary duty to inquire of the person or persons in possession as to the character and extent of his rights. They do not consider the effect of the possible record of the lease, but presumably, if the lease were recorded, since the tenant would then have a record title to explain the possession, the purchaser would, in some states,²² be relieved from any duty of inquiry as to the rights of the tenant apart from the lease.²³

It has been intimated that if the tenant under a lease acquired the fee simple title immediately before the purchase of the land by another, the purchaser, knowing that such tenant has been in possession as tenant under a lease, may presume that his possession is still under the lease, and is under no obligation to make inquiry as to his rights.²⁴ But such a view cannot well be harmonized with the decisions, above referred to,²⁵ that by the possession of a tenant under a lease a

Brinsner, 129 Pa. 376, 6 L. R. A. 205, 11 Atl. 809, 18 Atl. 520. In Texas a contrary rule appears to prevail. *Smith v. Miller*, 63 Tex. 72; *Brown v. Roland*, 11 Tex. Civ. App. 648, 33 S. W. 373; *Hamilton v. Ingram*, 13 Tex. Civ. App. 604, 35 S. W. 748. But see *Jackson v. Walls*,—Tex. Civ. App.—, 187 S. W. 676.

21. *Allen v. Anthony*, 1 Meriv. 282; *Barnhart v. Greenshields*, 9 Moore P. C. 18; *Daniels v. Davison*, 16 Ves. 249

22. *Ante*, § 571(c)..

23. It was so decided in *Red River Valley Land & Investment Co. v. Smith*, 7 N. D. 236, 74 N. W. 194; *Hamilton v. Ingram*, 13 Tex. Civ. App. 604, 35 S. W. 748. *Contra*, *Dengler v. Fowler*, 2 R. P.—66

94 Neb. 621, 143 N. W. 944. The first cited case refers to *Leach v. Ansbacher* 55 Pa. 85, to the effect that, if a purchaser knows of a lease, he can attribute the lessee's possession to the lease, and is not charged with notice of any outstanding equities. But this latter case is overruled by *Anderson v. Brinsmer*, 129 Pa. 376, 6 L. R. A. 205, 11 Atl. 809, 18 Atl. 520.

24. *Rogers v. Jones*, 8 N. H. 264; *McMechan v. Griffing*, 3 Pick. (Mass.) 149; *Hewes v. Wiswell*, 8 Me. 94; *Kelley v. Blakeney*, —Tex. Civ. App.—, 172 S. W. 770, *Contra*, *Crooks v. Jenkins*, 124 Iowa, 317, 104 Am. St. Rep. 82, 100 N. W. 82.

25. *Ante*, this section, note 20.

purchaser is charged with notice of rights of the latter not based on the lease.²⁶ If the purchaser is, by the possession of one who entered under a lease, charged with notice of his rights, for instance, under a contract for the purchase of the fee simple title, he should be charged with notice of his rights under an actual conveyance.

There is a decision to the apparent effect that a purchaser cannot, by the possession of a tenant under a lease, be charged with notice of such tenant's rights, if the latter was, before the making of the lease, in possession as a trespasser.²⁷ It is not clear why the purchaser should, in such case, be relieved from the duty of inquiry.

— (g) **Continued possession by grantor.** Some courts have adopted the view that the continuance in possession by a grantor, after conveying the land, is, like the possession of any other person, sufficient to put a subsequent purchaser on inquiry, and so affect him with notice of any rights in the grantor.²⁸ Other courts take the view that, by executing a conveyance of property, the

26. See *Flagg v. Mann*, 2 Sumn. 486, 556; *Matthews v. Demeritt*, 22 Me. 312.

27. *Emmons v. Murray*, 16 N. H. 385.

28. *Gerwin v. Shields*, 187 Ala. 153, 65 So. 769; *Pell v. McElroy*, 36 Cal. 268; *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *Springfield Homestead Ass'n v. Roll*, 137 Ill. 205, 31 Am. St. Rep. 358, 27 N. E. 184 (*semble*). *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *Hopkins v. Garrard*, 7 B. Mon. (Ky.) 312; *Kentland Coal & Coke Co. v. Elswick*, 167 Ky. 593, 181 S. W. 181, (if conveyance procured by fraud); *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646; *Teal v. Scandi-*

navian American Bank of Grand Forks, 114 Minn. 435, 131 N. W. 486; *Ludowese v. Amidon*, 124 Minn. 288, 144 N. W. 965; *Smith v. Myers*, 56 Neb. 503, 76 N. W. 108; *Seymour v. McKinstry*, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94 (*semble*); *Grimstone v. Carter*, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; (But see *Cook v. Travis*, 20 N. Y. 400); *O'Toole v. Omlie*, 8 N. D. 444, 79 N. W. 849; *Manigault v. Lofton*, 78 S. C. 499, 59 N. E. 534; *Pippin v. Richards*, 146 Wis. 69, 130 N. W. 872; In *Hedlin v. Lee*, 21 N. D. 495, 131 N. W. 390, it was held that a purchaser from one who claimed under an invalid foreclosure sale was, by the continued possession

grantor in effect declares that he thereby disposes of all his rights therein, and that a subsequent purchaser from the grantee may accordingly assume that, if the grantor retains possession, it is not by force of any interest retained by him, but merely by the sufferance of the grantee, and that the purchaser is consequently relieved from any duty of making inquiry as to his rights,²⁹ unless, according to some cases, his possession continues a considerable period after the delivery of the conveyance.³⁰ One difficulty with this latter view is that it imputes to a conveyance an effect as a declaration by the grantor, for the purpose of raising an estoppel against him, which is not necessarily in accord with the understanding of the parties or with the legal effect of the conveyance. One executing, for instance, a

of the former owner, charged with notice if the invalidity of the sale.

29. *Morgan v. McCuin*, 96 Ark. 512, 132 S. W. 459; *Malette v. Wright*, 120 Ga. 735, 48 S. E. 229; *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. 243; *Trulin v. Plested*, 178 Iowa, 220, 159 N. W. 633; *McNeil v. Jordan*, 28 Kan. 7; *Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453; *McEwen v. Keary*, 178 Mich. 6, L. R. A. 1916B 1063, 144 N. W. 524; *Baldwin v. Anderson*, 103 Miss. 462, 60 So. 578; *Vankeuren v. Central R. Co. of New Jersey*, 38 N. J. L. 165; *Rankin v. Coar*, 46 N. J. Eq. 566, 11 L. R. A. 661, 22 Atl. 177; *Cook v. Travis*, 20 N. Y. 400; *Red River Valley Land Investment Co. v. Smith*, 7 N. D. 236, 74 N. W. 194; *Rowsey v. Jamison*, 46 Okla. 780, 149 Pac. 880; *La Forest v. Downer*, 63 Ore. 176, 126 Pac. 995; *Scott v. Gallagher*, 14 Serg. & R. (Pa.) 333;

Eylar v. Eylar, 60 Tex. 315; *Love v. Breedlove*, 75 Tex. 649, 13 S. W. 22; *Murry v. Carlton*, 65 Wash. 364, 44 L. R. A. (N. S.) 314, 118 Pac. 332. But the purchaser can obviously not be protected if a lack of good faith on his part appears otherwise. *Smith v. Phillips*, 9 Okla. 297, 60 Pac. 117.

On apparently the same theory it has been held that the continuance in possession of one whose title has been divested by judicial decree does not affect with notice one purchasing from the person in whom title is vested by the decree. *Dawson v. Danbury Bank*, 15 Mich. 489; *Harms v. Coryell*, 177 Ill. 496, 53 N. E. 87.

30. *Turman v. Bell*, 4 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 886; *American Bldg. & Loan Ass'n v. Warren*, 101 Ark. 163, 141 S. W. 765; *Bennett v. Robinson*, 27 Mich. 26; *Stevens v. Hulin*, 53

conveyance of a fee simple title, may perfectly well acquire, by the same or a subsequent transaction, an equity against the grantee or a lease for a limited period, and it is difficult to see why his conveyance should be regarded as a declaration that he has not acquired, or will not acquire, such an interest, or why a subsequent purchaser should be justified in assuming, for the purpose of being relieved from any duty of inquiry, that the grantor's continuance in possession is wrongful rather than rightful.

It has been decided that if A and B being in possession of land, A conveys the land to B, and they subsequently both remain in possession, the possession of B does not charge a purchaser from A with notice of B's title.³¹ If, however, in such case, B assumes control of the property, A remaining thereon only in a subordinate capacity, B's possession might, it would seem, affect the purchaser from A with notice of B's title.

§ 572. Notice from statements in instruments of title. In so far as a purchaser has actual or constructive notice of a conveyance or other instrument executed by one previously owning or claiming to own the land, he is charged with notice of all matters stated or referred to in such conveyance, which may possibly affect the title, and he is bound to make any inquiries or researches suggested by such statements or references.³²

Mich. 93, 18 N. W. 569; *Contra*, Jones v. Grimes, 115 Miss. 874 76 So. 735.

31. McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Watt v. Parsons, 73 Ala. 202; Foulks v. Reed, 89 Ind. 373; Atwood v. Bearss, 47 Mich. 72, 10 N. W. 112; Rankin v. Coar, 46 N. J. Eq. 566, 11 L. R. A. 661, 22 Atl. 117.

32. Gaines v. Summers, 50 Ark. 322; Hitchcock v. Hines, 143 Ga. 377, 85 S. E. 119; Crawford v. Chicago B. & Q. R. Co., 112 Ill. 314; Smith v. Burgess,

133 Mass. 513; Sioux City & St. P. R. Co. v. Singer, 49 Minn. 301, 32 Am. St. Rep. 554; Stewart v. Matheny, 66 Miss. 21, 14 Am. St. Rep. 538, 5 So. 387; Gross v. Watts, 206 Mo. 373, 121 Am. St. Rep. 662, 104 S. W. 30; Buchanan v. Balkum, 60 N. H. 406; Roll v. Rea, 50 N. J. L. 264, 12 Atl. 905; McPherson v. Rollins, 107 N. Y. 316, 1 Am. St. Rep. 826, 14 N. E. 411; Muller v. McCann, 50 Okla. 710, 151 Pac. 621; Jennings v. Bloomfield, 199 Pa. 638, 49 Atl.

For this purpose a purchaser is charged with notice of any conveyance which occurs in the chain of title under which he claims, that is, he is charged with notice of all matters stated or referred to in any conveyance which is essential to support his claim, without reference to whether he has actual notice of such conveyance.³³ And the fact that such conveyance in the chain of title is not of record is immaterial in this regard.³⁴ And he is charged with notice of the contents, not only of instruments in his chain of title, but also of other instruments referred to in such instruments, although not of record,³⁵

135; *Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484. So a purchaser is chargeable with notice of a restrictive covenant contained in a conveyance in his chain of title; *Wiegman v. Kusel*, 270 Ill. 520, 110 N. E. 884; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241; *Schadt v. Brill*, 173 Mich. 647, 45 L. R. A. (N. S.) 726, 139 N. W. 878; *Winfield v. Henning*, 21 N. J. Eq. 188; *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675.

One purchasing land with notice of a mortgage or deed of trust thereon to secure a loan, containing a power of sale, has been regarded as charged with notice of a sale under the power. *Farrar v. Payne*, 73 Ill. 82; *Heaton v. Prather*, 84 Ill. 330; *Hill v. Ballard*—(Mo.)—, 178 S. W. 445; *Mansfield v. Elcelsior Refining Co.*, 135 U. S. 326, 34 L. Ed. 162.

33. *Wormley v. Wormley*, 8 Wheat. (U. S.) 421, 447, 5 L. Ed. 651; *Larkin v. Haralson*, 189 Ala. 147, 66 So. 459; *Costello v. Graham*, 9 Ariz. 257, 80 Pac. 336; *White v. Moffett*, 108 Ark. 490, 158 S. W. 505; *Myers v. Berven*, 166 Cal. 484, 137 Pac. 260; *Simms*

v. Freiherr, 100 Ga. 607, 28 S. E. 288; *Stager v. Crabtree*, 177 Ill. 59, 52 N. E. 378; *Hazlett v. Sinclair*, 76 Ind. 488; *Knowles v. Williams*, 58 Kan. 221, 48 Pac. 856; *Hyde Park Supply Co. v. Peck-Williamson Heating & Ventilating Co.*, 176 Ky. 513, 195 S. W. 1115; *Green v. Early*, 39 Md. 223; *Baldwin v. Anderson*, 103 Miss. 462, 60 So. 578; *Gross v. Watts*, 206 Mo. 373, 121 Am. St. Rep. 662, 104 S. W. 30; *Lyon v. Gombert*, 63 Neb. 630, 88 N. W. 774; *Gosman v. Pfistner*, 80 N. J. Eq. 432, 83 Atl. 781; *Holmes v. Holmes*, 86 N. C. 205. *In re Mulholland*, 224 Pa. 536, 132 Am. St. Rep. 791; *Baxter v. First Nat. Bank*, 85 Tenn. 33, 1 S. W. 501; *Whitlock v. Johnson*, 87 Va. 323, 12 S. E. 614.

34. *Green v. Maddox*, 97 Ark. 397, 134 S. W. 931; *Bailey v. Southern R. Co.*, 112 Ky. 424, 60 S. W. 631; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241; *Gilbough v. Runge*, 99 Tex. 539, 122 Am. St. Rep. 659, 91 S. W. 566; *2 Pomeroy*, Eq. Jur. 627.

35. *Hamilton v. Nutt*, 34 Conn. 501; *Weigel v. Green*, 213 Ill. 227,

in so far, at least, as it is reasonably possible for him to acquire knowledge thereof. And it follows that notice of a prior conveyance thus acquired by reference thereto in the chain of title is sufficient to defeat any claim of priority based on the failure to record such conveyance.³⁶ Being put upon inquiry by the recital or statement in a conveyance in the chain of title, the purchaser "is bound to follow up this inquiry, step by step, from one discovery to another and from one instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the estate is obtained. Being thus put upon inquiry, the purchaser is presumed to have prosecuted the inquiry until its final result and with ultimate success."³⁷ Likewise, if a purchaser is charged with notice of an instrument, as being of record, or in his chain of title, and such instrument refers to a judicial proceeding, he is chargeable with notice of the

75 N. E. 913; *Walls v. State*, 140 Ind. 16, 38 N. E. 177; *Taylor v. Mitchell*, 58 Kan. 194, 48 Pac. 859; *Bailey v. Southern Ry. Co.*, 112 Ky. 424, 60 S. W. 631, 61 S. W. 31; *White v. Foster*, 102 Mass. 375; *Daughaday v. Paine*, 6 Minn. 443; *Binder v. Weinberg*, 94 Miss. 817, 48 So. 1013; *Buchanan v. Balkum*, 60 N. H. 406; *Sweet v. Henry*, 175 N. Y. 268, 67 N. E. 574; *Creek Land & Imp. Co. v. Davis*, 28 Okla. 579, 115 Pac. 468; *Hancock v. McAvoy*, 151 Pa. 460, 18 L. R. A. 781, 31 Am. St. Rep. 774, 25 Atl. 47; *Davis v. Tebbs*, 81 Va. 600; *Duval v. Crawford*, 73 W. Va. 122, 80 S. E. 833. In *Re Nisbet & Potts' Contract* (1905) 1 Ch. 391, it was held that one acquiring title by adverse possession was charged with notice of recitals in a conveyance to the dissee.

36. *Rosser v. Cheney*, 61 Ga.

468; *Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243; *Bronson v. Wanzer*, 86 Mo. 408; *Buchanan v. Balkum*, 60 N. H. 406; *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826; *Parke v. Neeley*, 90 Pa. St. 52; *Davis v. Tebbs*, 81 Va. 600; *Town v. Gensch*, 101 Wis. 445, 76 N. W. 1096, 77 N. W. 893.

37. *Loomis v. Cobb*,—Tex. Civ. App.—, 159 S. W. 305, per Higgins, J. See *Croasdale v. Hill*, 78 Kan. 140, 96 Pac. 37; *Bergstrom v. Johnson*, 111 Minn. 247, 126 N. W. 899; *Adams v. Gossom*, 228 Mo. 566, 129 S. W. 16; *Snyder v. Collier*, 85 Neb. 552, 133 Am. St. Rep. 682, 123 N. W. 1023; *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. 905; *Sweet v. Henry*, 175 N. Y. 268, 67 N. E. 574; *Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484; *Montgomery v. Noyes*, 73 Tex. 203, 11 S. W. 138.

character and validity of such proceeding, so far as the title is dependent thereon.³⁸

A purchaser has occasionally been held to be charged with notice of the inadequacy of the consideration recited in a conveyance under which his grantor claims, so as to be put on inquiry as to whether the title is not defective.³⁹ But such a view has been regarded as inapplicable when the conveyance had been executed a number of years before.⁴⁰

A reference in one instrument to another instrument can not affect a purchaser with notice of the latter instrument unless the reference is such as to put a reasonably careful man on inquiry with regard thereto.⁴¹ And consequently it must be in such language as to suggest a probability, or at least a possibility, that the instrument referred to in some way affects the title.⁴² Furthermore, it has been said, it must be sufficiently specific to enable a purchaser to ascertain by inquiry and in-

38. *Chicago R. I. & P. R. Co. v. Kennedy*, 70 Ill. 350; *Singer v. Scheible*, 109 Ind. 575, 10 N. 616; *Spears v. Waddington*, 146 Ky. 434, 142 S. W. 679; *Wood v. Krebbs*, 30 Gratt. (Va.) 708; *Whitney v. Whitney Elevator & Warehouse Co.*, 183 Fed. 678, 106 C. C. A. 28.

39. *Winters v. Powell*, 180 Ala. 425, 61 So. 96; *Gaines v. Summers*, 50 Ark. 322, 7 S. W. 301; *Hume v. Franzen*, 73 Iowa, 25, 34 N. W. 490 (*semble*); *Laldwin v. Anderson*, 103 Miss. 462, 60 So. 578.

40. *Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1020; *Ross v. Kenwood Inv. Co.*,—Wash.—, 131 Pac. 649; *Kinney v. McCall*, 57 Wash. 545, 107 Pac. 385. In the last cited case it is well said that "a purchaser of real property is not

bound to compare the consideration recited in every deed in his chain of title with the market value of the property at the time of the several conveyances, under penalty of having the property impressed with a secret trust in his hands."

41. *Wood v. Pitman Coal Co.*, 90 Ky. 588, 14 S. W. 588; *Jennings v. Dockham*, 99 Mich. 253, 58 N. W. 66; *Croft v. Wood*, 3 Hun (N. Y.) 571; *Stewart's Appeal*, 98 Pa. 377; *Durst v. Daugherty*, 81 Tex. 650, 17 S. W. 388; *Lewis v. Barnhart*, 145 U. S. 56, 36 L. Ed. 621.

42. *Mueller v. Engeln*, 12 Bush (Ky.) 441; *Mendelsohn v. Armstrong*, 52 La. Ann. 1300, 27 So. 735; *Kansas City Land Co. v. Hill*, 87 Tenn. 589, 5 L. R. A. 45, 11 S. W. 797.

vestigation whether the instrument or proceeding or other matter referred to does affect the title.⁴³

A purchaser is not charged with notice of matters referred to in a conveyance of the land which is not a part of the chain of title under which he claims, which is not referred to in any instrument constituting a part of such chain, and of which he has not otherwise any actual or constructive notice.⁴⁴ and *à fortiori* is this the case as regards a conveyance of other land.⁴⁵ But a purchaser has been regarded as charged with notice of a provision contained in a conveyance of neighboring land, made by one in his chain of title, when the purpose and effect of such provision was to create an easement or other servitude upon the land which he is purchasing.⁴⁶

A purchaser is not, it seems, put on inquiry as to defects in the title by the fact that a conveyance in the chain of title contains no covenant for title,⁴⁷ or is in the form of a quitclaim deed.⁴⁸ And the same view has

43. *Spellman v. McKeen*, 96 Miss. 693, 51 So. 914; *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355. See *Walls v. State*, 140 Ind. 16, 38 N. E. 177.

44. *Grundies v. Reid*, 107 Ill. 304; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Sullivan v. Mefford*, 143 Iowa, 210, 121 N. W. 569; *Knox County v. Brown*, 103 Mo. 223, 15 S. W. 382; *Chandler v. Robinson* (N. J. Eq.), 75 Atl. 180; *Hetherington v. Clark*, 30 Pa. St. 393; *Ramirez v. Smith*, 94 Tex. 184, 59 S. W. 258; *Ely v. Wilcox*, 20 Wis. 523.

45. *Lewis v. Barnhart*, 145 U. S. 56, 36 L. Ed. 621; *Bazemore v. Davis*, 55 Ga. 504; *Meacham v. Blaess*, 141 Mich. 258, 104 N. W. 579; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Kiley v. Hall*, 76 Ohio 374, 117 N. E. 359;

Claiborne v. Holland, 88 Va. 1046, 14 S. E. 915; *Providence Forge Fishing Hunting Club v. Gill*, 117 Va. 557, 85 S. E. 464. But in *Rogers v. White*,—Tex. Civ. App.—, 194 S. W. 1001, the purchaser of land was regarded as charged with notice as to the ownership of such land by reason of a statement in a conveyance to him of other land.

46. *Ante*, § 567(d), notes 60-64.

47. *Wilhelm v. Wilken*, 149 N. Y. 447, 32 L. R. A. 370, 52 Am. St. Rep. 743, 44 N. E. 82; *Schott v. Dosh*, 49 Neb. 187, 59 Am. St. Rep. 531, 68 N. W. 346; *Babcock v. Wells*, 25 R. I. 23, 105 Am. St. Rep. 848, 54 Atl. 596; *Padgitt v. Still*,—Tex. Civ. App.—, 192 S. W. 1110.

48. *Ante*, § 567(1), note 28.

been expressed as to the presence of a special warranty in ordinary form.⁴⁹ The warranty might, however, be so limited as to put a purchaser on notice.⁵⁰

§ 573. **Actual and constructive notice.** Notice is usually said to be either actual or constructive, but the cases and text books are absolutely lacking in harmony as to the line of demarcation between the two classes of notice, and any statements here made in regard thereto are ventured merely by way of suggestion. Fortunately it is immaterial whether notice is, in a particular case, to be regarded as actual or constructive, unless it is asserted as satisfying a statutory requirement of actual notice.⁵¹

It would seem that one might properly be said to have actual notice when he has information in regard to a fact, or information as to circumstances an investigation of which would lead him to information of such fact, while he might be said to have constructive notice when he is charged with notice by a statute or a rule of law, irrespective of any information which he may have, actual notice thus involving a mental operation on the part of the person sought to be charged, and constructive notice being independent of any mental operation on his part. In the nature of things, information as to a matter necessarily varies as regards the particularity of the information, and there seems, in principle, no distinction between notice of a fact based on positive information that that very fact exists, and notice based on information creating a suspicion that the fact exists.

Applying such a criterion, a purchaser may have actual notice of a prior claim on the land, not only when the nature of the claim is specifically stated to him, but also when he is told that a certain person has

49. *Marston v. Catterlin*, 270 Mo. 5, 192 S. W. 413.

292; *Padgitt v. Still*,—Tex. Civ. App.—, 192 S. W. 1110.

50. *Cypress Lumber Co. v. Shadel*, 52 La. Ann. 2094, 28 So.

51. *Ante*, §§ 568, note 50, 571, note 68.

a claim of a character not mentioned, he thus having information sufficient to enable him to inquire as to the existence of such claim,⁵² and he may be regarded as having actual notice of the claim though he has not been actually informed that any claim exists, as for instance when he pays a grossly inadequate price for the property,^{52a} or, in England, when the vendor refuses to produce the title papers. Applying the same criterion, a purchaser has constructive notice of all instruments in his chain of title, irrespective of whether he has any information in regard thereto, and also of all statements or references in an instrument affecting the title, of the existence of which instrument he has actual or constructive notice, although he has not seen such instrument.⁵³ Likewise, the notice with which a principal may be charged by reason of notice to his agent,⁵⁴ may properly be referred to as constructive notice, it being entirely independent of any mental consciousness on the part of the principal.

Adopting the suggested line of demarcation between actual and constructive notice, a purchaser might, under particular circumstances, be regarded as having both actual and constructive notice. In the case, for instance, of possession of the property by a third person, the purchaser is charged with constructive notice of an adverse claim under which such person is holding,⁵⁵ irrespective of his knowledge of such possession, as when he is living in another state. But also he may be regarded, provided he knows of such possession, and only then, as having actual notice of the claim on which such possession is based. And so the presence of structures upon the property may be sufficient to charge a purchaser with actual notice of an easement upon the property, provided he has actual knowledge of such structures. But if he were to be charged with notice of the easement by reason of the existence of the struc-

52. *Ante*, § 569, note 52.

54. *Ante*, § 570.

52a. *Ante*, § 569, notes 55, 56.

55. *Ante*, § 571(a), note 68.

53. *Ante*, § 572.

tures, independently of his having knowledge of them, the notice would be constructive and not actual.⁵⁶

§ 574. **Purchasers for value.**—(a) **Valuable consideration.** In order to claim priority as against one whose rights have first accrued, one must be a purchaser for value, and one who receives a conveyance based on a merely “good,” as distinguished from a “valuable,” consideration, takes subject to all prior conveyances or incumbrances. It is a principle of equity, independently of statute, that such a purchaser takes subject to prior equities, but the recording acts usually in terms require a conveyance to be recorded only as against purchasers for valuable consideration, and, even in the absence of such an express declaration, the statutes have ordinarily been so construed.⁵⁷

One is not a purchaser for a valuable consideration, unless he has parted with money or money's worth in consideration of the conveyance,⁵⁸ that is he must, as a consideration for the conveyance, have done some act by reason of which, if the conveyance were set aside, he would be in a worse pecuniary position than before.⁵⁹ For this reason, an agreement by the grantee to support the grantor is not a valuable consideration, if it is in effect merely a condition on which he can retain the title, or merely a promise to pay, which would become ineffective in case of lack of title on the part of the vendor.⁶⁰ But the assumption by the purchaser, as a part of the price, of a debt due by his vendor to a third

56. *Ante*, § 569, note 54.

57. See 2 Pomeroy, Eq. Jur. §§ 656, 746-751; 1 Stimson's Am. St. Law, § 1611; Webb, Record of Title, § 204.

58. *Frey v. Clifford*, 44 Cal. 335; *Doss v. Armstrong*, 6 How. (Miss.) 258; *Strong v. Whybark*, 204 Mo. 341, 12 L. R. A. (N. S.) 240, 120 Am. St. Rep. 710, 102 S. W. 968; *Ten Eyck v. Witbeck*, 135 N. Y. 40, 31 Am. St. Rep.

809, 31 N. E. 994.

59. *Boon v. Baines*, 23 Miss. 136.

60. *Doe v. Doe*, 37 N. H. 268. For a like reason, it does not seem that there is a valuable consideration accruing to the grantor merely because his conveyance contains the reservation of an easement in his favor. But *Aden v. City of Vallejo*, 139 Cal. 165, 72 Pac. 905, is *contra*.

person, whereby he becomes absolutely obligated to the latter, constitutes a valuable consideration.⁶¹

— (b) **Pre-existing debt.** By the very decided weight of authority, one who takes a mortgage or deed of trust to secure a pre-existing debt, without at the time relinquishing any right or claim as a consideration for the mortgage, is not a purchaser for value.⁶² Occasional decisions, however, assert that the mortgagee is in such case protected as against a prior unrecorded conveyance. This view is occasionally based upon the fact that the recording act does not in terms mention a valuable consideration as essential to the protection of a subsequent purchaser,⁶³ and occasionally upon the theory that such a mortgagee is a purchaser for valuable consideration.⁶⁴ So far as this latter view may be sought to be supported by reference to the rule adopted in many jurisdictions, that the indorsee of a negotiable instrument, taking it as security for a pre-existing debt, takes it free of equities or defenses between prior

61. *Jackson v. Winslow*, 9 Cow. (N. Y.) 13; *Warren v. Wilder*, 114 N. Y. 209, 215, 21 N. E. 159; *Watkins v. Reynolds*, 123 N. Y. 211, 25 N. E. 322; *Citizen's Bank of Parker v. Shaw*, 14 S. Dak. 197, 84 N. W. 779; *Henderson v. Pilgrim*, 22 Tex. 464; *Essex v. Mitchell*,—Tex. Civ. App. —, 183 S. W. 399.

62. *People's Sav. Bank v. Bates*, 120 U. S. 556, 30 L. Ed. 754; *Jones v. Robinson*, 77 Ala. 499; *Haldiman v. Taft*, 102 Ark. 45, 143 S. W. 112; *Hubert v. Merchants' Bank*, 137 Ga. 70, 72 S. E. 505; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Senneff v. Brackey*, 165 Iowa, 525, 146 N. W. 24; *Goodwin v. Massachusetts Loan & Trust Co.*, 152 Mass. 189, 25 N. E. 100; *Boxheimer v. Gunn*, 24 Mich. 372;

Schumpart v. Dillard, 55 Miss. 361; *Weaver v. Barden*, 49 N. Y. 286; *Union Nat. Bank of Oshkosh v. Oium*, 3 N. D. 193, 44 Am. St. Rep. 533, 54 N. W. 1034; *McGrath v. Cowen*, 57 Ohio St. 385, 49 N. E. 338; *Adamson v. Souder*, 105 Pa. 498, 55 Atl. 182; *Brown v. Vanlier*, 7 Humph. (Tenn.) 239; *Spurlock v. Sullivan*, 36 Tex. 511; *McDonald & Co. v. Johns*, 62 Wash. 521, 33 L. R. A. (N. S.) 57, 114 Pac. 175; *Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576, 24 N. W. 419.

63. *Hayner v. Eberhardt*, 37 Kan. 308, 15 Pac. 168; *Dorr v. Meyer*, 51 Neb. 94, 70 N. W. 543.

64. *Frey v. Clifford*, 44 Cal. 335; *Cammack v. Soran*, 30 Gratt. (Va.) 292; *Chapman v. Chapman*, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813; *Gilbert*

parties, it seems appropriate to quote the statement of a high tribunal that "the rules established in the interests of commerce to facilitate the negotiation of mercantile paper, which, for all practical purposes, passes by delivery as money, ought not, in reason, to embrace instruments conveying or transferring real or personal property as security for the payment of money."⁶⁵

If, as a consideration for the giving of a mortgage or deed of trust to secure a pre-existing debt, the creditor relinquishes other security for the debt, he is in a position to claim as a purchaser for value,⁶⁶ as he is if he extends the time for the payment of the debt.⁶⁷

One who takes an absolute conveyance of land in satisfaction of a pre-existing debt, he relinquishing all claim on the debt, is in some jurisdictions regarded as entitled to claim as a purchaser for valuable consideration,⁶⁸ while in other jurisdictions he is not so re-

Bros. & Co. v. Lawrence Bros., 56 W. Va. 281, 49 S. E. 155.

65. People's Sav. Bank v. Bates, 120 U. S. 556, 30 L. Ed. 754, per Harlan, J. And see, to the same effect. Haldiman v. Taft, 102 Ark. 45, 143 S. W. 112.

66. Richardson v. Wren, 11 Ariz. 395, 95 Pac. 124, 16 L. R. A. (N. S.) 190; Wilson v. Knight, 59 Ala. 172; Fitzpatrick v. Papa, 89 Ind. 17; McCleery v. Wakefield, 76 Iowa, 529, 2 L. R. A. 529, 41 N. W. 210; Hinds v. Pugh, 48 Miss. 268; Lane v. Logue, 12 Lea. (Tenn.) 681. See Farmers' Merchants' Nat. Bank v. Wallace, 45 Ohio St. 153, 12 N. E. 439.

67. Jones v. Robinson, 77 Ala. 499; Randolph v. Webb, 116 Ala. 135, 22 So. 550; Hill v. Yarbrough, 62 Ark. 320, 35 S. W. 433; Tripler v. MacDonald Lumber Co., 173 Cal. 144, 159 Pac. 591; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250, Koon v.

Tramel, 71 Iowa, 132, 32 N. W. 243; De Mey v. Defer, 103 Mich. 239, 61 N. W. 524; Schumpert v. Dillard, 55 Miss. 348; Dourdedoure v. Humbert, 85 N. J. Eq. 89, 95 Atl. 742; O'Brien v. Fleckenstein, 180 N. Y. 350, 105 Am. St. Rep. 768, 73 N. E. 30; Branch v. Griffin, 99 N. C. 173, 5 S. E. 393, 398 (*semble*); First Nat. Bank v. Lamont, 5 N. D. 393, 67 N. W. 145; Farmer's & Merchants' Nat. Bank v. Wallace, 45 Ohio St. 153, 12 N. E. 439; Pittsburgh & C. R. Co. v. Barker, 29 Pa. St. 160; Farmer's & Merchants' Bank v. Citizens' Nat. Bank, 25 S. D. 91, 125 N. W. 642; Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823.

68. Saffold v. Wade, 51 Ala. 214; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659; Jerome v. Carbonate Nat. Bank, 22 Colo. 37, 43 Pac. 215; Sutton

garded.⁶⁹ On principle, it would seem, the former view is the more satisfactory, and such a view is in no way inconsistent with the view that one to whom a mortgage is given to secure a pre-existing debt is not a purchaser for value, since there is, in the latter case, no relinquishment of the claim. It has, nevertheless, been asserted by an able writer,⁷⁰ that, however, logical may be the view that a conveyance is on valuable consideration if executed in satisfaction of a debt, and is not on valuable consideration if executed as security for a debt, such a distinction is unfortunate in its practical results, as rendering it possible for the creditor, in his testimony, to give such a color to the transaction as may be most for his benefit, as against a third person not a party to the transaction. This is no doubt true, to some extent at least, but whether it is desirable to obscure the legal principles applicable to a particular state of facts for the sake of diminishing the possibility of perjury, a possibility which can never be entirely excluded, may well be doubted, and it may be remarked, moreover, that this is by no means the only case in which a person may be affected by the testimony of

v. Fork, 144 Ga. 587, 87 S. E. 799; Bunn v. Schnellbacher, 163 Ill. 328, 45 N. E. 227 (*semble*); Adams v. Vanderback, 148 Ind. 92, 62 Am. St. Rep. 497, 45 N. E. 645, 47 N. E. 24; Busey v. Reese, 38 Ind. 264; Hanold v. Kays, 64 Mich. 439, 8 Am. St. Rep. 835, 31 N. W. 420; Soule v. Shotwell, 52 Miss. 236; State Bank of St. Louis v. Frame, 112 Mo. 502, 20 S. W. 620; Clements v. Doerner, 40 Ohio St. 632; Alstin's Ex'r v. Cundiff, 52 Tex. 453; Cammack v. Soran, 30 Gratt. (Va.) 292; Shufeldt v. Pease, 16 Wis. 659.

69. Land v. Hea, 20 Idaho, 250, 118 Pac. 506; Metropolitan Bank v. Godfrey, 23 Ill. 579; Lilli-

bridge v. Allen, 100 Iowa, 582, 69 N. W. 1031; Western Grocer Co. v. Alleman, 81 Kan. 543, 27 L. R. A. (N. S.) 620, 135 Am. St. Rep. 398, 106 Pac. 460; Schloss v. Feltus, 103 Mich. 525, 36 L. R. A. 161, 61 N. W. 797; Pan-coast v. Duval, 26 N. J. Eq. 445; Dickerson v. Tillinghast, 4 Paige (N. Y.) 215, 25 Am. Dec. 528; Howells v. Hettrick, 160 N. Y. 308, 54 N. E. 679; Temple v. Osburn, 55 Ore. 506, 106 Pac. 16; Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823.

70. 2 Pomeroy, Eq. Jur. § 749. And see Retsch v. Renehan, 16 N. Mex. 541, 120 Pac. 897; Gest v. Packwood, 34 Fed. 363.

another person as to a matter in regard to which he himself is not in a position to testify.

In a few of the states in which one who receives a conveyance in satisfaction of an indebtedness is not ordinarily regarded as a purchaser for value, it has been decided, apparently, that he is such a purchaser if, at the time, he relinquishes security which he holds for the indebtedness.⁷¹ But since the satisfaction and consequent extinguishment of the debt would necessarily release the security for the debt, it is not readily apparent why the express relinquishment of security should, when accompanying a satisfaction of the debt, constitute a valuable consideration.

— (c) **Adequacy of consideration.** It is generally agreed that, in order that one may be protected as a purchaser for value, it is not necessary that the consideration paid by him be adequate, that is, that it equal the full value of the property.⁷² On the other hand it is said that one who pays a merely “nominal” consideration cannot claim as a purchaser for value.⁷³ What degree of inadequacy is necessary to render the consideration merely nominal is a question of difficulty.

71. *Bunn v. Schnellbacher*, 163 Ill. 328, 45 N. E. 227; *Grand Rapids Nat. Bank v. Ford*, 143 Mich. 402, 114 Am. St. Rep. 668, 8 Ann. Cas. 102, 107 N. W. 76; *Padgett v. Lawrence*, 10 Paige (N. Y.) 170, 40 Am. Dec. 232.

72. *Frey v. Clifford*, 44 Cal. 335; *Ennis v. Tucker*, 78 Kan. 55, 130 Am. St. Rep. 352; *Strong v. Whybark*, 204 Mo. 341, 12 L. R. A. (N. S.) 240; *Hume v. Ware*, 87 Tex. 380, 28 S. W. 935; *Reed v. Nunn*, 80 C. C. A. 215, 148 Fed. 737; *Bassett v. Notworthy*, Rep. temp. Finch, 102, 2 White & Tudor's Leading Cas. in Eq. 1.

But in North Carolina it is

said that the price must be fair and reasonable. *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579.

73. *Curtis v. Riddle*, 177 Ala. 128, 59 So. 47; *Morris v. Wicks*, 81 Kan. 790, 26 L. R. A. (N. S.) 681, 106 Pac. 1048; *Tinnin v. Brown*, 98 Miss. 378, Ann. Cas. 1913A, 1081, 53 So. 780; *Ten Eyck v. Witbeck*, 135 N. Y. 40, 31 Am. St. Rep. 809, 31 N. E. 994; *Abernathy & South & W. R. Co.*, 150 N. C. 97, 63 S. E. 180; *Huff v. Maroney*, 23 Tex. Civ. App. 465, 56 S. W. 754; *Dunn v. Barnum*, 2 C. C. A. 265, 51 Fed. 355. In *Nichols-Stewart v. Crosby*, 87 Tex. 443, 29 S. W. 380, it was decided that a con-

It has been said in this connection that "a small sum, inserted and paid, perhaps because of a popular belief that some slight money consideration is necessary to render the deed valid, will not of itself satisfy the terms of the (recording) statute, where it appears upon the face of the conveyance, or by other competent evidence, that it was not the actual consideration."⁷⁴ This statement was made in connection with a conveyance to a near relative, and it indicates, it is conceived, the proper criterion for such a case, that is, that if the transaction is in reality a gift, though under the guise of a sale, the beneficiary is not a purchaser for valuable consideration.⁷⁵ It does not seem, however, that one who pays a substantial price should be deprived of the protection accorded a purchaser for value merely because, by reason of relationship or friendship, he acquires the property at a price lower than would have been demanded of another person, except as this may tend to charge him with notice.

In the case of a transaction between persons who are connected by no ties of relationship or friendship, the possibility of regarding the transaction as a gift is excluded, and it can only be regarded as a sale. Though one pays only ten dollars for property worth one thousand, he is, unless the transaction was intended as a gift, actually a purchaser, and it is difficult to say that he is not a purchaser for value. But that the property is offered to him at such a decidedly inadequate price is sufficient to subject him to a duty of inquiry as to the

sideration of five dollars for property worth eight thousand was "too grossly inadequate."

74. *Ten Eyck v. Witbeck*, 135 N. Y. 40, 31 Am. St. Rep. 809, 31 N. E. 994. See also *Martin v. White*, 115 Ga. 866, 42 S. E. 279.

75. In *Strong v. Whybark*, 204 Mo. 341, 12 L. R. A. (N. S.) 240, 120 Am. St. Rep. 710, 102 S. W.

968, the transaction was evidently merely a gift, and it does not seem that the grantee should have been protected as a purchaser for value. The view there stated that a consideration of one dollar or less is insufficient to entitle the purchaser to protection, while any greater sum is sufficient, is most unsatisfactory.

existence of an adverse claim,⁷⁶ and a very great discrepancy between the consideration paid and the market value of the property might, it seems, of itself justify a finding that the purchase was not *bona fide*.⁷⁷

— (d) **Notice before payment.** A purchaser who did not pay the consideration before receiving notice of the adverse right cannot claim priority thereto, even though he had previously received a transfer of the legal title.⁷⁸ He can assert the adverse right as a defense to the claim for the purchase price, and hence is not in the position of a purchaser for value.

— (e) **Notice after part payment.** A purchaser to whom the legal title has been conveyed, and who paid part, but not all, of the purchase money, before obtaining notice of the adverse claim, is usually considered as entitled to protection to the extent of the payments made by him before receiving notice.⁷⁹ The

76. *Ante*, § 569, note 55.

77. *Dunn v. Barnum*, 2 C. C. A. 265, 51 Fed. 355; *Reed v. Munn*, 80 C. C. A. 215, 148 Fed. 737; *Nichols-Stewart v. Crosby*, 87 Tex. 443, 29 S. W. 380.

78. *Wells v. Morrow*, 38 Ala. 125; *Duncan v. Johnson*, 13 Ark. 190; *Beattie v. Crewdson*, 124 Cal. 577, 57 Pac. 463; *Donalson v. Thomason*, 137 Ga. 848, 74 S. E. 762; *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549; *Schultze v. Houfes*, 96 Ill. 335; *Sillyman v. King*, 36 Iowa, 207; *Winlock v. Munday*, 156 Ky. 806, 162 S. W. 76; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Fraser v. Fleming*, 190 Mich. 238, 157 N. W. 269; *Marshall v. Hill*, 246 Mo. 1, 151 S. W. 131; *Holladay v. Rich*, 93 Neb. 491, 140 N. W. 794; *Patten v. Moore*, 32 N. H. 382; *Jewett v. Palmer*, 7 Johns.

Ch. (N. Y.) 65, 11 Am. Dec. 401; *Halloran v. Holmes*, 13 N. D. 411, 101 N. W. 310; *Evans v. Templeton*, 69 Tex. 375, 5 Am. St. Rep. 71, 6 S. W. 843; *Lamar's Ex'r v. Hale*, 79 Va. 147; *Tibbs v. Zirgle*, 55 W. Va. 49, 104 Am. St. Rep. 977, 2 Ann. Cas. 421, 46 S. E. 701; *Trice v. Comstock*, 57 C. C. A. 646, 121 Fed. 620, 61 L. R. A. 176.

79. *Craft v. Russel*, 67 Ala. 9; *House v. Davis*, 196 Ala. 153, 71 So. 685; *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29, 41 Pac. 1010; *Donaldson v. Thomason*, 137 Ga. 848, 74 S. E. 762; *Dickinson v. Wright*, 56 Mich. 42, 22 N. W. 312; *Parker v. Foy*, 43 Miss. 260, 5 Am. Rep. 484; *Macauley v. Smith*, 132 N. Y. 524, 30 N. E. 997; *Rector v. Wildrick*, —Okla.—, 158 Pac. 610; *Youst v. Martin*, 3 Serg. & R. (Pa.) 423;

mode of effecting this protection is, however, a matter as to which the cases do not lay down any uniform rule. It is sometimes stated that the adverse claimant cannot assert his claim against the land in the hands of the purchaser without reimbursing the latter the amount paid by him before receiving notice,⁸⁰ while, by other cases, the adverse claimant is not entitled, as against the purchaser, to recover the land, but can merely assert his claim to the extent of the purchase money not paid at the time of the purchaser's acquisition of notice, such unpaid purchase money being thus in effect substituted for the land.⁸¹ As between these two methods of adjusting the rights of the parties, that one should be adopted which, in view of the facts of the case, is most likely to produce an equitable result, and this would depend to some extent, it seems, upon the respective portions of the purchase money paid and unpaid at the time of the acquisition of notice, and also upon the relation of the agreed price to the actual value of the property.⁸² In order that the purchaser may obtain reimbursement for the amount paid by him

Sparks v. Taylor, 99 Tex. 411, 6 L. R. A. (N. S.) 381, 90 S. W. 485. But see Wormley v. Wormley, 8 Wheat. (U. S.) 421, 450, 5 L. Ed. 651; Doswell v. Buchanan, 3 Leigh (Va.) 365; Heck v. Fink, 85 Ind. 9.

80. Marchbanks v. Banks, 44 Ark. 48; Henry v. Phillips, 163 Cal. 135, 124 Pac. 837; Kitteridge v. Chapman, 36 Iowa, 348; Bennett v. Titherington, 6 Bush (Ky.) 193; Wiles v. Shaffer, 175 Mich. 704, 141 N. W. 599 (*semble*); Dougherty v. Cooper, 77 Mo. 528; Haughtout v. Murphy, 22 N. J. Eq. 531; Fluegel v. Henschel, 7 N. D. 276. 66 Am. St. Rep. 642, 74 N. W. 396; Webb v. Bailey, 41 W. Va. 463, 23 S.

E. 644.

If the purchaser has already been reimbursed out of the rents and profits of the property, he cannot, it has been held, claim any further reimbursement for the payments made by him. Beck v. Ulrich, 13 Pa. 636, 16 Pa. 499.

81. Flagg v. Mann, 2 Sumn. 486, 563; Dowell v. Applegate, 7 Fed. Rep. 881; Baldwin v. Sager, 70 Ill. 503; Burton v. Regan, 75 Ind. 77; Green v. Green, 41 Kan. 472, 21 Pac. 586; Hardin v. Harrington, 11 Bush (Ky.) 367; Sparks v. Taylor, 99 Tex. 411, 427, 6 L. R. A. (N. S.) 381, 90 S. W. 485.

82. See Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388.

before notice, he must, it has been held, state such claim, with the grounds thereof, in his pleading.⁸³

If the purchaser makes improvements on the property before receiving notice of the adverse claim, he is entitled, as a condition of recovery of the land by the claimant, to reimbursement of the cost of the improvements as well as of the payments innocently made by him.⁸⁴ This according with the rule ordinarily applied in equity in favor of an innocent purchaser.⁸⁵

— (f) **Payment by note.** The fact that the purchaser has given a non-negotiable note for the price does not constitute him a purchaser for value, since he may be relieved therefrom in equity upon a showing that the title to the property has failed.^{85a}

If the purchaser gives a negotiable note on account of the price, and such note is transferred to a *bona fide* holder for value, the purchaser of the property, though he subsequently receives notice of an adverse claim to the property, cannot avoid payment of the note, and he is consequently in the position of one who has paid value.⁸⁶ But if he receives notice before the note is

83. *Freeman v. Pullen*, 130 Ala. 653, 31 So. 451; *Mackey v. Bowles*, 98 Ga. 730, 25 S. E. 834; *Donaldson v. Thomason*, 137 Ga. 848, 74 S. E. 762; *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644. And see *Freeman v. Pullen*, 130 Ala. 653, 31 So. 451.

84. *Lewis v. Phillips*, 17 Ind. 408; *Florence Sewing Mach. Co. v. Zeigler*, 58 Ala. 221; *Youst v. Martin*, 3 Serg. & R. (Pa.) 423.

85. *Ante*, § 274.

85a. *Marchbanks v. Banks*, 44 Ark. 48; *Kitteridge v. Chapman*, 36 Iowa, 348; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Jewett v. Palmer*, 7 Johns. Ch. (N. Y.) 65, 11 Am.

Dec. 401; *Wood v. Rayburn*, 18 Gre. 3, 22 Pac. 521 (*semble*); *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; *Beck v. Ulrich*, 13 Pa. St. 636, 53 Am. Dec. 507; *Lamoille County Sav. Bank & Trust Co. v. Belden*, 90 Vt. 535, 98 Atl. 1002.

86. *Beebe Stave Co. v. Austin*, 92 Ark. 248, 135 Am. St. Rep. 172, 122 S. W. 482; *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29, 41 Pac. 1010; *Donaldson v. Thomason*, 137 Ga. 848, 74 S. E. 762; *Partridge v. Chapman*, 81 Ill. 137; *Rush v. Mitchell*, 71 Iowa, 333, 32 N. W. 367; *Daugherty v. Northern Coal & Coke Co.*, 174 Ky. 423, 192 S.

negotiated, he is, it seems, in a position to prevent the subsequent negotiation of the note, and can not thereafter pay the note, and assert that, by reason of such payment, he is a *bona fide* purchaser for value.⁸⁷ Occasionally it appears to have been considered that the purchaser, if he has given a negotiable note, is protected as a purchaser for value, even though it has not been negotiated at the time of his receipt of notice of an adverse claim.⁸⁸

— (g) **Payment without acquiring legal title.** The cases but rarely consider whether one who pays the agreed consideration, without at the time taking a conveyance, is to be protected as against a prior unrecorded conveyance of which he has at the time no notice. He acquires at most in such case merely an equitable as distinguished from a legal title, and whether the holder of an equitable title is to be regarded as within the protection of the recording act is a question of the construction of such act.⁸⁹ Furthermore, if the recording act protects a subsequent purchaser only when his conveyance is first recorded,⁹⁰ one paying for land without at the time taking a conveyance of the legal title would not be protected unless he has a contract which is susceptible of record as a conveyance, and this is first recorded, or, in case such a contract is not regarded as a conveyance within the statute, as might well be the case, unless he subsequently obtains a conveyance, and this is first recorded. If a conveyance of the legal title is thus subsequently obtained by the purchaser after he has acquired notice of the prior unrecorded convey-

W. 501; *Digby v. Jones*, 67 Mo. 104.

87. *Baldwin v. Sager*, 70 Ill. 503; *Freeman v. Denning*, 3 Sandf. Ch. (N. Y.) 327.

88. *Tillman v. Heller*, 78 Tex. 597, 11 L. R. A. 628, 22 Am. St. Rep. 77, 14 S. W. 700; *Dodd v. Gaines*, 82 Tex. 429, 18 S. W.

618; *Citizens' Bank of Parker v. Shaw*, 14 S. D. 197, 84 N. W. 779. But as to Texas see *Nellius v. Thompson Bros. Lumber Co.*,—Tex. Civ. App.—, 156 S. W. 259.

89. *Ante*, § 567(m), notes 32, 33.

90. *Ante*, § 567(m), notes 11-12.

ance, there is some analogy to the case of the holder of a later equity who, after acquiring notice of an earlier equity, obtains the legal title.⁹¹ That is, the grantee in the prior conveyance might be considered, as regards the subsequent purchaser, as having merely an equity, and adopting such a view, the question whether the subsequent purchaser could secure priority by obtaining a conveyance with notice of the prior unrecorded conveyance would appear to be determinable with reference to the rule adopted in that jurisdiction, as between the holders of equities.⁹²

§ 575. Purchasers with notice from purchasers without notice. A purchaser for value may not only enjoy the property free from any adverse claim of which he had no notice at the time of his purchase, but he may also transfer his rights in this respect to others, and the fact that his alienee himself has notice is immaterial, it being thus the rule that a purchaser with notice from a purchaser without notice has all the rights of the latter.⁹³ Were the rule otherwise, a purchaser without notice might be unable to dispose of his property for value. The one exception to this rule exists when the second purchaser had previously held the property sub-

91. *Ante*, § 566(b), notes 10-13.

92. See, as apparently applying the analogy suggested. *Wheaton v. Dyer*, 15 Conn. 307; *Paul v. McPherrin*, 48 Colo. 522, 21 Ann. Cas. 460, 111 Pac. 59.

93. *Harrison v. Forth, Finch*, Prec. Ch. 51; *Whitfield v. Riddle*, 78 Ala. 99; *White v. Moffett*, 108 Ark. 490, 158 S. W. 505; *Moore v. Allen*, 26 Colo. 197, 77 Am. St. Rep. 255, 57 Pac. 698; *Roe v. Cato*, 27 Ga. 637; *Buck v. Foster*, 147 Ind. 530, 62 Am. St. Rep. 427, 46 N. E. 920; *East v. Pugh*, 71 Iowa, 162, 32 N. W. 309;

Varney v. Deskins, 146 Ky. 27, 141 S. W. 411; *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012; *Barksdale v. Learnard*, 112 Miss. 861, 73 So. 736; *Craig v. Zimmerman*, 87 Mo. 475, 56 Am. Rep. 466; *McGrath v. Norcross*, 78 N. J. Eq. 120, 79 Atl. 85, 82 N. J. Eq. 367, 91 Atl. 1069; *Card v. Patterson*, 5 Ohio St. 319; *Mastersson v. Crosby*,—Tex. Civ. App.—, 152 S. W. 173; *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439; *King v. Porter*, 69 W. Va. 89, 71 S. E. 202.

ject to such adverse claim. That is, one having notice cannot, by disposing of the property to an innocent purchaser, and subsequently reacquiring it, obtain the right to hold it free from such claim.⁹⁴

§ 576. Purchasers without notice from purchasers with notice. A purchaser of land without notice, either from the records or otherwise, of a prior outstanding claim, is not affected thereby, even though his grantor had actual notice of the claim.⁹⁵ Were a purchaser affected by the fact of notice to his grantor, one could never purchase with safety, since one can never be certain that his vendor is without notice of some adverse claim.

§ 577. Purchasers at execution sales. A purchaser at a sale on execution stands, in most jurisdictions, in the position of any other purchaser for value, and takes free from any equitable claims upon the land, or claims based on unrecorded instruments, of which he has no notice, actual or constructive, at the time of his purchase.⁹⁶ In some states, however, an exception to

94. *Simpson v. Montgomery*, 25 Ark. 365, 99 Am. Dec. 228; *Huling v. Abbott*, 86 Cal. 423, 25 Pac. 4; *Bourquin v. Bourquin*, 120 Ga. 115, 47 S. E. 639; *Johnson v. Gibson*, 116 Ill. 294, 6 N. E. 205; *Trentman v. Eldridge*, 98 Ind. 525; *Bailey v. Binney*, 61 Me. 361; *Clark v. McNeal*, 114 N. Y. 287, 11 Am. St. Rep. 638, 21 N. E. 405; *Church v. Ruland*, 64 Pa. St. 432; *Rogis v. Barnatowich*, 36 R. I. 227, 89 Atl. 838; *Phillis v. Gross*, 32 S. D. 438, 143 N. W. 373; *Yost v. Crutcher*, 112 Va. 870, 72 S. E. 594.

95. *Lee v. Cato*, 27 Ga. 637, 73 Am. Dec. 746; *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457

Young v. Wiley, 183 Ind. 449, 107 N. E. 278; *Trull v. Bigelcw*, 16 Mass. 406, 8 Am. Dec. 144; *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004; *Anderson v. Roberts*, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235; *Odom v. Riddick*, 104 N. C. 515, 7 L. R. A. 118, 17 Am. St. Rep. 686, 10 S. E. 609; *Coombs v. Aborn*, 29 R. I. 40, 14 L. R. A. (N. S.) 1248, 68 Atl. 817; *London v. Youmans*, 31 S. C. 147, 17 Am. St. Rep. 17, 9 S. E. 775; *Bowman v. Holland*, 116 Va. 805, 83 S. E. 393.

96. *Meek v. Skeen*, 60 Fed. 322, 8 C. C. A. 641; *Hallett v. Alexander*, 50 Colo. 37, 34 L. R.

this general rule is recognized in case the judgment creditor is the purchaser at the execution sale, usually on the theory that he is not a purchaser for value,⁹⁷ an exception which is denied in other states.⁹⁸ And in a few states, it seems, a purchaser at execution sale takes merely such title as the execution debtor had.^{98a}

A. (N. S.) 328, Ann. Cas. 1912B, 1277, 114 Pac. 490; Tyler v. Johnson, 61 Fla. 730, 55 So. 870; Gorman v. Wood, 68 Ga. 524; Rogers v. Smith, 146 Ga. 373, 91 S. E. 414; McFadden v. Worthington, 45 Ill. 362; Home Savings & State Bank v. Peoria Agricultural & Trotting Society, 206 Ill. 9, 99 Am. St. Rep. 132, 69 N. E. 17 (*semble*); McMillan v. Hadley, 78 Ind. 590; Gower v. Doheney, 33 Iowa, 36; Lee v. Birmingham, 30 Kan. 312, 1 Pac. 73; Walker v. McKnight, 15 B. Mon. (Ky.) 467; Dow v. Whitney, 147 Mass. 1, 16 N. E. 722; Hart v. Gardner, 81 Miss. 650, 33 So. 442, 497; Paine's Lessee v. Mooreland, 15 Ohio, 435, 45 Am. Dec. 585; Boynton v. Winslow, 37 Pa. St. 315.

97. Sturdivant v. Cook, 81 Ark. 279, 98 S. W. 964; Mountain Home Lumber Co. Ltd. v. Swartwout, 30 Idaho, 559, 166 Pac. 271; Lewis v. Taylor, 96 Ky. 556, 29 S. W. 444; Banning v. Edes, 6 Minn. 402; McAdow v. Black, 6 Mont. 601, 13 Pac. 377; McClenaghan v. McClenaghan, 1 Strob. Eq. (S. C.) 295, 47 Am. Dec. 534; McKamey v. Thorp, 61 Tex. 648; American Sav. Bank & Trust Co. v. Helgesen, 67 Wash. 572, 122 Pac. 26; Collins v. Smith, 57 Wis. 284, 15 N. W. 192.

98. Hunter v. Watson, 12 Cal.

363, 73 Am. Dec. 543; Riley v. Martinelli, 97 Cal. 575, 21 L. R. A. 33, 33 Am. St. Rep. 209, 32 Pac. 579; Lusk v. Reel, 36 Fla. 418, 51 Am. St. Rep. 32, 18 So. 582; Pugh v. Highley, 152 Ind. 252, 71 Am. St. Rep. 327, 44 L. R. A. 392, 53 N. E. 171; Halloway v. Platner, 20 Iowa, 121, 89 Am. Dec. 517; Gower v. Doheney, 33 Iowa, 36; McNamara v. McNamara, 167 Iowa, 479, 149 N. W. 642; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Siple v. Wass, 49 N. J. Eq. 463, 24 Atl. 463; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Sternberger v. Ragland, 57 Ohio St. 148, 48 N. E. 811.

98a. Gray v. Denson, 129 Ala. 406, 30 So. 595; Hendrix v. Southern Ry. Co., 130 Ala. 205, 89 Am. St. Rep. 27, 30 So. 596; Frost v. Yonkers Sav. Bank, 70 N. Y. 553; Clute v. Emmerich, 99 N. Y. 342, 2 N. E. 6; Hicks v. Skinner, 71 N. C. 539; Burgin v. Burgin, 82 N. C. 196.

Occasionally the innocent purchaser at execution sale is protected as against unrecorded instruments which might have been recorded, but not as against equities which were not susceptible of record. Tennant v. Watson, 58 Ark. 252, 24 S. W. 495; Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.,

Even though the purchaser at execution sale has notice of the adverse claim of another, he takes the land unaffected thereby, if the rights of the judgment creditors were superior thereto, his position being analogous to that of a purchaser with notice from a purchaser without notice. Consequently, when, as may be the case in a number of states,⁹⁹ the lien of the judgment or execution is superior to an equity or conveyance which is prior in point of time, owing to the want of notice thereof to the judgment creditor, the purchaser under the execution, even though having notice, is not affected by such equity or claim.¹ But if the lien of the judgment or execution is subject to a pre-existing equity or conveyance, either because the judgment creditor had notice thereof, or because such is the law of the state,² the purchaser at execution sale, if he has notice of such outstanding right in a third person, takes subject thereto.³

§ 578. Burden of proof. Regarding the question of burden of proof, in its general aspect, in accordance with the statement of a leading authority on the law of evidence,⁴ as merely one "of policy and fairness based on experience in the different situations," it is not surprising that the courts, in imposing such burden in

58 Miss. 846; *Lissa v. Posey*, 64 Miss. 362, 1 So. 500.

99. *Ante*, § 567(m), note 47.

1. *Stevenson v. Texas & P. Ry.* Co., 105 U. S. 703, 26 L. Ed. 1215; *Motley v. Jones*, 98 Ala. 443, 13 So. 872; *Danner v. Crew*, 137 Ala. 617, 34 So. 822; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516; *Guiteau v. Wisely*, 47 Ill. 433; *Hughes v. Williams*, 218 Mass. 448, 105 N. E. 1056; *Sharp v. Shea*, 32 N. J. Eq. 65; *Herring v. Cannon*, 21 S. C. 212, 23 Am. Rep. 661; *Butler v. Maury*, 10 Humph.

(Tenn.) 420; *Grace v. Wade*, 45 Tex. 522.

2. *Post*, § 670.

3. *Koch v. Wilcoxon*, 30 Cal. App. 517, 158 Pac. 1048; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381, 22 N. E. 976; *Churchill v. Morse*, 23 Iowa, 229, 92 Am. Dec. 422; *Tate v. Sanders*, 245 Mo. 186, 149 S. W. 485; *Moyer v. Hinman*, 13 N. Y. 180; *Cantwell v. Barker*, 62 Ore. 12, 124 Pac. 264.

4. 4 Wigmore, Evidence, § 2486.

connection with the issue of purchase for value without notice, are by no means in harmony. The claim by a subsequent purchaser to priority may be based, in the particular case, on the equitable doctrine of *bona fide* purchaser for value, as it exists apart from statute, or on the statutory provision for the recording of conveyances, and the rules as to the burden of proof are not necessarily the same in both cases.⁵ The courts do not however, ordinarily suggest any distinction between the two cases, in this regard, and the decisions hereafter cited in regard to the burden of proof in the one case are usually, so far as appears from the language of the opinions, applicable as well in the other.

In this connection, as in others, the question of the burden of proof is somewhat complicated by the fact that the phrase is used in two senses, that is, in the sense of the risk of non persuasion of the jury or other tribunal, and also in the sense of the burden of producing evidence.⁶ In the decisions here referred to, in regard to the burden of proof as to purchase for value without notice, the courts do not ordinarily attempt to distinguish between these two meanings of the phrase, and it may be assumed that, in stating that the burden of proof is on the subsequent purchaser, or on the holder of the prior equity or unrecorded instrument, as the case may be, they mean that such person has both burdens, one of them, however, that of introducing evidence, being susceptible of being subsequently shifted to the other party.

There are a number of authorities to the effect that one who asserts an equity against a purchaser has the burden of showing that the latter purchased with

5. See *Bell v. Pleasant*, 145 Cal. 410, 104 Am. St. Rep. 61, 78 Pac. 957; *McAlpine v. Burnett*, 23 Tex. 649; *Johnson v. Newman*, 43 Tex. 628; *Kimball v. Houston Oil Co.*, 100 Tex. 336, 99 S. W. 852; *Sanely v. Crepen-*

hoft, 1 Neb. (Unoff.) 8, 95 N. W. 352.

6. 4 Wigmore, Evidence, § 2485 *et seq.*; 2 Chamberlayne, Evidence, § 936 *et seq.*; Phipson, Evidence (4th Ed.) 22 *et seq.*

notice of the equity,⁷ and in support of such a view it has been suggested⁸ that, regarding an equitable claim as in its nature a mere right *in personam*, even when it is referred to as an equitable interest or estate,⁹ it seems reasonable that one asserting such a claim against a person, not originally subject thereto, merely by reason of his having purchased certain property, should be required to show that the purchase was under such circumstances as to make the purchaser so subject. In some jurisdictions, however, a contrary view has been adopted, to the effect that the purchaser has the burden of showing lack of notice on his part of the prior equity.¹⁰

7. Arnett v. Handley, 185 Ala. 119, 64 So. 66; Bell v. Pleasant, 145 Cal. 410, 104 Am. St. Rep. 61, 78 Pac. 957; Kowalsky v. Kimberlin, 173 Cal. 506, 160 Pac. 673; Johansen v. Looney, 30 Idaho, 123, 163 Pac. 303; Easter v. Severin, 64 Ind. 375; Fields v. Stamper, 177 Ky. 323, 197 S. W. 919; Molony v. Rourke, 100 Mass. 190; Upton v. Betts, 59 Neb. 724, 82 N. W. 19; Holland v. Brown, 140 N. Y. 344, 35 N. E. 577 (*semble*); Newton v. McLean, 41 Barb. (N. Y.) 285; Wilkins v. Anderson, 11 Pa. 399; Giles v. Hunter, 163 N. C. —, 194, 9 S. E. 549; Meador Bros. v. Hines, — Tex. Civ. App. —, 165 S. W. 915; Rogers v. Houston, 94 Tex. 403, 60 S. W. 869; Teagarden v. R. B. Godley Lumber Co., 105 Tex. 616, 154 S. W. 973; Crane's Nest Coal Co. v. Virginia Iron, Coal & Coke Co., 108 Va. 862, 62 S. E. 954, 1119; Scott v. Farnan, 55 Wash. 336; Cassiday Fork Boom & Lumber Co. v. Terry, 69 W. Va. 572, 73 S. E. 278. See Daniell, Chancery Pleading and Practice (7th

Ed.) 494; Langdell, Equity Pleading (1st Ed.) §§ 111, 141, 142; Martin v. Carlisle, 46 Okla. 268, 148 Pac. 833 (*semble*).

8. Langdell, Op. Cit. §§ 141, 142.

9. *Ante*, § 103(b).

10. Bates v. Bigelow, 80 Ark. 86, 96 S. W. 125; Smith v. J. R. Newberry Co., 21 Cal. App. 432, 131 Pac. 1055; Koebel v. Doyle, 256 Ill. 610, 100 N. E. 154; Garritson v. Bray, 277 Ill. 158, 115 N. E. 195; Hume v. Franzen, 73 Iowa, 25, 34 N. W. 490; Hannan v. Seidentopf, 113 Iowa, 658, 86 N. W. 44; Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623; Stephenson v. Kilpatrick, 166 Mo. 262, 65 S. W. 773; Upton v. Betts, 59 Neb. 724, 82 N. W. 19; Gallatian v. Cunningham, 8 Cow. (N. Y.) 382; Atalanta & C. A. L. R. Co. v. Victor Mfg. Co., 93 S. C. 397, 76 S. E. 1091; Balfour v. Hopkins, 93 Fed. 570; Tobey v. Kilbourne, 222 Fed. 760, 138 C. C. A. 368;

In some jurisdictions one who claims priority as a *bona fide* purchaser over an earlier conveyance by reason of its absence from the records, has the burden of showing that he is such a purchaser, that is, that he paid value without notice of such unrecorded conveyance.¹¹ The theory of these decisions appears ordinarily to be that, the conveyance, though not recorded, being perfectly valid as a conveyance of the legal title, and insufficient as such only as against purchasers for value without notice, it is for the person seeking to bring himself within this privileged class to show that he is properly a member thereof. In a considerable number of states, on the other hand, one claiming under an unrecorded conveyance is regarded as having the burden of showing that a subsequent purchaser had notice of such conveyance,¹² a view which has oc-

See *Boone v. Chiles*, 10 Pet. (U. S.) 177, 211, 9 L. Ed. 388; *Atty. Gen. v. Biphosphated Guano Co.*, 11 Ch. Div. 336.

11. *Bell v. Pleasant*, 145 Cal. 410, 104 Am. St. Rep. 61, 78 Pac. 958; *Gardner v. Early*, 72 Iowa, 518, 34 N. W. 311; *Ludowese v. Amidon*, 124 Minn. 288, 144 N. W. 965; *Shraiberg v. Hanson*, 138 Minn. 80, 163 N. W. 1032; *Brown v. Tuschoff*, 235 Mo. 449, 138 S. W. 497; *Dundee Realty Co. v. Leavitt*, 87 Neb. 711, 30 L. R. A. (N. S.) 389, 127 N. W. 1057; *Kimball v. Houston Oil Co.*, 100 Tex. 336, 99 S. W. 852; *Ryle v. Davidson*, 102 Tex. 233 115 S. W. 28; *Scott v. Farnham*, 55 Wash. 336, 104 Pac. 639.

In *Bruce v. Overton*, 54 Okla. 250, 154 Pac. 340, the burden of proof is placed on the subsequent purchaser on the ground that the facts are peculiarly within his knowledge.

In Texas, apparently, while

the burden of proof rests on a subsequent purchaser, it does not rest on a subsequent creditor. *Rule v. Richards*, — Tex. Civ. App. —, 159 S. W. 386. A subsequent mortgagee is a purchaser and not a creditor within this rule. *Turner v. Cochran*, 94 Tex. 480, 61 S. W. 923.

12. *Gratz v. Land & River Imp. Co.*, 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393; *Center v. Planters' & M. Bank*, 22 Ala. 743; *Richards v. Steiner Bros.*, 166 Ala. 353, 52 So. 200; *Oscicola Land Co. v. Chicago Mill & Lumber Co.*, 84 Ark. 1, 103 S. W. 609; *Jones v. Ainell*, 123 Ark. 532, 186 S. W. 65; *Feinberg v. Stearns*, 56 Fla. 279, 131 Am. St. Rep. 119, 47 So. 797; *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494; *Lowden v. Wilson*, 233 Ill. 340, 84 N. E. 245; *McGuire v. Gibbert*, 270 Ill. 160, 110 N.

asionally been in terms based on the theory that one who was negligent in having his conveyance recorded cannot thereby impose a burden upon another,¹³ and occasionally on the theory that one who purchases with notice of the prior conveyance is guilty of fraud, and that this will never be presumed.¹⁴

It has been held that, even though the burden is on the adverse claimant as against a purchaser to show notice to the latter, a purchaser who admits notice has the burden of showing that the one from whom he purchased was a *bona fide* purchaser, so that he would be protected as a purchaser with notice from a purchaser without notice.¹⁵

One claiming as a purchaser for value without notice has, in the majority of jurisdictions, the burden of proving the payment of a valuable consideration, this being regarded as a matter peculiarly within his knowledge.¹⁶ In some states, however, a contrary view has

E. 377 (in suit in equity); Citizens' Bank v. Julian, 153 Ind. 655, 55 N. E. 1007; Hoskins v. Carter, 66 Iowa, 638, 24 N. W. 249; Butler v. Stevens, 26 Me. 484; Shotwell v. Harrison, 22 Mich. 410; Sheldon v. Powell, 31 Mont. 249, 107 Am. St. Rep. 429, 78 Pac. 491; McGrath v. Norcross, 78 N. J. Eq. 120, 79 Atl. 85, 82 N. J. Eq. 367, 91 Atl. 1069; Brown v. Volkenning, 64 N. Y. 76; Advance Thresher Co. v. Esteb, 41 Ore. 469, 69 Pac. 447; Wilkins v. McCorkle, 112 Tenn. 688, 80 S. W. 834; Daly v. Rizzutto, 59 Wash. 62, 29 L. R. A. (N. S.) 467, 109 Pac. 276; South Penn. Oil Co. v. Blue Creek Development Co., 77 W. Va. 682, 88 S. E. 1029; Olmstead v. McCrory, 158 Wis. 323, 148 N. W. 871.

13. See Boggs v. Warner, 6

Watts. & S. (Pa.) 439; Hoyt v. Jones, 31 Wis. 389.

14. Bush v. Golden, 17 Conn. 594; Rogers v. Wiley, 14 Ill. 65, 56 Am. Dec. 491; Holmes v. Stout, 10 N. J. Eq. 419; Brown v. Volkenning, 64 N. Y. 76 (*semble*); Kimball v. Houston Oil Co., 100 Tex. 336, 99 S. W. 852; Vest v. Michie, 31 Gratt. (Va.) 149, 31 Am. Rep. 722; Sheffey v. Bank of Lewisburg, 33 Fed. 315.

In Advance Thresher Co. v. Esteb, 41 Ore. 469, 69 Pac. 447, the burden is regarded as resting on the claimant under the unrecorded conveyance, apparently on the theory that he has merely an equitable title.

15. Biggs v. Hoffman, 60 Wash. 495, 111 Pac. 576.

16. Lake v. Hancock, 38 Fla. 53, 56 Am. St. Rep. 159, 20 So.

been asserted as regards a purchaser claiming as against a prior unrecorded conveyance,¹⁷ especially when the later conveyance recites the payment of a substantial consideration.¹⁸ And in one state, apparently, one asserting an equity as against a subsequent purchaser has the burden of showing the non payment by the latter of a valuable consideration.¹⁹ But even though A, claiming as against a prior unrecorded conveyance by the same grantor, may reasonably be subjected to the burden of proving his payment of a valuable consideration, it does not seem that one claiming under A should be subjected to a like burden of proving such payment by A, it not being a matter peculiarly within his knowledge, as it is within A's knowledge.

By the weight of authority, the subsequent purchaser does not satisfy the requirement that he show payment of a valuable consideration by showing a recital to that effect in his conveyance, such a declaration not being regarded as sufficient to affect the rights

811; *McGuire v. Gilbert*, 270 Ill. 160, 110 N. E. 377; *Roseman v. Miller*, 84 Ill. 297; *Kruse v. Conklin*, 82 Kan. 358, 36 L. R. A. (N. S.) 1124, 108 Pac. 856; *Perkins v. Gregory*, 87 Kan. 303, 124 Pac. 168; *Shotwell v. Harrison*, 22 Mich. 410; *Lloyd v. Simons*, 90 Minn. 237, 95 N. W. 903; *American Exchange Nat. Bank v. Fockler*, 49 Neb. 713, 68 N. W. 1039; *King v. McRackan*, 168 N. C. 621, 84 S. E. 1027, 171 N. C. 752, 88 S. E. 226; *Morris v. Daniels*, 35 Ohio St. 406; *Weber v. Rothchild*, 15 Ore. 385, 3 Am. St. Rep. 162, 15 Pac. 650; *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; *Lloyd v. Lynch*, 28 Pa. 419; *Bugg v. Seay*, 107 Va. 648, 122 Am. St. Rep. 877, 60 S. E. 89; *Harvey v. Mutter*, 66 W. Va. 208.

17. *Gratz v. Land & River Imp. Co.*, 27 C. C. A. 305, 82 Fed. 381, 40 L. R. A. 393; *Kimball v. Houston Oil Co.*, 100 Tex. 236, 99 S. W. 852; *Hoyt v. Jones*, 31 Wis. 389.

18. *Ryder v. Rush*, 102 Ill. 338; *Hiller v. Jones*, 66 Miss. 646, 6 So. 465; *Harrison v. Moore*, — Mo. —, 199 S. W. 188; *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004; *Jackson v. McChesney*, 7 Cow. (N. Y.) 360; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.*, 82 N. Y. 476. See *McConnell v. Citizens' State Bank*, 130 Ind. 127, 27 N. E. 616.

19. *Teagarden v. R. B. Godley Lumber Co.*, 105 Tex. 616, 154 S. W. 973; *Kenedy Pasture Co.*

of third persons.²⁰ But, as above indicated, a different view has in some states been asserted in reference to a purchaser claiming as against a prior unrecorded conveyance.²¹

It is not infrequently stated that upon proof by the subsequent purchaser of payment by him of a valuable consideration, the burden of proof shifts to the prior claimant to show notice to the purchaser.²² The statement referred to in effect regards the burden of producing evidence both of payment of value and lack of

v. State, — Tex. Civ. App. —, 196 S. W. 287.

20. Langley v. Pulliam, 162 Ala. 142, 50 So. 365; Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 Pac. 1153; Lake v. Hancock, 38 Fla. 53, 56 Am. St. Rep. 159, 20 So. 811; Roseman v. Miller, 84 Ill. 299; Sillyman v. King, 36 Iowa, 207; Minneapolis & St. L. R. R. v. Chicago, M. & St. P. R. R., 116 Iowa, 681, 88 N. W. 1082; King v. Mead, 60 Kan. 539, 57 Pac. 113; Shotwell v. Harrison, 22 Mich. 410; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Ranney v. Hardy, 43 Ohio St. 157; Adams Oil & Gas Co. v. Hudson, 55 Okla. 386, 155 Pac. 220; Richards v. Snyder, 11 Ore. 501, 6 Pac. 186; Lloyd v. Lynch, 28 Pa. 419, 70 Am. Dec. 137; Davidson v. Ryle, 103 Tex. 216, 124 S. W. 616 (but recital may be considered); Bugg v. Seay, 107 Va. 648, 122 Am. St. Rep. 877, 60 S. E. 89; Johnson v. Georgia, L. & T. Co., 72 C. C. A. 639, 141 Fed. 593.

21. *Ante*, this section, note 18.

22. Barton v. Barton, 75 Ala. 400; Coskrey v. Smith, 126 Ala.

120, 28 So. 11; Kendrick v. Colyar, 143 Ala. 597, 42 So. 110; Osceola Land Co. v. Chicago Mill & Lumber Co., 84 Ark. 1, 103 S. W. 609; Williams v. Smith, 128 Ga. 306, 57 S. E. 801; Walter v. Brown, 115 Iowa, 360, 88 N. W. 832; Kruse v. Conklin, 82 Kan. 358, 36 L. R. A. (N. S.) 1124, 108 Pac. 856; Hooper v. De Vries, 115 Mich. 231, 73 N. W. 132; Wright v. Larson, 51 Minn. 321, 38 Am. St. Rep. 504, 53 N. W. 712; Ward v. Ishill, 73 Hun (N. Y.) 550, 26 N. Y. Supp. 141 (*semble*); Morris v. Daniels, 35 Ohio St. 406; Varwig v. Cleveland, C. C. & St. L. R. Co., 54 Ohio St. 455, 44 N. E. 92. See Wood v. Chapin, 13 N. Y. 509, 523, 67 Am. Dec. 62; Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co., 82 N. Y. 476; Smith v. Pure Strains Farm Co., 180 N. Y. App. Div. 703, 167 N. Y. Supp. 877; Atkinson v. Greaves, 70 Miss. 42, 11 So. 688; Adams Oil & Gas Co. v. Hudson, 55 Okla. 386, 155 Pac. 220; Daly v. Rizzutto, 59 Wash. 62, 29 L. R. A. (N. S.) 467, 109 Pac. 276.

"For it is not consistent with the ordinary conduct of men, who

notice as in the first place upon the subsequent purchaser, who may, however, by introducing evidence of payment of value, shift to the prior claimant the burden of introducing evidence to show the existence of notice. This does not, however, affect the burden of convincing the jury, by a preponderance of evidence, that the purchase was not only for value but that it was also without notice. The burden in this regard remains, as it was at the commencement of the action, upon the subsequent purchaser.²³

§ 579. *Lis pendens*. The doctrine of *lis pendens* by which one purchasing land from a party to a pending litigation concerning such land takes subject to the results of such litigation, is properly based, it would seem, not on the theory that such purchaser has notice of the adverse claim, but rather on the principle that, pending the litigation, a party thereto cannot transfer his rights in the land to others, so as to prejudice another party to the litigation, since otherwise the decision might be utterly ineffectual.²⁴ The courts, however, frequently refer to the doctrine as constituting a branch of the law of notice, a pending litigation being said to be notice to purchasers from parties thereto, and this is, in most

must be supposed to act with reference to their own interests, that valuable consideration should be paid for that which the purchaser knows does not belong to the seller." Stayton, C. J., in *Rogers v. Pettus*, 80 Tex. 425, 15 S. W. 1093.

23. See *Errett v. Wheeler*, 109 Minn. 157, 26 L. R. A. (N. S.) 816, 123 N. W. 414; *Dundee Realty Co. v. Leavitt*, 87 Neb. 711, 30 L. R. A. (N. S.) 389, 127 N. W. 1057.

24. *Bellamy v. Sabine*, 1 De Gex & J. 566; *Cherry v. Dickerson*, 128 Ark. 572, 194 S. W. 690; *Cheever v. Minton*, 12 Colo. 557,

13 Am. St. Rep. 258, 21 Pac. 710; *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762; *Watson v. Wilson*, 2 Dana (Ky.) 406, 26 Am. Dec. 459; *Turner v. Houpt*, 53 N. J. Eq. 526, 33 Atl. 28; *Lamont v. Cheshire*, 65 N. Y. 30; *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351; *Baker v. Leavitt*, 54 Okla. 70, 153 Pac. 1099; *Dovey's Appeal*, 97 Pa. St. 153; *Newman v. Chapman*, 2 Rand. (Va.) 93, 14 Am. Dec. 776; *Linn v. Collins*, 77 W. Va. 592, Ann. Cas. 1918C, 86, 87 S. E. 934. See 2 *Pomeroy Eq. Jur.* § 632; editorial note 20 *Harv. Law Rev.* 488.

cases, the result of the doctrine. Consequently it is not improper to refer to the doctrine in connection with the law of notice.

The doctrine of *lis pendens* is sometimes spoken of as being peculiarly applicable to equitable proceedings, on the ground that, in the case of a legal action, a purchaser pending the litigation can take only the title of his vendor, irrespective of notice; but this latter statement in regard to legal actions sees to involve but another statement of the doctrine of *lis pendens*, and the doctrine is regularly applied in the case of proceedings concerning land at law, as well as in equity.²⁵ Applications of the doctrine accordingly occur in connection with actions of ejectment,²⁶ as well as in connection with equitable proceedings, such as suits to foreclose a mortgage or enforce any other lien,²⁷ to establish a trust in land,²⁸ to set aside a conveyance,²⁹ or for partition.³⁰

25. See 2 Pomeroy, Eq. Jur. § 633; Tilton v. Cofield, 93 U. S. 163, 23 L. Ed. 858; Cheever v. Minton, 12 Colo. 557, 13 Am. St. Rep. 258, 21 Pac. 710; Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762; Smith v. Hodson, 78 Me. 180, 3 Atl. 276; McIlwrath v. Hollander, 73 Mo. 105, 39 Am. Rep. 484; Lamont v. Cheshire, 65 N. Y. 30; Rollins v. Henry, 78 N. C. 342; Houston v. Timmerman, 17 Ore. 499, 4 L. R. A. 716, 11 Am. St. Rep. 848, 21 Pac. 1037; Metcalfe v. Pulvertoft, 2 Ves. & B. 200.

26. Walden v. Bodley, 9 How. (U. S.) 34, 13 L. Ed. 36; Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166; Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190; Glanz v. Ziabek, 233 Ill. 22, 84 N. E. 36; Smith v. Hodsdon, 78 Me. 180, 3 Atl. 276; Rollins v. Henry, 78 N. C. 342; Snively v. Hitechew, 57 Pa. St. 49.

27. Owen v. Kilpatrick, 96 Ala. 421; Burleson v. McDermott, 57 Ark. 229, 21 S. W. 222; Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762; O'Brien v. Putney, 55 Iowa, 292, 7 N. W. 615; Bell v. Diesem, 86 Kan. 364, 121 Pac. 335; Rosenheim v. Hartsock, 90 Mo. 357, 2 S. W. 473.

28. Walker v. Elledge, 65 Ala. 51; Pratt v. Hoag, 5 Duer (N. Y.) 631.

29. Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 33 L. Ed. 178; Evans v. Welch, 63 Ala. 250; Leuders v. Thomas, 35 Fla. 518, 48 Am. St. Rep. 255, 17 So. 633; Watson v. Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459; Cossett v. O'Riley, 160 Mich. 101, 125 N. W. 39; Jackson v. Andrews, 7 Wend. (N. Y.) 152, 22 Am. Dec. 574.

30. Skvor v. Weis, 153 Iowa, 720, 134 N. W. 85; Hale v.

In most jurisdictions, apart from statute, a proceeding is pending for the purpose of this doctrine, only when the original pleading in the suit, that is, the declaration, bill, complaint, or petition, as the case may be, has been filed, and the defendant whose interest is sought to be acquired has been served with process.³¹ But by statute in many of the states the original doctrine of *lis pendens* has been modified by statutory provisions requiring a notice of *lis pendens* to be registered or recorded in some particular mode, in order that a purchaser for value and without actual notice may be charged with notice of the litigation.³²

The doctrine of *lis pendens* applies not only in favor of a plaintiff as against a transferee of a defendant, but also in favor of a defendant as against a transferee of a plaintiff, though its application is naturally called for much less frequently in the latter case. The *lis pendens* in favor of a defendant would seem properly to commence, in the absence of a statute requiring the defendant to file a notice, at the same time as that in favor of a plaintiff, that is, so soon as the plaintiff's

Ritchie, 142 Ky. 424, 134 S. W. 474.

31. See Banks v. Thompson, 75 Ala. 531; Majors v. Cowell, 51 Cal. 478; Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233; Allen v. Poole, 54 Miss. 323; Jackson v. Dickenson, 15 Johns. (N. Y.) 309, 8 Am. Dec. 236; Barry v. Hovey, 30 Ohio St. 344; Shufeldt v. Jefcoat, 50 Okla. 790, 151 Pac. 595; Diamond v. Lawrence County, 37 Pa. St. 353; Staples v. White, Handley & Co., 88 Tenn. 30, 12 S. W. 339; Hanrick v. Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

32. 2 Pomeroy, Eq. Jur. § 640. See Smith v. Gale, 144 U. S. 2 R. P.—68

509, 36 L. Ed. 521; Zeigler v. Daniel, 128 Ark. 403, 194 S. W. 246; Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Tripp's Adm'r v. Bailey, 152 Ky. 369, 153 S. W. 452; Alterauge v. Christiansen, 48 Mich. 60, 11 N. W. 806; Jorgenson v. Minneapolis & St. L. Ry. Co., 25 Minn. 206; Wood v. Price, 79 N. J. Eq. 620, 38 L. R. A. (N. S.) 772, Ann. Cas. 1913A, 1210, 81 Atl. 983; Sheridan v. Andrews, 49 N. Y. 478; Todd v. Outlaw, 79 N. C. 235; Sprague v. Stevens, 37 R. I. 1, 91 Atl. 43; Vicars v. Saylor, 111 Va. 207, 68 S. E. 988; Phillips v. Thompson, 73 Wash. 78, Ann. Cas. 1914D, 672, 131 Pac. 461.

original pleading has been filed, and defendant has been served with process,³³ except in so far, perhaps, as a right to affirmative relief may be asserted by defendant in his answer or cross complaint.³⁴

A purchaser is affected by a *lis pendens* only if the land in litigation is described in the pleadings with such reasonable certainty as to enable the purchaser to know that it is the land which he is proposing to purchase.³⁵

The doctrine of *lis pendens* applies, not only against a person who acquired the property in litigation from a party thereto by voluntary conveyance, but also against one who acquires the interest of such a party by judicial³⁶ or execution³⁷ sale. It does not apply as against one who, pending the litigation, acquires the interest or supposed interest of one who is not a party

33. *Stein v. McGrath*, 128 Ala. 175, 30 So. 792; *Welton v. Cook*, 61 Cal. 481; *Hurd v. Case*, 32 Ill. 45; *Olson v. Leibpke*, 110 Iowa, 594, 80 Am. St. Rep. 327, 81 N. W. 801; *S. C. Hall Lumber Co. v. Gustin*, 54 Mich. 624, 20 N. W. 616; *Jorgenson v. Minneapolis & St. L. Ry. Co.*, 25 Minn. 206; *Bailey v. McGinnis*, 57 Mo. 362; *Moss v. N. Y. Elevated Ry. Co.*, 27 Abb. N. C. 318; *Zane v. Fink*, 18 W. Va. 693.

34. *Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 95; *McGuire v. Gilbert*, 270 Ill. 160, 110 N. E. 377; *Hart v. Hayden*, 79 Ky. 348; *Garver v. Graham*, 6 Kan. App. 344, 51 Pac. 344; *Compare, S. C. Hall Lumber Co. v. Gustin*, 54 Mich. 624, 20 N. W. 616, and see 7 Columbia Law Rev. p. 282; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640.

35. *Miller v. Sherry*, 2 Wall (U. S.) 237, 17 L. Ed. 827;

Mitchell v. Amador Canal & Mining Co., 75 Cal. 464, 17 Pac. 246; *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762; *Boyd v. Emmons' Adm'r*, 103 Ky. 393, 45 S. W. 364; *Allan v. Poole*, 54 Miss. 323; *Griffith v. Griffith*, 9 Paige (N. Y.) 317; *Todd v. Outlaw*, 79 N. C. 235; *McWhorter v. Brady*, 41 Okla. 383, 140 Pac. 782; *Lewis v. Mew*, 1 Strob. Eq. (S. C.) 180; *Boshear v. Lay*, 6 Heisk. (Tenn.) 163; *Seibel v. Bath*, 5 Wyo. 409, 40 Pac. 756.

36. *Randall v. Duff*, 79 Cal. 115, 3 L. R. A. 754, 756, 21 Pac. 610; *Randall v. Lower*, 98 Ind. 255; *Rider v. Kelsey*, 53 Iowa, 367, 5 N. W. 509.

37. *Brinkley v. Sanford*, 99 Ga. 130, 25 S. E. 32; *Ellis v. Sisson*, 96 Ill. 105; *Gibbs v. Davis*, 93 Ky. 466, 20 S. W. 385; *Ettenborough v. Bishop*, 26 N. J. Eq. 262.

thereto.³⁸ It applies, it has been decided, as against one acquiring a judgment lien upon the property of a party to the pending litigation.³⁹

A suit pending in one county which affects land lying in another county of the same state has been regarded as binding on a purchaser from a party thereto,⁴⁰ and a suit pending in a federal court would seem to affect a purchaser of land lying anywhere in the same district.⁴¹ The full faith and credit clause of the Federal Constitution has been held, however, not to require the court of one state to subject a purchaser of land lying therein to the results of litigation in a court of another state.⁴²

There is a conflict in the decisions as to whether a suit to assert a conveyance or enforce an incumbrance,

38. *Miller v. Sherry*, 2 Wall. (U. S.) 237, 17 L. Ed. 827; *Scarlett v. Gorham*, 28 Ill. 319; *Parsons v. Hoyt*, 24 Iowa, 154; *Harrod v. Burke*, 76 Kan. 909, 92 Pac. 1128; *Herrington v. Herrington*, 27 Mo. 560; *Merrill v. Wright*, 65 Neb. 794, 161 Am. St. Rep. 645, 91 N. W. 697; *Allen v. Morris*, 34 N. J. Eq. 159; *Parks v. Jackson*, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656; *Green v. Rick*, 121 Pa. St. 130, 2 L. R. A. 48, 6 Am. St. Rep. 760, 15 Atl. 497; *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345.

39. *Stout v. Lye*, 103 U. S. 66, 26 L. Ed. 428; *Cooney v. Coppock*, 119 Iowa, 486, 93 N. W. 495; *Newdigate v. Jacobs*, 9 Dana (Ky.) 17; *Fuller v. Scribner*, 76 N. Y. 190; *Stewart v. Wheeling & L. E. Ry. Co.*, 53 Ohio St. 151, 29 L. R. A. 438, 41 N. E. 247; *Cradlebaugh v. Pritchett*, 8 Ohio St. 647, 72 Am. Dec. 610; *Winchester v. Paine*, 11 Ves. Jr. 194; *Trye v. Ald-*

borough, 1 Ir. Ch. 666.

40. *Marshall v. Whitley*, 136 Ga. 805, 72 S. E. 244; *Wickliffe's Ex'r v. Breckenridge's Heirs*, 1 Bush (Ky.) 427. And see *Carr v. Lewis Coal Co.*, 96 Mo. 149, 9 Am. St. Rep. 328, 8 S. W. 907. But a contrary view is expressed in *Benton v. Shafer*, 47 Ohio St. 117, 7 L. R. A. 812, 24 N. E. 197.

41. *Rutherglen v. Wolf*, 1 Hughes 78, Fed. Cas. No. 12,175; *Atlas Ry. Supply Co. v. Lake & River Ry. Co.*, 134 Fed. 503; *Wilson v. Hefflin*, 81 Ind. 35; *Stewart v. Wheeling & L. E. Ry. Co.*, 53 Ohio St. 151, 29 L. R. A. 438, 41 N. E. 247.

42. *Shelton v. Johnson*, 4 Sneed (Tenn.) 672; *Carr v. Lewis Coal Co.*, 96 Mo. 149, 9 Am. St. Rep. 328, 8 S. W. 907 (*dictum*). And see *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616. *Contra*, *Fletcher v. Ferrell*, 9 Dana (Ky.) 372.

such as a mortgage, which has not been recorded, is sufficient to make a purchaser of the land pending the litigation a purchaser with notice, so as to render the unrecorded instrument effective as against him.⁴³

43. That it does have such effect, see *Bolling v. Carter*, 9 Ala. 921; *Thoms v. Southard*, 2 Dana (Ky.) 475. That it does not, see *Newman v. Chapman*. 2 Rand. (Va.) 93, 14 Am. Dec. 766; *Douglass v. McCrackin*, 52 Ga. 596. See, also, *McCutchen v. Miller*, 31 Miss. 65, 85; *Page v. Street*, Speers Eq. 159, 212.

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